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ANTHROPOCENTRIC CONSTITUTIONALISM AND INTERPRETATION OF FUNDAMENTAL RIGHTS

Rainer ARNOLD[1]

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*

THE ANTHROPOCENTRIC NATURE OF LAW

The ultimate objective of law is to serve the human being, to protect and to promote it. Law is anthropocentric, centered on the human being.

This is true also and in particular for constitutional law. The foundation of a constitution is the basic value order which results from this function of law: it consists of human dignity, freedom and equality.

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This value order is the compelling consequence of the existence of the human being, it is an anthropological axiom. It denotes a real phenomenon and recognizes it by law.

These values are not first constituted by law, rather they are immanent in the human being, are reality and therefore necessarily the basis of law, which normatively recognizes this reality.

Law is the system of order in the coexistence of human beings and is therefore necessarily based in reality on the values associated with the human being.

Connected with the dignity of the human being is its fundamental freedom; this results from the fact that the human being is “an end in itself”, that is, it carries its end only within itself and cannot serve an end outside the human being, that is, the human being is never an instrument for another purpose[1].

The human being stands within the community of human beings, is therefore not an "isolated individual", but a "community-related and community-bound human being". The German Federal Constitutional Court[2] rightly sees the image of man in the Basic Law in this way. Since it reflects the reality of the human being, this basic relationship between individual and community applies generally, to every legal order.

This statement refers to the state legal order, but its basic idea can also be transferred to legal orders that affect human freedom in their effects, whether by intervening or by providing protection. The state-like supranational law of the European Union affects people, either directly through binding legal norms or indirectly by influencing and contributing to shape their lives, which happens to a large extent through EU legal obligations of the Member States. The individual's community-boundedness, as the Federal Constitutional Court has correctly pointed out for the German legal system, also exists within the framework of the European Union, on the one hand vis-à-vis one's own state, but on the other hand also vis-à-vis the Union as a transnational community. The

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[1] Immanuel Kant, *Critique of Practical Reason*, Part I, book II/2 V (Riga: Hartknoch, 1788)

[2] vol. 4, 7,15/16

freedom of the individual as a principle also exists in this framework, but its necessary restriction is characterized by this double relationship, namely to the community in the state and to the community in the supranational order.

A similar observation can be made for international law. Here, the individual is primarily bound to the community in the state; through the state, which alone has subjectivity under international law, the individual is "mediatized" vis-à-vis international law. The common good that applies in the context of international law, in whose favor the freedom of the individual can be legitimately restricted, is added to the state's common good; the latter must - not least because of the "open statehood"[1]- be oriented towards the international common good and always subordinate to it.

In the supranational as well as in the (universal and regional) international sphere, the individual is affected by an impact on its freedom (through direct intervention in freedom or influence on its life and thus on its freedom in general) or also through providing protection (through human rights guarantees, through obligations of states to democracy, the rule of law, environmental protection, protection of minorities, etc.). These norms of protection in favor of human beings are guarantees and at the same time values that shape and permeate these legal systems. They are ideal constitutional norms. These include in particular Article 2 EU Treaty, the EU Charter of Fundamental Rights, the guarantees of the ECHR and the numerous guarantees of human rights under international law.

The anthropocentric basic order of values always applies where human beings are affected by public authority. Human being’s dignity, associated with its (relatively) restrictable freedom and equality are the core, in a functional sense the constitutional core, of every relationship between man and power.

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[1] R.Geiger, *Grundgesetz und Völkerrecht*, 6th ed. (2013), 1 et seq.

THE SUBSTANTIAL AND FUNCTIONAL EFFICIENCY OF FREEDOM

Freedom is an outflow of human dignity. Unlike dignity itself, it can be restricted, but its content is always comprehensive. Dignity and freedom are anthropological attributes of the human being and the point of reference for law. Since law is oriented towards these facts, it is not constitutive what individual rights to freedom are explicitly written in a constitution. Unwritten freedom rights are nevertheless implicitly part of the constitution.

This is also confirmed by the character of the constitution as a living instrument that adapts to changing circumstances. The constitution is necessarily dynamic, since it is intended to be the basic legal order in perpetuity, or at least for an indefinite, long period of time. Its text is formulated at a historical moment, but it intends to maintain its regulatory function for later times. The interpretation of the written text must therefore maintain this regulatory function, which can lead to a changed understanding of the text. In addition, the regulatory function of the constitutional concept of freedom must be comprehensively recognized. Unwritten, non-formulated fundamental rights must therefore be made visible through interpretation, insofar as this becomes necessary through further development of the circumstances. The principle of freedom, as part of the constitution, is also a "living" principle that must be grasped in its functional optimum in each case. If, for example, as a result of technological development, the threat to the personality of the individual has arisen through digital data processing, a "new" fundamental right has arisen as an expression of the principle of freedom, which comes to light, if it is not included in the written text of the constitution by way of constitutional amendment, through judicial interpretation. This corresponds to the substantial efficiency of the principle of freedom.

Some constitutions express freedom as a principle in their text, such as Article 2(1) of the German Basic Law. If this is not the case, however, the constitution nevertheless contains this principle, in accordance with what has been said above, since freedom is conceptually

necessarily linked to human dignity and must be the basis of every authentic constitution. It contains, as stated, two essential aspects, firstly, that written fundamental rights cannot have a conclusive character, and secondly, that fundamental rights, whether written or not, undergo change through the passage of time, thereby interpretation must be adapted to the functional optimum.

CONSEQUENCE FOR THE INTERPRETATION OF FREEDOM RIGHTS

Freedom of the human being is comprehensive in nature; this is an anthropological fact. Protection of freedom is always correspondingly comprehensive, regardless of the legal system involved. This means that the perceptions as developed in other legal systems as well as in the supranational and international spheres can certainly be used to interpret the fundamental rights of one's own legal system. This can be seen as a transnational discourse, not bound by national borders, which serves to realize the principle of freedom in the concrete case.

If, as is assumed here, this realization will only be accomplished if the optimum of protection is achieved, then it is relevant and even required to also draw on arguments for this protection from other legal systems. The discourse refers to the realization of the optimum of protection and not to the mere collection of arguments from one's own legal system.

Fundamental and human rights are to be interpreted by a universal, transnational argumentative discourse to achieve comprehensive, optimal protection of the human being.

OPEN STATEHOOD AND THE PROTECTION OF INDIVIDUAL FREEDOM - FUNCTIONAL AND INSTITUTIONAL INTERPRETATION APPROACH

While the functional interpretation approach, which is based on the idea of the comprehensive protective function of the principle of freedom anchored in constitutional law, as it has just been considered, an

interpretation perspective can also be used which looks at this issue from an institutional point of view.

The question arises as to whether the national legal system answers today's largely globalized management of the state's tasks from an unchanged traditional perspective or whether new forms of perspective are appropriate.

THE SOVEREIGNTY – RELATED LIMITS OF INTERPRETATION AND OPEN STATEHOOD

The interpretation of state norms is traditionally bound to sovereignty and fundamentally limited to one's own legal system. Taking institutional note of foreign legal systems is only permitted to the extent that the national constitution allows it. If this is allowed to a considerable extent, it is justified to speak of open statehood.

If we look at the constitutional order of the Federal Republic of Germany as an example, we can see a dualism-oriented view of international law for international treaties[1]. This is different in numerous states; even in traditional sovereignty-based legal systems such as the French legal system, international treaties as sources of international law are directly integrated into the internal legal system and even have a higher rank than ordinary laws[2]. This enables the judge to disregard internal statutory law in favor of international treaties, a progressive stance that contrasts with traditional constitutional concepts. On the other hand, as far as the general rules of international law are concerned, there is also a recognizable willingness in the German legal system to integrate them into internal law, i.e. to give them a rank above statute law, even if not above the constitution[3].

If we look at the supranational law of the European Union, the opening of the statehood is clearly more significant. The transfer of sovereign rights made possible by the constitution means, according to

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[1] Article 59.2 Basic Law, BL

[2] Article 55 of the French Constitution

[3] Article 25 BL

the explanation of the Federal Constitutional Court[1] the opening of the formerly closed legal order while the supranational law becomes directly part of the German legal order without losing its autonomous character. Added to this is the primacy of the supranational norms (over national law even constitutional law except the so-called national constitutional identity)[2], so that the opening in favor of supranational law results in an even more far-reaching relativization of the autonomy of the own legal order than can be said for international law.

These are the institutional framework conditions of the opening of state power. The question in our context, however, is whether, beyond this institutional opening, non-state law can be referred to for the interpretation of internal legal norms, especially constitutional norms, without being bound by the institutional limitations. For the purely functional understanding of the comprehensive protection of the individual's freedom discussed above, it is not decisive from which legal system the argument for the protection of freedom is taken. Regardless of national borders, from this perspective the discourse is quite generally open.

INTERPRETATION REGARDLESS OF FRONTIERS AND INSTITUTIONAL LIMITS

Can this also be assumed from an institutional perspective? State practice seems to support this, even if sufficient argumentation is usually not provided. To take the German example, the Federal Constitutional Court has used Germany's commitment to international human rights developments, enshrined in Article 1(2) of the Basic Law, to consider the interpretation of the Basic Law's fundamental rights in the light of the European Convention on Human Rights and the case law of the European Court of Human Rights[3]. And only recently has the jurisprudence of the FCC assumed that an interpretation of German fundamental rights must

[1] vol. 37, 271, 280
[2] FCC vol.123, 267, 344, 353
[3] vol. 111, 307, 317, 323, 326, 329

be made in the light of the Charter of Fundamental Rights[1]. Other countries have explicitly provided in the constitution that national fundamental rights are to be interpreted in the light of international human rights instruments[2]; a similar, but not equally stringent legal provision is the aforementioned art. 1.2 of the German constitution. However, it appears to be a general tendency to adapt national liberties to international standards through interpretation.

We have already spoken above of an interpretation that is friendly to international and European law, which aims to avoid collisions between the internal and external legal systems. However, the need for such an inter- and supranational law interpretation is to be understood in a broader way.

Thus, it is not only a matter of a friendly adaptation to the conflicting legal system, but also of the constant adaptation of the content of the norms to another higher-ranking, but institutionally separate legal system, to international law and EU law. It is a treaty obligation to observe these legal systems and to adapt the relevant domestic norms to them, for example on the basis of universal or regional human rights treaties or on the basis of the EU integration treaties. However, the national constitution sets institutional limits to the state - internal effectiveness of the treaty obligations as a result of the existing national rules on the impact of international and EU law on domestic law. These rules do not allow these external obligations to violate the national constitution. For the area of EU law, this applies only in a weakened form, insofar as only the core area of constitutional identity is exempted from the primacy of EU law. However, there are again functional openings, e.g. in the case of equivalence, the reservation of constitutional identity is not used[3].

If we take the example of the interpretation of German fundamental rights in the light of the European Convention on Human

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[1] FCC vol.152,152, 177

[2] e.g. Article 10 of the Spanish Constitution

[3] FCC Decision of Dec. 1, 2020, http://www.bverfg.de/e/rs20201201_2bvr184518en.html para.58; English version

Rights, the discrepancy between the institutional limits on the application of external law within the state and the failure to respect these limits in interpretation becomes clear. The European Convention on Human Rights, as an international treaty, is applicable in German law only as transformed ordinary federal law. The interpretation, however, uses the Convention for the interpretative determination of fundamental rights, which form part of the constitution. Thus, the ECHR is constitutionalized through interpretation. Although, as already mentioned, the FCC refers back to the general commitment of Germany to the international development of fundamental rights, as expressed in Art. 1.2 BL; however, this alone is not a sufficient argument for the admissibility of interpreting constitutional law by means of an international treaty. It is rather the binding of the state under international law that is reflected, from the outside, in the interpretation of the constitution. Terms that need to be filled in, such as the broadly formulated fundamental rights, are interpreted in the way required by the state's obligation under international law and not in the institutionally limited way as required by internal rules based on traditional dualism. The FCC's recent decision on the Climate Change Act also provides an example. The court directly filled the state-objective provision in favor of environmental protection with international law by considering the Paris Agreement on Climate Change to be determinative of the objectives of Article 20a of the BL[1].

ARGUMENTATION WITH REFERENCE TO THE CONSTITUTIONAL CONTEXTS OF VARIOUS ORDERS – JUDICIAL DIALOGUE

Apart from the two perspectives discussed so far - the anthropological and the institutional perspective - there is another argumentation pattern in connection with our question: that of the "constitutional compound (interconnection)". This was also taken up by the FCC in its decision "right to be forgotten I" of 6 November 2019, but

[1] http://www.bverfg.de/e/rs20210324_1bvr265618en.html, English version, paras. 195 et seq.

has already been considered in many facets in the literature. It ultimately assumes that the legal and also constitutional systems in the European area are interconnected, which are institutionally autonomous, but functionally form a connection. This is also and particularly important for the interpretation of value norms, especially fundamental rights, in the legal systems involved. This will be explained and examined in more detail using the example of the above-mentioned FCC decision[1].

The FCC rightly speaks of an "overarching connectedness of the Basic Law and the EU Fundamental Rights Charter in a common European tradition of fundamental rights" (para.56).

The Charter is based on the various constitutional traditions of the Member States, which it "brings together, expands and develops as a yardstick for Union law", and this methodologically in the same way as the general principles of law with the function of protecting fundamental rights, which were developed under judicial law before the Charter came into existence (ibidem). The "common ground" of the fundamental rights systems of the Member States and of the EU itself (i.e. its treaty foundations and the Charter of Fundamental Rights) is rightly seen by the FCC in the ECHR (para.57). The link between EU law and the ECHR is highlighted by key provisions of EU law: Articles 52.3 and 53 of the Charter as well as Article 6.3 EU Treaty.

If we look closer to these provisions, we can state that the orientation towards the ECHR is clearly preponderant. The fact that the EU has not yet acceded to the ECHR - contrary to the requirement of Art. 6.2 of the EU Treaty - does not change the powerful guiding influence of the ECHR. In essence, the EU Charter of Fundamental Rights is generally to be interpreted in the light of the ECHR, even if Article 52.3 of the Charter restricts this to rights "corresponding" to the ECHR. If the substantially comprehensive principle of freedom as an outflow of human dignity is also recognized as a basis for the ECHR, as has already been expressed in these considerations, then all the rights present (explicitly or implicitly) in the EU Charter can also be ascertained in the ECHR (and its additional protocols). From this point of view, the parallelism of rights

[1] http://www.bverfg.de/e/rs20191106_1bvr001613en.html

that is decisive for the orientation towards the ECHR is comprehensively given. Nor does Article 52.4 of the Charter, which provides for the orientation of part of the Charter provisions on the common constitutional principles of the Member States, lead to a different conclusion, since these common national principles are themselves adapted to the ECHR and oriented towards it. The FCC makes this convergence concentrated on the ECHR rightly clear. Furthermore, Article 6.3 EU Treaty is a fundamental norm for the area of values and at the same time for the interpretation of these values, which are part of EU law as "general principles". They are therefore of fundamental importance for the EU legal order; as an expression of values, they are elementary, ideal building blocks of this legal order and at the same time a guarantee for the protection of human beings. If Art. 6.3 EU Treaty refers to both sources of law, the ECHR and the national constitutional systems, their validity in the EU legal order should not be split up according to convention and constitutional principles of the member states, but should be cumulative, as a common European corpus of values. This is ultimately the same idea of the coherence of values as the FCC has in mind in the aforementioned decision.

As already mentioned, the fundamental rights of the German Basic Law are interpreted in the light of the ECHR; the ECHR is understood as an essential aid to interpretation. But the EU Charter also has an influence on the interpretation of German fundamental rights. The FCC states: “Rather, it corresponds to the embedding of the Basic Law as well as the Charter in common European fundamental rights traditions that the fundamental rights of the Basic Law are also to be interpreted in the light of the Charter” (FCC ibidem, para. 60).

It is even said that German fundamental rights include the level of protection of EU fundamental rights (ibidem, para.59). The reason given is the "common foundation in the ECHR".

It is significant that the FCC refers to “such interactions between the Charter, the Convention and the constitutions of the member states as the basis of a protection of fundamental rights that is open to diversity, but still underpinned by a common ground…” (para.59).

We therefore see a functional fusion of the ECHR, the EU Charter (and the EU Treaty, as far as values are concerned) and national guarantees of fundamental rights, for which the "common foundation" is used as the main argument. This is about the process of the emergence of European constitutional law.

It is correct that the functional approach is given priority over the institutional perspective, which focuses on determined separate legal systems. This also becomes clear in the FCC's recent case law[1] that the constitutional complaint, which was previously seen exclusively as an instrument of protection against violations of German fundamental rights, can now also be used in the case of incorrect application of the fundamental rights of the EU Charter by German courts - also a victory for the functional concept of protection, which is not limited by traditional institutional hindrances.

CONCLUSIONS

In the preceding considerations, it was examined whether argumentations, particularly interpretation perspectives regarding fundamental and human rights (especially as expressed in court decisions) from other legal systems can be used for the interpretation or whether the interpretation must be limited to argumentations stemming from this own legal system.

Can comparative and in particular international law arguments and perspectives for the interpretation of the values of a particular constitutional order be made useful? The question is particularly prompted by the jurisprudence and practice of national and international courts, which often consider the perspectives of courts from other legal systems as authoritative.

Is the interpretation of human rights transnational or must the interpretation take place within the boundaries of one's own legal system?

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[1] http://www.bverfg.de/e/rs20191106_1bvr027617en.html; English version

Three perspectives were presented: the first perspective as the anthropological approach, which is based on the anthropocentric values order (human dignity, principle of freedom and equality) and orients the interpretation to these universal principles, independently of a concrete legal system.

The second perspective is the institutional approach, which permits reference to another legal system only insofar as this other legal system is institutionally authorized by the constitution to enter into the national legal sphere.

The third perspective is that of the mutual dependence and influence of different legal orders in integration spaces. This involves the linking of the ECHR, the EU Charter of Fundamental Rights and national fundamental rights.

The anthropological approach, which, in accordance with the nature of the human being, aims at an optimal protection of liberty, based on dignity, seems to be preferable.

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DOCTRINAL POSITIONS ON THE PHENOMENON OF ENSURING INTERNATIONAL SECURITY IN THE CONTEXT OF REGIONAL CRISES

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ALABDULJABBAR Naif Jassim[2]

Abstract:

The legal regulation of peace and security processes through regional organizations in various regions of the world is one of the basic concerns of the science of public international law, and the legal regulation of the relationship between regional structures and the United Nations in this process is the subject of research of a series of fundamental works and specialized articles.

At present, the specialized literature on the analysis of the place and role of regional organizations in the process of preventing and combating the negative effects generated by armed conflicts in the process of ensuring regional peace and security offers a series of studies in the languages of international circulation, both of dedicated authors and of those from the affected regions that are the subject of this research.

Keywords *- public international law; regional security; regional conflicts; regional crises; regional organizations; legal mechanisms for prevention and control.*

In order to review the most important papers cited and analyzed during the research, we note the complete lack of a fundamental paper on the subject of research. That is why we aim to reflect the main analyzes of dedicated authors on one or another region.

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The scientific work *Manuel de Droit international public***,** by Denis Alland, reflects the basic elements of the problem. In the author's opinion, this paper aims to "allow a first contact through a cursive and panoramic presentation of its main chapters".[1]

In fact, this handbook presents international actors and subjects, acts and commitments and the observance and application of international law "the destinies of international law in domestic law", international responsibility, international countermeasures and sanctions, and the settlement of disputes.

Denis Alland adopts a classical approach reflected in the definition of international law that he proposes from the beginning: "all the rules and institutions that govern the conduct of international subjects, i.e. mainly states and international organizations".[2] Without trying to follow the latest developments in jurisprudence or doctrine, this paper offers a classic approach to the main notions already established in public international law - state, international organization, and defines as clearly as possible their constituent elements, functions and responsibilities.

A no less valuable work is the one made by the team of authors from the Republic of Moldova that reflects the fundamentals of public international law in general, and the definitions we are interested in on the subject under analysis in particular, such as armed conflicts, international organizations and regional security.[3]

On the issue of the place and role of regional organizations in the process of ensuring regional peace and security, author Gary Wilson, in his work *The United Nations and collective security*, provides a comprehensive analysis, considers the full range of measures that can be used by the UN in its mission of ensuring collective security, including military enforcement, peacekeeping, non-military sanctions and diplomacy.

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[1] D. Alland, *Manuel de Droit international public* (Paris: PUF, 2014), 13
[2] Alland, *Manuel de Droit international public*, 17
[3] O. Balan and Al. Burian, *Dreptul Internațional Public, ediția a IV-a* (Chisinau: 2020), 650

Although primarily a scientific work of public international law, some ideas are complemented by relevant political and economic issues to present a clear picture of the UN collective security system in its implementation and the factors that have an impact on how it works.

Each of these measures is analyzed in detail, assessing the legal framework, the main legal controversies that arise regarding their proper use and the use by the UN of the mechanism for ensuring collective security in practice. The author reflects the main strengths and weaknesses of the various means by which the UN can try to prevent, minimize or end the conflict.

The most important sections of this paper in the sense of our research would be Chapter I which analyzes the concept of collective security and Chapter VIII which characterizes the role of regional arrangements in the UN collective security system.[1]

In the paper *Regional organizations and the development of collective security. Beyond Chapter VIII of the UN Charter***,** Ademola Abass provides a rather sophisticated justification for finding an exception to the ban on the use of force beyond the control of the UN Security Council, defining the elasticity of Article 2 (4) by the fact that "collective security deficiencies provided by the Security Council have made the prohibition of force provided for in Article 2 (4) obsolete". Dr. Abass's argument, which would allow regional organizations to project force without the authorization of the UN Security Council, is based on the idea that Article 2 (4) requiring all states "to refrain in their international relations from threatening or using force against the territorial integrity or political independence of any State or in any other manner incompatible with the purposes of the United Nations", is based on the final clause of Article 2 (4). Abass claims that "there is a lack of consensus on what kind of force would not be incompatible with the purpose of the UN".[2]

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[1] G. Wilson, *The United Nations and collective security* (Abingdon, Oxon: Routledge, 2014), 264

[2] A. Abass, *Regional organisations and the development of collective security. Beyond Chapter VIII of the UN Charter* (Oxford: Hart, 2004), 187

We support the idea of analyzing the provisions of Article 2 (4) of the UN Charter in order to understand when and under what circumstances regional structures can use force to ensure regional peace and security. The problem is to establish the criteria and algorithm for identifying the force that can be used and the clear distinction between it and aggression.

Abass A. examines whether there is room in Article 2 (4) of the UN Charter for states to formally accept within the regional organization to ensure collective security in case the United Nations is unwilling or unable to act. Realities show that the African Union and ECOWAS have acknowledged the violation of the United Nations universal system of collective security in favor of African states that have sought to establish an effective continental peace and security system after the events in Liberia, Sierra Leone and especially Rwanda.

However, everyday realities require us to analyze and at least accept the right to question the effectiveness of the classical interpretation of the provisions of the UN Charter in Art. 2 (4) regarding the prohibition of aggression in relation to the urgent need for prompt intervention of regional organizations on phenomena that directly affect peace and security in the region.

Experts Van der Lijn J. and Avezov, X., in the report conducted under the auspices of the Stockholm International Peace Research Institute (SIPRI) *The Future Peace Operations Landscape: Voices from Stakeholders Around the Globe, Final Report of the New Geopolitics of Peace Operations Initiative*,[1] demonstrate that the reasons of states for supporting peace operations vary considerably.

Thus, despite the fact that war should be excluded from the range of dispute settlement instruments between states, unfortunately, it remains a pervasive element in contemporary international relations, and the UN provides the most important mechanism for preventing and

[1] J. Van Der Lijn and X. Avezov, *The Future Peace Operations Landscape: Voices from Stakeholders Around the Globe, Final Report of the New Geopolitics of Peace Operations Initiative* (Stockholm: SIPRI, 2015), 90

combating this harmful phenomenon to ensure global and regional peace and security through peacekeeping operations with the full involvement of regional organizations.

One of the analyzed aspects that is of interest for our research would be the relationship between the legal status of peacekeeping operations and the sovereignty of the states on whose territory this type of interventions take place. Thus, with the exception of operations in Africa, Europe and North America, the sovereignty of the states concerned by the peacekeeping operations under the auspices of regional organizations has met with colossal resistance motivated by the protection and respect of the sovereignty of the states concerned.[1]

The relationship between the Responsibility to Protect and the principle of sovereign equality of states, as well as its interpretation in terms of the need to ensure peace and security on the Globe in general, and in a region in particular, is one of the key aspects in the process of assessing the place and role of regional organizations in the process of ensuring regional peace and security as components of the global peace and security paradigm under the auspices of the UN.

The paper highlighted the precedents and solutions adopted in various regions to solve this dilemma and found that the relationship between state sovereignty and the right of regional organizations to intervene to prevent or counteract dangers and threats to regional peace and security through more "robust" instruments can be included in the normative provisions of international law. However, some regional organizations have stipulated in the text of the articles of association or in other statutory documents the impossibility of intervening in the territory of a member state without its express consent, regardless of the circumstances.

Another important element is the critical approach to the essence of the mandate of UN peacekeeping operations. The authors believe that peacekeeping missions cannot address all aspects of the conflict. The

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[1] Van Der Lijn and Avezov, *The Future Peace Operations Landscape: Voices from Stakeholders Around the Globe, Final Report of the New Geopolitics of Peace Operations Initiative*, 23

mandates of the mission must be explicit in relation to the challenges they are authorized and equipped to address, as well as the specific limitations of peace operations to establish as accurate as possible a relationship between the objectives set for the mission and the resources to be allocated, and not allow resource-providing states to exceed the competencies and responsibilities set out in the mandate.[1]

The experts who conducted the report believe that despite the fact that they have conducted their own peace operations, regional organizations are less equipped with everything needed to do so effectively and are sometimes lacking in impartiality. In addition to the potential competing interests of international organizations, the failure of coordination between organizations is a serious challenge when several institutions are present in a single conflict area.[2]

The strengthening of national interests in various regions, to the detriment of the common goal of ensuring regional peace and security, generates a substantial decrease in trust between partners - crisis-affected states, states in the region, regional organizations and resource-providing states for peacekeeping operations under the auspices of the UN.

What's Wrong with the United Nations and How to Fix It,[3] by Thomas G. Weiss, critically examines the structure and viability of the collective security system under the auspices of the United Nations, which he considers to be affected by several shortcomings such as: the modest efficiency of the international decision-making system, the relationship between the initiative to ensure global peace and the sovereign interests of states, and the difficulty of relating to the subject of ensuring international peace and security under the auspices of the UN due to excessive bureaucracy and overlapping jurisdictions. The author

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[1] Van Der Lijn and Avezov, *The Future Peace Operations Landscape: Voices from Stakeholders Around the Globe, Final Report of the New Geopolitics of Peace Operations Initiative*, 71-73

[2] Van Der Lijn and Avezov, *The Future Peace Operations Landscape: Voices from Stakeholders Around the Globe, Final Report of the New Geopolitics of Peace Operations Initiative*, 57-68

[3] T. G. Weiss, *What's Wrong with the United Nations and How to Fix It* (Cambridge: Polity Press, 2016), 320

proposes a wide and systemic series of actions, tools and mechanisms to prevent and combat these elements that cause the inefficiency of the UN system of international peace and security.

The European continent is not so much affected by armed conflict, but that does not mean that international regional structures in the area would not be of real interest to our research. Author Kaplan L.S., in the scientific work *NATO Divided, NATO United: The Evolution of an Alliance*, reflects the circumstances of the formation and the specific features of the interaction between the United States and European states both in the process of forming the organization and their interaction within the organization in the moments of crucial importance for its existence, as well as when adopting a decision on intervening in regional conflicts.

Among the historic clashes addressed by Kaplan there are differences between the United States and Europe over Germany's rearmament after World War II, the Suez Crisis of 1956, the United States' decision to cancel the cooperation agreement with the United Kingdom on The Skybolt missile project, the Vietnam War, the Strategic Defense Initiative, and a number of additional political dissensions within the alliance.[1]

A clear topic is NATO's ability to survive these temporary difficulties. Since its inception, NATO has faced internal political disputes, but continues to survive at important crossroads. Given its history of survival and adaptation, the dismantling of this regional organization is proving unlikely, and its role and place in the process of ensuring regional peace and security is growing, including through its interventions outside the territories of the member states.

The African continent is proving to be, at least from a statistical point of view, the area most affected by various crises that have degenerated into international or non-international armed conflicts, which has substantially affected the degree of peace and security. Author Paul D. Williams provides an in-depth and comprehensive assessment of

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[1] L. S. Kaplan, *NATO Divided, NATO United: The Evolution of an Alliance. Westport* (CT: Praeger, 2004), 165

over six hundred armed conflicts that have taken place in Africa from 1990 to the present - from the continental catastrophe in the Great Lakes Region to the widespread conflicts in the Sahel and the Horn of Africa war network.[1]

The author analyzes the context in which these wars took place, investigates the typical algorithms of organized violence, the circumstances that provoked them and the major international responses undertaken to ensure lasting peace. Regardless of the aspect of the research, the historical analysis of events on the African continent offers the opportunity to observe both the evolution of events and the identification of factors, conditions and circumstances that generated the imperative of UN and regional structures intervention to ensure peace and security in the region.

The same author in the article *The African Union's conflict management capabilities*[2] reflects and analyzes in detail not only the structure and importance of the African Union as a regional organization responsible for ensuring peace and security in the region, but also its internal mechanisms and instruments to be used for the effective realization of this desideratum. It is also critically analyzed the intervention mechanism and conflict management within this regional structure in order to determine the legal and functional impediments to the interventions carried out within the organization.

Extremely complex and dynamic conflict systems pose consistent challenges to African peace and security structures. New practices and models of cooperation are being developed in an attempt to build a more peaceful and stable continent. The article edited by De Coning C., Gelot L. and Karlsrud J., *African peace operations: trends and future scenarios, conclusions and recommendations,* takes stock of how African peace operations have evolved over the last decade - from protecting

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[1] P.D. Williams, *War and conflict in Africa* (Cambridge: Polity Press, 2011), 320

[2] P.D. Williams, *The African Union's conflict management capabilities* (***Working Paper***). *International Institution and Global Governance Program* (New York. 2011), 1-29 [On line] *https://www.files.ethz.ch/isn/146220/IIGG_WorkingPaper7.pdf* (accessed 21.12.2019)

people displaced from Darfur by Janjaweed militias to supporting operations coordinated by countries in the Lake Chad basin region in their fight against Boko Haram insurgents.[1]

It is a work by a group of well-known authors in the field of regional security on the African continent and provides a critical and complex analysis not only on the events that have occurred in the area over the past four decades, but also on the evolution of mechanisms and tools of ensuring regional peace and security.

In the authors' view, the most important thing is that the experiences of the last decade require the African Union to maintain a high degree of flexibility so that it can continue to adapt to the extremely dynamic and complex challenges it will be called upon to manage.[2]

In the same vein, the authors Soderbaum F., Tavares R. reflect in the paper *Problematizing regional organisation in African security*[3] several issues related to the problematization of the role of regional organizations in African security with emphasis on the advantages and disadvantages of African regional and sub-regional organizations towards other security mechanisms, in particular UN peacekeeping operations, formal and informal grounds for intervention, and matters whose security is in fact protected by peace activities carried out by regional organizations.

The state of affairs in the Middle East is the subject of research of a colossal number of scientific papers. The difficulty of their analysis lies in the deep imprint generated by the authors' opinions and attitudes towards one side or the other involved or affected by various crises, including the conflict between Israel and Palestine. The author Mohammedi A., in the article *De l'usage du droit international au*

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[1] C. De Coning, L. Gelot and J. Karlsrud, "African peace operations: trends and future scenarios, conclusions and recommendations", in C. De Coning, L. Gelot and J. Karlsrud *The Future of African Peace Operations: From the Janjaweed to Boko Haram* (Londres: Zed Books, 2016), 1.

[2] C. De Coning, L. Gelot and J. Karlsrud, *The Future of African Peace Operations: From the Janjaweed to Boko Haram* (Londres: Zed Books, 2016), 144.

[3] F. Soderbaum and R. Tavares. „Problematizing regional organisation in African security", in *African Security* 2 (2-3), (2009): 160

Moyen-Orient: approche critique,[1] offers us a critical approach to the various misinterpretations of the provisions of public international law on the status of Palestine by various subjects of public international law depending on their interests and position both towards the targeted actors and towards this precedent.

A critical approach to international law must allow a clear defense of the sovereignty of states, not only in a conservative perspective of interstate games, but also because it is the only way to make international law a framework for coexistence rather than an instrument of assertiveness or influence. The critical approach should focus more on the "sovereignty of the strongest" than on the sovereignty of all other states.[2]

The Middle East is one of the areas with the highest density of armed conflicts or crises that have required the intervention of the UN or regional organizations in order to ensure regional peace and security. In this region, attempts to intervene by the Arab League and other regional peace and security mechanisms have clashed with the dominant position of state sovereignty in relation to the need to intervene in order to prevent or combat the negative effects of crises affecting peace and security in the region.

Another paper that analyzes the conflict in terms of ensuring regional peace and security in the Middle East is *Palestine and the Arab-Israeli Conflict: 100 Years of Regional Relevance and International Failure* by Makdisi K.[3]

In the author's opinion, the Israeli-Palestinian conflict is a focal point not only for regional security but also for world security in general. In his view, such international trends and global movements add an extra layer to the regional situation, and until the Palestinian issue is resolved in a meaningful and fair manner, such tension and violence will continue,

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[1] A. Mohammedi, "De l'usage du droit international au Moyen-Orient: approche critique" in *Revue Québécoise de droit international*, volume 30-2 (2017): 171 - 193.
[2] Mohammedi, „De l'usage du droit international au Moyen-Orient: approche critique", 193.
[3] K. Makdisi, "Palestine and the Arab-Israeli Conflict: 100 Years of Regional Relevance and International Failure", in *MENARA Working Papers* No. 27 (2018): 25

and European states must be more self-critical on their role in perpetuating the Israeli occupation of Palestine despite their stated commitment to the two-state solution. The reality is that the EU has deepened its economic, cultural and security ties with Israel and supported only a weak Palestinian authority, and their policies towards Palestine will be the main test for their commitment to a fair solution to the Arab-Israeli conflict and for respect for the basic principles of human rights and international law.[1]

It is important to note the difficulty of identifying equidistant works on this subject not only among the authors affected by their ethnicity, but also due to the complexity of the subject under investigation both in its essence and in terms of ensuring peace and security in the region.

The religious component is an undeniable element in the paradigm of analyzing the factors and circumstances that pose threats and dangers to regional peace and security in the Middle East. Authors Hashemi N. and Postel D., in *Sectarianization. Mapping the New Politics of the Middle East,* analyze chronologically the events that led to the sectarianization of Iraq in particular and the Middle East in general: the Iranian Revolution of 1979, the US invasion and occupation of Iraq in 2003, and the recent wave of uprisings in Iraq in 2011.

The authors argue that the US invasion of 2003, as a moment of sectarian outburst drawing a line between "sectarian" and "non-sectarian" Iraq, overlooks "cumulative factors that have developed over several generations" under an authoritarian regime.[2]

The primary conclusion of this paper is that sectarianism and the religious aspect have been widely used by the authoritarian governments of the Middle East to either provoke or argue military intervention and threats to regional peace and security.

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[1] Makdisi, "Palestine and the Arab-Israeli Conflict: 100 Years of Regional Relevance and International Failure", 20

[2] N. Hashemia and D. Postel, *Sectarianization. Mapping the New Politics of the Middle* (East. London: Hurst, 2017), 101.

It also describes the instrumentalization of religious differences, diversity and pluralism in the political struggles of the regimes against their own constituencies.[1]

Thus, the authors make a work that stands out as a strong reference to the history of sectarianism in the Middle East, as well as the mechanisms of power policy behind it, and reflects a chronological analysis of religious, civilizational and structural aspects of sectarianism as an element used by both regional powers and other actors to camouflage current interests and to argue for military interventions and other threats to regional peace and security. This paper highlights how authoritarian regimes in the Middle East have had decades of experience in instrumentalizing religious differences.

In the sense of the analysis of the specialized literature, we should mention the fact that at national level there is a series of works that analyze under different aspects the phenomenon of international security in general and regional security in particular. They are of real interest in understanding the real circumstances and factors that have given rise to the international normative approaches that expressly regulate some elements related to ensuring regional security and international legal instruments for ensuring regional peace and security.

The article *Obligation of States to comply with mandatory rules of international law in the context of ensuring international security* analyzes the concept of international security in the light of the process of reconciliation of a society that has faced an armed conflict or a crisis situation by implementing the mechanisms of transitional justice, a process that has demonstrated its viability in several states that have gone through such situations. The analysis of the concept of international security in complex with other institutions of international law will allow the creation of a clearer image, which will not allow ignoring some universally recognized rules of international law. However, such an

[1] Hashemia and Postel, *Sectarianization. Mapping the New Politics of the Middle East*, 154

approach aims to ensure fundamental human rights and freedoms in any situation, including in conditions of armed conflict.[1]

It should be mentioned that for the purposes of this research, the resolutions, reports and communiqués of international and regional organizations have a special place. Even if they do not form sources of law in the direct sense of this meaning, the information and analyzes within their content prove to be extremely useful for elucidating problematic and debatable aspects of the research.

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[1] V. Gamurari and N.J. Alabduljabbar, "The Obligation of States to Comply with Imperative Normes of International Law of the Context of International Security Insurnce", in *Conferința cu participare internațională "Aportul mediului academic la consolidarea dialoguui dintre Republica Moldova și partenerii strategici în contextul crizelor regionale* (Chisinau, 18.10.2018), 90.

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BRIEF CONSIDERATIONS ON THE NOTION *SOURCE THE LAW* END THE SCIENCE OF LAW

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Abstract:

The case law is one of the concepts of the science of law to which the most contradictory opinions are related. Two of the largest systems of law, the Roman-Germanic and the Anglo-Saxon ones, traditionally have separate opinions on the recognition of the jurisprudence as source of law. The term of jurisprudence is a creation of the Roman law, though the seed of this phenomenon has emerged in the Ancient East (Assyria, Egypt etc.) on the base of that law, which had a sacral feature. In Rome, the jurisprudence defined the activity of the jurist-consults (especially their practice). In time, the term would have to define both the legal decisions, as well as the theoretical knowledges.

Key words: *source of law; ius scriptum; ius non scriptum; legal practice; science of the law.*

INTRODUCTION

From the perspective of the way in which the law is born, one can differentiate between the *ius scriptum* and the *ius non scriptum*[2].

Ius scriptum is stated by the public organisms, invested with the power to establish compulsory legal norms for the citizens, who have

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[2] *Dig.*, 1.1.6 § 1

entrusted them with this power. It can be the creation of the legislator, which is rarely happening, or, may establish norms previously established as customs.

Ius non scriptum includes the norms, arising imperceptibly, through the long-term exercise of the same practice, supported by the knowledge that what it is practiced corresponds to the law in force. In reality, it is a creation of the common good sense. This law so-called *consuetudo, mos maiorum* refers to two elements: a) *usus*, endless and long lasting repetition (duiturna, inveterate consuetudo) of the same actions; b) *opinio necessitatis*, the faith that what is practiced, is in accordance with the legal provisions.

The unwritten law may be based on an error; in this case, the norm established by error cannot extent by interpretation to similar cases[1]. Considered as consuetudinary, it sources from customs, as it is not only resulted from Latin expressions, but also from modern terms: *coutume, Gewohnheitsrecht, practices*, the custom of the place[2].

For the legal science, the notion "source of law" has two meanings: a material and a formal one. In the material meaning, the source of law refers to the social aspect, the factors configuring the law, which determine the action of the legislator[3], and by source of the civil procedural law, in the material meaning, the social actions generating the norms of this branch of law[4].

In the formal meaning, the source of law refers to the means by which the material source is expressed, the form of the *law* in all its norms, to have mandatory powers. Therefore, the specific form of expression of the norms of the civil procedural law is called the source of civil procedural law[5].

The case law is one of the concepts of the science of law to which the most contradictory opinions are related. Two of the largest systems of

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[1] *Dig*., 1.3.39
[2] Andreea Rîpeanu, *Drept roman* (Bucharest: Pro Universitaria, 2008), 17-18
[3] Irina Grigore-Rădulescu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2010), 117-118
[4] Maria Fodor, *Drept procesual civil* (Bucharest: Universul Juridic, 2014), 38
[5] Fodor, *Drept procesual civil*, 39

law, the Roman-Germanic and the Anglo-Saxon ones, traditionally have separate opinions on the recognition of the jurisprudence as source of law.

The term of jurisprudence is a creation of the Roman law, though the seed of this phenomenon has emerged in the Ancient East (Assyria, Egypt etc.) on the base of that law, which had a sacral feature. In Rome, the jurisprudence defined the activity of the jurist-consults (especially their practice). In time, the term would have to define both the legal decisions, as well as the theoretical knowledges[1].

For the Roman law, the case law was recognized with the condition of its undertaking and confirmation through court decisions. The fact that the courts have used for a determined period, the case law that they created, strengthen then belief that they soon will follow it. The challenge of time represented the best proof in justifying the introduction of the case law and a guarantee for its stability. Such approach meant that only few legal decisions could have established a case law. Therefore, the concept of *constant legal practice* was based.

The Roman-Germanic legal system[2], by declaring the continuity of the Roman law, has waived the active casuistic, in favour of the written law. It has recognized the concept of *res judicata,* according to which the legal decision is mandatory only for the parties who have participated in the examination of the case. Thus, the legal decision has been recognized as legal fact. The echoes were different in the continental European states. The case law in the legal system of the northern European states traditionally has a value that high that certain jurists came up with the proposal to include those legal systems in the family of the common law. Among the states of Western Europe, France had the strongest attitude, the *Code of Napoleon* consecrated the fact that the judge cannot refuse to examine the case under the pretext of the

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[1] S. Neculaescu, *Introducere în dreptul civil* (Bucharest: Lumina Lex, 2001), 137

[2] *The Roman-Germanic law system was crystallized in the 13th century, when the European states received the Roman law and mixed it with their own customary law*. Irina Grigore-Rădulescu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2014), 39

inexistence, uncertainty or insufficiency of the legal norm (Art 90 of the French Civil Code), but neither can he rule a decision as a general regulation. These two initial conditions have determined the evolution of the legal case law. Though, initially, in Germany and Austria, at legislative level, it has been stated the fact that the law is not created through legal decisions, later the attitude towards the case law has changed. The Swiss Civil Code states that in the case of ascertaining a gap of the law, the judge must act as legislator, following the dominant doctrine and customs. In Southern European states it is recognized the statute of secondary source of law for the case law (Italy). The Spanish Civil Code proposes to judges, for the gaps of the law to consecutively appeal to customs, legal decisions and the general principles of the law. Thus, in the contemporary law of the states belonging to the Roman-Germanic system it is shaped the trend to form the judicial law and the possibility for judges to verify the result of the constant practice.

In the common law states, the concept of constant legal practice has been completely received. It is a paradox the fact that the technique created by the common law judges is very close to the Roman law: *the jurist of the common law, as well as the Roman jurist avoids generalizations and, as far as possible, the definitions. Their method is the active casuistic. They move from a specific case to another and aim to create a valid mechanism for solving each of them*[1]. After a century, the English law intuitively reached the technique of the Roman law[2]. The active casuistic has influenced the particularities of the common law systems (legal continuity, the specificity of the concept of norm, the structure of the law and the system of the sources).

In the literature of the common law states traditionally it is considered that the case law is created by a few judicial decisions. In the

[1] S. N. Milson, *Studies of the History of Common Law* (London: Historical Foundations of the Common Law, 1985)
[2] Milson, *Studies of the History of Common Law*

process of counterbalancing different judicial decisions by comparing them was shaped a common norm which needed to be developed[1].

In the current jurisprudential law, a special attention is paid to single cases, containing the case law (the precedent). The norm, thus recognized has a mandatory feature. According to the most spread conception in the legal literature of the common law states, the judicial law of the case law (precedents) represents the law formed by norms and principles created and applied by the judges in the decision-making process.

To a certain extent, the judicial law is contrary to the case laws. Thus, the judicial case law is the traditional source of law in the common law states. Having this quality, it faced a difficult evolution, its creation lasting for centuries, being finalized by the recognition of the case law (*stare decisis*) in the 19th century, by differentiating the law of the precedent from the judicial law. The principle of the case law has stated that the judges are compelled to follow the decisions of the courts which, according to the law, are placed on a hierarchic superior scale (*the vertical action of the principle of the case law*). The superior courts are compelled to follow their own previous decisions (*the horizontal action of the principle of the case law*). The principle of the case law has proven the general mandatory feature of the legal decision, not only for the parties involved in the case examination, thus permanently shaping the denial in the application of the principle of *res judicata*. The fact that the judges are compelled to consult the case laws and to find the logical connection between cases; the doctrine has examined it as the domination of the law, the limitation of the legislation by the courts, the inner will of the judges. The principle of the case law has permanently recognized the creation of the legal norms by the courts, though subsequently it has been subjected to several modifications[2].

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[1] Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice*, (Chicago: University of Chicago Law School, 1967), 595; Rupert Cross, *Precedent in English Law*. 3rd Edition (Oxford: Clarendon Press, 1977), 261

[2] Llewellyn, *Jurisprudence: Realism in Theory and Practice*, 595

The written form has widened the perspectives of the law, thus contributing to its highlighting among other social norms. The written norms had more advantages (precision, clarity and determination in exposure, the possibility of formulating abstract norms). In the unwritten law is more difficult to determine the content of the norms and to identify the mechanism for its creation.

The jurist has the task to analyze a court decision in order to draft a general norm (*ratio decidendi* and *obiter dictum*). According to the definition of R. Cross, *ratio decidendi* represents a legal norm directly or indirectly examined by the judge, as a necessary step in drafting a conclusion corresponding to the arguments prior adopted by him[1].

Ratio decidendi is a fundamental step in the process of stating the norm of the case law. But, the doctrinarian analysis of this process has not established univocal conclusions until now. As an unwritten norm, the case law has certain particularities for its application. The multitude of the judicial case laws offers to jurists the possibility to select the case law according to their case file. The selection is based on the comparison of the facts grounding the examined case file and of the cause based on whose examination the case law has been issued. The case law has a series of particularities. Thus, it is not possible to determine the moment of its entrance into force because the unwritten form is stated during an undetermined period of time. It is only at a certain stage that we can safely speak of the existence of the norm.

The unwritten feature of the judicial case law makes more difficult the decision to publish them. Publishing the reports which refer to case laws remains an activity of a limited number of commercial entities, the consequence being the publication of certain unofficial editions. These are useful for judges in stating their opinions, without giving them a legal norm. In the same time, such editions cannot objectively comprise all case laws. This is why, in practice, there are controversies regarding the application of unpublished case laws.

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[1] Cross, *Precedent in English Law*, 261

For the purpose of exercising the control over the existing situation in the common law states, there were created special councils[1].

Substantial changes in the systematization of the judicial case law have been introduced through informatics. The constant evolution of the case law with the intent of preserving the traditional structure of the system of law has generated a series of consequences in the states of the common law[2].

In the virtue of the particularities for its establishment, the case law is retroactive. Thus, although the US Constitution forbids the occurrence of the effects on the past (*ex post facto*), the courts have reached the conclusion that it refers to the statutory law. For the judicial case law, we ascertain the occurrence of the consequences, even if at the moment of the offence there was no legal norm. A less critical evaluation of the retroactive effect is made by the followers of the natural law school. They start from the fact that the judges do not create, but only proclaim a right existing before the adoption of the case law. In this way, judges appeal to the principles of the law to enforce the judgment, which allows a fair precedent to be formulated. In practice, the common law states have initiated multiple attempts to overcome this shortcoming. Thus, it has been solved the question whether such case law shall be established by the judges or it is necessary the normative statement of the action of the case laws, because the law's force is superior to the case law's. Also, the statement of the action for perspective of the case law is connected with the judicial law making, with the attempts to equate the judicial case law with the law.

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[1] For instance, in New Zeeland are members of such council (New Zeeland Council of Law Reporting): the General Prosecutor, the General Solicitor, five representatives of the community of jurists and a judge from the Supreme Court.

[2] First of all, in the law of those certain states was established a different relation between the fact and the law. Thus, the judge by examining that case and ascertaining a gap in the law shall create and apply a new norm. He shall appreciate the factual circumstances, determining their legal value; also, he shall analyze if they condition the occurrence of the legal effects and if they generate a legal norm.

JUDICIAL PRECEDENT AND THE COMMON LAW

The role of the judicial precedent derives from its contribution to the creation of the single common law, both nationally, as well as at the level of the branch of law. The analysis of this process allows the identification of the connection created between the case law and the courts. Also, it can show us how the case law can contribute to the removal of the contradictions between different judicial cultures (states with joint jurisdiction).

Thus, in Great Britain the single common law was formed through legal decisions. This fact has a historical explanation, but not logical[1]. For the English law it is applicable the use of the terms common and case law (precedent)[2]. The establishment of the single law (common) has begun after the Normand conquest. According to English scientist P. Stein, the English law represents a species of the German law, in which the two currents were formed (Anglo-Saxon and Normand). The Normand kings had more success in establishing a centralized governing, managing to maintain the noblemen in a state of dependence, offering the English law a series of specific features[3]. In the creation of the law, a special role was played by the royal courthouses. In case of litigation, the person was entitled to address the local courthouse (the customary law); the church judges (the canonical law); the city court (the commercial law); the baron's court or the royal court (active throughout the country). Initially, the royal courthouses followed the king, settling the litigations.

Later, the judges settled in a London's neighbourhood from where they moved for examining the cases. Because in every locality there were a series of customs, the judges tried to take them into account. This situation has been determined by the fact that in the royal courts was

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[1] A. K. Kiralfy (British journalist), *The English Legal System* (London: Sweet & Maxwell, 1983), 309

[2] The common law was formed both in the courts of common law, as well as in those of the law of equity. In its turn, the contemporary law was established based on the law of precedent and the law of equity (British judicial dictionaries).

[3] Peter Stein, *Legal Institutions. The Development of Dispute Settlement* (London: Butterworths, 1984), 236

used the institution of the jurors, who were locals and in their personal assessment of the litigation were using the local customs known to them. Also the parties had the right to bring witnesses to confirm the existence of a certain custom. Thus, the judges moving around the state became aware of different customs. Returning to London, knowing each other and having the opportunity to communicate intensely (by living in the same neighbourhood), they debated the cases handled and compared the judgments handed down in similar cases. The common debate of the practice has eased the establishment of a common position of the judges for similar cases. E. Jenks stated that: "*it is not possible the precise determination of the means for establishing the common law. By means which cannot be established, the royal judges, meeting in London after returning from the territory, for the purpose of examining the cases in centralized courts... and Westminster, have agreed upon the need to merge different local customs in a common or single law, which shall be applied throughout the state*".

Even if the judicial precedent suggests the existence of a certain judicial hierarchy, differentiated by a superior and inferior statute, the British legal system has been fundamentally reshaped and reformed in the past two centuries. The reform did not stop the development of the law of precedents, but has had a significant influence. The unification of the courts of common law with those of the chancellor during the reform of 1873-1875 has conditioned the unification of the precedent law with the law of equity. Because the law of precedents is understood as the law of the jurists, a determinant factor was the qualification made by the jurists. It was supported by the professional corporations existent in the 16th century, establishing certain requirements for the persons applying for membership. They have contributed not only to the maintenance of a high professional level and the prestige of the judicial profession, by guaranteeing continuity in the approach of the law, thus contributing to the development of the single national law. In order to be a good jurist, to build a career in the legal area, was necessary the detailed study of the principle of the precedent. This is the reason why, in many common law states, there has been a stage in which the teaching in legal education institutions was insured exclusively by jurists. They combined the

theoretical knowledge with practice. The fact that the teaching was pointed in the direction of the practice and especially towards the law of precedents generated a series of consequences. This gave rise to the method of legal thinking and culture, especially directed towards the precedent. In England, for centuries, schools near professional unions have thrived (*Inns of Court*), where the teaching was insured by lawyers and judges. In the same time, universities like Oxford or Cambridge, until mid 19th century, were specialized in the teaching of the Roman and canonical law.

One of the forms of the scientific activity consisted in the comment of the judicial precedents. In this meaning, the comments of Brakstone and Coke were noted. Nowadays, the science of the law continues to be developed by judges.

Starting from the premise that the law of the precedents has contributed to the establishment of the single national law and that a series of institutions specific to the common law were created by judicial precedents, the British provincial law finds itself in statutes (written laws), as well as in the unwritten law; but just because the unwritten law finds itself in the decisions of the courts and judges, the latter ones being permanently subjected to the legislation activity; also they must relate to the authority of their predecessors[1].

THE LAW OF PRECEDENTS AND THE COMMON LAW

Beside the fact that the law of precedents has contributed to the creation of the British common law, it has had a significant role also in the family of the common law. Simultaneously with the expansion of the British Empire, the English model has spread on other continents, thus guaranteeing its continuity.

In this context, the Australian scholar A. Castles stated that "*for centuries the method, practice and style of the judicial thinking, which were developed using and around the unwritten British law, have created*

[1] Georg Wilhelm Friedrich Hegel, *Principiile filosofiei dreptului*, (Bucharest: IRI, 1996), 208

a specific judicial culture. This was the culture in which the judges, same as the legislator, were recognized as spokesmen of the law..."[1].

Nowadays, the common law is one of the largest families of law, of which there are states whose population represents 1/3 of the world population, but which are economically, culturally and traditionally different (Great Britain, Ireland, USA, Canada, Australia, Oceania, New Zeeland, Nigeria, Ghana, Kenya, Uganda, Tanzania and Zambia). The common element of these states is that in the past they all were under British ruling, which also determined the direct action of the British law, including the jurisprudential one, thus the reception of the principle of precedent

In the national systems of law two stages are to be emphasized: the stage of the active reception of the British jurisprudential law and the acceptance of the principle of precedent and the stage or the establishment of the national jurisprudential law. In addition, simultaneously with the legal norms were created the judicial thinking, technique and the educational system. In other words, *the entire factory of the common law has been transported by colonists in the new territories*[2].

But the question on how the law of the metropolis has influenced the social progress, the social structures, the socio-professional climate and the culture in the colonies arises. The development of the common law was tightly connected with the judicial professionals. Only that their limited number represented an obstacle in the way of the independent development of the jurisprudential law. Neither the colonists had a clear image of the concept of the British common law. They trusted the laws and the legislative organisms, considering that the wide discretionary powers of the judges may be used for the creation of the arbitrary norms. Thus, they appealed the British jurisprudential law associated with the symbols of the natural rights, equity, reasoning, but not with specific norms, established by judges in the process of examining the litigations. It was well known the fact that the common law follows the colonists.

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[1] Alex Castles, *Australian Legal History* (Sydney: Law Book Co, 1981), 553
[2] Castles, *Australian Legal History*, 553

As a result, the common law (jurisprudential) was seen as a natural law, which eased its spreading. In this context, the French scholar R. David stated that "*the thought that the law represents the reasoning, causes for British, according to tradition, a feeling of supranational. The term of common law is usually used without a national label. The common law is not intended as a supranational law; it is the legacy of all nations of English language*"[1].

The French and Italian literature still continues the disputes on the possibility of using in relation to the common law of the masculine or feminine article (*le common law* or *la common law*). In other words, the notion of common law refers to the notion of the right (*ius, droit, diritto, Recht*) or the law (*lex, loi, legge, Gesetz*). In the specialized contemporary English language, the term of law is used both for the right and for the law.

An important element in the creation of the family of the common law was the fact that for the colonial courts, and later for the dominion ones, the common superior court was the Judicial Commission of the Secret Council, which contributed in the uniformity of the national legal systems in the process of establishment. During the examination of the complaints against the judicial decisions from the Community's states, it has been ascertained the fact that at the base of the law of the member states of the common law system were common approaches and principles: "*no matter the differences between the law of the South-African states, the law of the United States, of New Zeeland, most of the fundamental principles have common roots*"[2].

The purpose of the Judicial Commission was to bring the law of the community states in accordance with the British law, so that *the law from the north to the south of the borders to develop as uniform as possible*[3]. Nevertheless, while the national systems were established, the

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[1] René David, *Le droit comparé. Droits d'hier, droits de démain* (Paris: Economica, 1982), 182

[2] Cheali vs Equiticorp Finance Group Ltd. and others, http://www.uniset.ca/other/css/19921AC472.html

[3] Cheali vs Equiticorp Finance Group Ltd. and others, http://www.uniset.ca/other/css/19921AC472.html

role of the Judicial Commission diminished and even it began to attach more importance to national specificity in the decision-making process. The Judicial Commission has recognized the fact that the force of the common law does not lie in uniformity, but in its capacity of adjusting to the particularities of the national law.

The jurisprudential law has contributed not only to the uniformity of the national legal systems, but also to the adaptation of the western culture to the local conditions and traditions. In this way was achieved the development of the diversity of the national legal systems.

Also, the jurisprudential law has become the base of all legal systems found under British influence. The long-term domination of the British law over the law of the Community, the particularities of the development of the common law have conditioned a special judicial culture developed on different continents, but which received a determinant unity, supported by the attention paid by every state to the judicial precedents from other states. Such borrowed precedents were called *convincing*. The practice of invoking such convincing precedents has contributed to the creation of a single judicial culture in that family. The jurisprudential law acts as the liaison within this family.

For the common law systems, the process of borrowing the precedents is very active. Thus, 50% of the New Zeeland's jurisprudence is borrowed from Great Britain, 10% from Australia and a very small amount from Canada. In Australia, 30% of the jurisprudence is borrowed from Great Britain and 1% from New Zeeland. Even Great Britain borrows approximately 1% from the judicial precedents of Australia, Canada and New Zeeland[1].

The proof of the fact that the judicial precedent allows the unification of different judicial cultures is represented by the joint jurisdictions. Their specificity results from the fact that the jurisprudential law coexists either with the Roman-Germanic law (French, Roman-Dutch) or with the religious law (Muslim, Hindu). From the category of the states with joint laws are part Scotland, Quebec,

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[1] Cheali vs Equiticorp Finance Group Ltd. and others, http://www.uniset.ca/other/css/19921AC472.html

Louisiana, India, Pakistan, Israel, Philippines, Trinidad and Tobago and the South-African Republic. For certain law systems, the judicial precedent is placed in second plan, in other, on the contrary it has a new development, because its flexible feature allows it to adjust to different conditions and therefore in a legal system certain branches are formed based on the common law, while in others on the fundament of the Roman-Germanic law (see Louisiana, Quebec).

In India, the courts have succeeded to merge the jurisprudential law with the religious law (Hindu and Muslim). In fact, the judges not being knowers of the religious norms have managed to find the appropriate solution by attracting consultants. Therefore, in courts the norms of the Hindu and Muslim laws have been subjected to a series of changes, and as result were created the Anglo-Hindu law and the Anglo-Muslim law.

Currently, the law of precedents contributes in solving the Europeanization of the British law or, in other words, the development of the process within which takes place the ascertainment of the European Union standards by the national law. Within the European Union are dominant the states whose legal systems have Roman-Germanic roots, which is reflected in the features of the European law. In its turn, the experience of Great Britain and Ireland is relevant only under the aspect of the mechanisms used for the purpose of adjusting the common law to the European law.

THE EVOLUTION OF THE JURISPRUDENCE IN CONTINENTAL EUROPE

In the Roman-Germanic law system it is accepted the reference to the solutions given in similar cases[1], for the solving and reasoning of certain jurisprudential solutions, even if this legal system does not consider as source of law the precedent. The same phenomenon

[1] Neil MacCornick, *Interpreting Statutes, A. Comparatives Study* (Hanover: Neil MacCornick, 1991), 567

happened with the Praetorian law over the Roman law[1]. The Praetorian law was formed by the creative solutions of magistrates for the purpose of supporting, amending and correcting the civil law (*adjuvandi vel supleandi vel corrigenda juris civilis gratia*). Also, the civil and the Praetorian law, often through the abolition of customs, of the judicial practice and the legal experts' opinions influenced each other to such an extent that it could no longer be said whether a norm was of civil or Praetorian origin[2]. Regarding the means in which the praetor reacted to the slow modification of the private law, it must be said that the *ius civile* stated norms mandatory for all citizens (as well as for magistrates). At first the praetors facilitated the application of the civil law, to help it through factual measures[3].

The creative solutions offered by the praetors have represented an importance source of inspiration for the legal norms and institutions of the Roman law.

The legal precedent, as source of law, has played a considerable role also during the feudal age, especially between the 15th and 17th centuries. The centralization of the state power and the establishment of the absolute monarchic regimes have increased the importance of the normative acts issued by the monarch, which has determined the gradual diminution of the judicial value of the precedent. The bourgeois revolutions have created legal systems different regarding its place and role and the recognition of the jurisprudence as source of law.

In its turn, the judicial precedent did not receive the recognition as source of law for the bourgeois continental law. The French civil code of 1804 has prohibited for the courts to rule based on general provisions.

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[1] All these measures, stated by time, represented *ius praetorianum*, creation of two praetors: urban and pilgrim, established in 242 BC to preside the division of justice between the Romans and the pilgrims (*qui inter cives et peregrinos ius dicit*), Andreea Rîpeanu, *Drept roman. Noţiuni fundamentale. Persoanele. Bunurile*, 1st Volume (Bucharest: Cermaprint, 2015), 65

[2] Andreea Rîpeanu, *Drept roman* (Bucharest: Pro Universitaria, 2008), 47; Kipp, *Geschichte d. Quellen des r. Rechts*, 2nd Edition, p.60; Lévy-Bruhl, "Prudent et Préteur", *Reva historique de droit français et étranger* (1926): 56

[3] Digeste, I.1, *Lex*, 7§1 and *Lex*. 8.

This normative act, with considerable influence, has dictated directly the non-application and non-recognition of the jurisprudence as source of law in the legal system of the continental Europe. It is the case of the Austrian Civil Code of 1811 (Art 12) and of the German Code of 1794 which stated that for the decisions to be rendered under no circumstance shall be taken into consideration neither the scientists' opinions nor the precedent decisions ruled by other courts. As result, with the emergence of codifications, the main source of law has become the law itself, drafted and adopted by the legislative organs. The precedent, though a subsidiary source of law, continued to hold an important role in that particular legal system.

CONCLUSIONS

Both norms, the written and unwritten law, emerging from the same popular will it is natural to have an equal mandatory force. The difference refers only to the means of creation. In the written law, the popular will is manifested, directly or by delegates and expressly, while in the consuetudinary law the same will makes a path, as *tacitus consensus populi*[1].

It results that the norm originating from a custom can abolish a rule belonging to the written law by the fact that is no longer applicable (*desuetudo*), as a new norm, of the written law, can abolish a rule of the consuetudinary law.

The legal practice, also known as the jurisprudence (Lat. jurisprudentia) represents all decisions ruled by all the courts. It is the science of the law[2] or, in other words, the knowledge of the divine and human things, the science of what is fair and unfair (Ulpian). The jurisprudential law or the common law system (from the English common law, case-law, judge-made law) represents the legal system developed based on the jurisprudence of the courts, auctoritas rerum

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[1] Ulpian, *Reg.: Mores sunt tacitus consensus populi longa consuetudine inventeratus*

[2] *Dicţionarul Explicativ al Limbii Române*, Romanian Academy, "Iorgu Iordan", Institute for Linguistics (Bucharest: Univers Enciclopedic, 1998), 551

perpetuo similiter indicatum. In the common law systems, the law is drafted and/or modified by judges, who have the authority and responsibility to create law using the case law[1].

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[1] *Marbury v Madison*, 5 U.S. 137 (1803)

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ORDINARY LEGISLATIVE PROCEDURE UNDER THE LISBON TREATY

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Abstract

According to the Treaty of Rome, the Treaty establishing the European Economic Community, signed in Rome in 1957, which entered into force in 1958, the Commission has powers in the field of proposing legislation, while decision-making powers in this area rest exclusively with the Council. The European Parliament had only consultative powers at the time. As a result of the reforms in the budgetary sphere (since 1970 and 1975) and in the legislative sphere, starting with the Maastricht Treaty - the Treaty establishing the European Union (TEU)[2] - the co-decision procedure is introduced extending the role of the European Parliament in the procedure for the adoption of normative acts. The Treaty of Lisbon represents the decisive step in this area, that of adopting legislation at European Union level, by enshrining the European Parliament's full equality with the Council in this area, including the adoption of the European Union budget.

Keywords: *Commission; Council;, European Parliament; European Union; legislation; budget; co-decision.*

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[2] The Treaty on European Union signed in Maastricht in 1992, which entered into force in 1993

ORDINARY LEGISLATIVE PROCEDURE UNDER THE TREATY OF LISBON

1. Preliminary clarifications

The institutions of the European Union have the power to take supranational decisions with binding effect. Their decision-making power is exercised in legislative, executive, budgetary, appointment and quasi-constitutional procedures[1]. The Treaty of Lisbon[2] amended the co-decision procedure, which is becoming an ordinary procedure in the European Union. Thus, the European Parliament together with the Council strengthens its role of legislator, namely, according to art. 14 TEU[3] ,, The European Parliament, together with the Council, shall exercise legislative and budgetary functions''.

The Council has performed legislative functions since the establishment of the European Communities, either individually or through special procedures, in most cases acting unanimously (for example: Article 19, Article 21, Article 65, Article 108 and Article 113 TFEU[4]) European Parliament with the role of participation, either together with the Council, through the ordinary procedure (of co-decision). The European Parliament, the Council and the Commission are mainly involved in the process of adopting legal acts (with or without legislation). The Economic and Social Committee and the Committee of the Regions have an advisory role. As we have shown, initially, when the European Communities were set up, the legislative function in the European Union (for the adoption of legislative acts) was held exclusively by the Council. The Single European Act[5] introduces by

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[1] D. Vătăman, *European Union Law* (Bucharest: Universul Juridic, 2007), 162

[2] For details see I. Boghirnea, *General Theory of Law* (Craiova: Sitech, 2013), 29

[3] Amended by the Treaty of Lisbon signed on 13 December 2007, entered into force on 1 December 2009

[4] The Treaty on European (Economic) Community signed on 25 March 1957, which entered into force in 1958, was reformed by the Treaty of Lisbon (see footnote 2) of this paper) and renamed the Treaty on the Functioning of the European Union.

[5] It was signed in Luxembourg in 1986 and entered into force in 1987.

Article 6 TEU the procedure for cooperation, according to which the European Parliament is recognized as having the power to adopt normative acts.

The Maastricht Treaty (TEU) introduces the co-decision procedure, according to which Parliament is on an equal footing with the Council as regards legislative powers.

The Amsterdam Treaty[1] simplifies the co-decision procedure, and the Treaty of Nice[2] extends it to all areas where the Council decided by qualified majority, leading to the strengthening of the European Parliament in the procedure for the adoption of legislation in the European Union. As far as the institution of the Commission is concerned, it remains the main legislative promoter. Thus, EU legislation can only be adopted on a proposal from the Commission unless the Treaties provide otherwise.

2. Steps in a legislative act

The ordinary legislative procedure involves the same steps as the co-decision procedure, but the Treaty of Lisbon and the Treaty on the Functioning of the European Union (TFEU) have changed the wording of this procedure to make it clear that Parliament is on an equal footing with the Council in adopting those acts (mainly regulations, directives, decisions).[3] Thus, the steps to be followed in adopting an act of the Union by ordinary procedure are:

a. The Commission proposal. According to art. 17 para. 2 TEU The Commission 'proposes to adopt the laws of the Union, unless the Treaties provide otherwise. It proposes for adoption the other acts, if the Treaties so provide. To this end, the Commission "has the general

[1] It was signed in 1997 and entered into force in 1999

[2] It was signed in 2001 and entered into force in 2003

[3] Elise Valcu, Ionel Didea and Lavinia Olah, „Means of collaborationat the level of the decisional Triangle. Within the legislative procedure states by the Lisbon Treaty“ in *Working Papers of 6 th LUMEN International Conference 16th - 19th of April 2015* (Iasi, Romania: Ed. Lumen, 2015)

mission (...) of initiative"[1], corresponding to the task of proposing legislative projects. Through the legislative initiative, the Commission contributes to the design, preparation and shaping of the measures taken by the Council and Parliament, which formulate the Union's policies and present them as proposals[2]. In most cases, the Commission acts on its own initiative, ie in cases where legal acts are adopted through the ordinary legislative procedure. This procedure is initiated only at the proposal of the Commission, according to art. 289 para. 1 TFEU. However, there are situations when[3]:

- the Council is the one requesting a recommendation or proposal, under the conditions of 135 TFEU, the Council being obliged to consult the Commission;

- The European Parliament, acting by a majority of its component members, may request the Commission to submit any appropriate proposal on matters which it considers necessary to draw up a Union act for the implementation of the Treaties (Article 225 TFEU).

Based on a report prepared by the competent commission, according to art. 225 TFEU, the European Parliament, acting by a majority of its component members, may request the Commission to submit to it any appropriate legislative proposal. The Commission may agree or refuse to prepare a legislative proposal requested by the European Parliament.

Also, a member of the European Parliament, according to art. 225 TFEU, on the basis of this institution's right of initiative, may make a proposal for a Union act. There are situations in which "the Commission may amend its proposal throughout the procedures leading to the adoption of a Union act", according to art. 293 para. 2 TFEU, which refers to an act of the Council which is adopted on a proposal from the Commission, "as long as the Council has not taken a decision"[4].

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[1] ECJ, 26 February 1976, SADAM, 88 to 90/75, Rec. 323

[2] O. Manolache, *Treaty of Community Law, 5th Ed.* (Bucharest: C.H. Beck, 2006), 127.

[3] Ioana-Nely Militaru, *European Union Law. Chronology. Springs. Principles. Institutions. The internal market of the European Union. Fundamental freedoms*, 3rd edition (Bucharest: Universul juridic, 2017), 267

[4] Militaru, *European Union Law*, 268

There are also situations in which the Commission is required to submit its proposals within a specified period of time. If it does not comply with the deadline, the other institutions of the Union and the Member States have the right to refer to the Court of Justice of the European Union for breach by the Commission of the obligations laid down in the Treaties, according to art. 265 TFEU. But there are also situations in which the Commission is not obliged to meet any deadline (for example, Article 109 TFEU).

However, the European Parliament or the Council may ask the Commission to explain and justify the merits of its proposals. The Commission's proposals shall be published in the Official Journal of the European Union, C series, referred to as "COM documents".

b. first reading in the European Parliament, at which Parliament shall adopt its position by a simple majority and forward it to the Council. The Council has two possibilities:

- approves the position of the European Parliament on the basis of which the restrictive act is adopted;

- did not approve the European Parliament's position, the Council adopting its own position and forwarding it to the European Parliament.

c. first reading in the Council, at which the Council adopts its position by qualified majority vote. If the Council approves the European Parliament's position, the act shall be adopted in accordance with the wording of the European Parliament's position.

d. second reading in the European Parliament. After receiving the Council's position, the European Parliament has three months in which to take a decision, namely[1]:

- to approve the proposal as amended by the Council. That act shall be deemed to be adopted in the wording of the Council's position,

- to reject the Council's position, the act being deemed not to have been adopted,

- to adopt amendments to the Council's position at first reading; the text, with amendments, shall be forwarded to the Council and to the

[1] Martina Schonard, https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.3.pdf, April 2021

Commission, which shall deliver an opinion on such changes.

e. second reading in the Council. If the Council agrees with the European Parliament's amendments within a maximum of 3 months of their receipt, the act shall be adopted. If it does not agree within 6 weeks, the conciliation committee is convened.

f. conciliation. The Conciliation Committee is composed of representatives of the Council and the European Parliament (in equal numbers). Representatives of the two institutions shall be assisted by the Commission. If the Conciliation Committee does not reach an agreement on the joint text, the procedure shall be terminated and the act shall not be adopted within the prescribed period.

If an agreement is reached, the joint text shall be forwarded to the Council and the European Parliament for approval.

g**. conclusion of the procedure, third reading.** The Council and the European Parliament have 6 weeks to approve the joint text. If the two institutions approve the joint text, the act shall be adopted.

One of the two institutions may not approve it within the prescribed period, in which case the procedure shall end and the act shall not be adopted.

Consultation procedure

The consultation entails that the institution of the Council take account of the opinion of the European Parliament and, if necessary, of the Economic and Social Committee and the Committee of the Regions[1].

Approval procedure The approval is applied under the conditions of art. 352 TFEU, following the entry into force of the Treaty of Lisbon, in particular the budgetary and horizontal flexibility clause. Approval is also required for association agreements (Article 217 TFEU, for the accession of the European Union to the ECHR (Article 6 (2) TEU) and for agreements establishing a specific institutional framework with major budgetary implications or in areas the ordinary legislative procedure applies (art. 218 para. 6 TFEU).

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[1] Martina Schonard 04/2021 https://www.europarl.europa.eu/ftu/pdf/ro/FTU_1.2.3.pdf

CONCLUSIONS. TREATY OF LISBON

The Treaty on the Functioning of the European Union contains "Special Provisions" for a legislative act which is subject to the ordinary procedure but which is not the result of a Commission proposal but of a group initiative or on the recommendation of the European Central Bank or at the request of the Court of Justice of the European Union[1]. The Commission no longer informs the European Parliament of its position, as this institution has not made the proposal, and therefore no longer gives its opinion. In such cases, the European Parliament and the Council shall forward the draft act to the Commission, including their positions at first and second reading.

The Treaty of Lisbon has made some progress in adopting European Union legislation, with the transition from unanimity to qualified majority in the appointment of the President of the Commission. In addition, the Treaty of Lisbon provides for the election of the President of the Commission by Parliament. The appointment of the President-elect must consider the results of the European elections[2]. This highlights the political legitimacy and public accountability of the European Commission. These provisions were applied after the 2014 European Parliament elections[3].

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PANDEMICS, GOOD GOVERNANCE AND PRIVATE INTEREST

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Abstract:

The pandemic that appeared at the beginning of 2020 brought several challenges from the perspective of legal framework, but also in the state – citizens' relation. Law institutions are being tested, but especially the social institutions. Suddenly all people became aware that they did not live in isolation and that legal mechanisms were only part of the human life complexity. In this new world it becomes necessary to consider what has remained constant and what has changed, as well as the fact that from today's realities the world of tomorrow will appear. Thus, it is necessary to seek to understand the main ways of expression of today's and tomorrow's society, in order to find ways for individuals to make fewer mistakes in their daily work.

Key words: *Pandemics; National Interest, Good Governance; Legal Framework; Private Interest, Citizens' Trust.*

INTRODUCTION

For thousands of years, science has had as its main subject the improvement of people's lives, and the appreciation that those involved in academic research have had was a direct consequence of their success in this field.

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The utilitarian nature of science has made it at the center of everyone's concerns, even if more indirectly – namely, when certain products do not work at optimal parameters. However, science is called to protect human life from various threats and to contribute to increasing the quality of life. A growing quality of life for larger parts of population means to achieve the main mankind purpose. In fact, people have always wanted a perfect life and in this sense they have designed fairy tales and literary or scientific works that describe a perfect model of it. To a large extent the fundamental aspects that all these creations of the human mind have emphasized have been those of peace, economic development and a high level of health, without forgetting the hedonistic aspects of human nature.

The scientific and technological progress of the last 200 years has brought with it a unique situation, in which people have come to believe that almost any suffering can be eliminated by treatments, that any difficult situation can be solved and that in general the power of the human mind is unlimited.

1. If we wanted to understand the mankind history we should use one or more criteria, and the results would be accepted only partially by ordinary people, and even less by academics. However, the need for these divisions cannot be disputed by anyone, because they mark certain periods in the life of continents or the entire planet that have really left deep traces in the countries' political and administrative practices. From this perspective we consider that this text needs the marking of some time limits, so that the logical succession of the presented ideas is better revealed.

People's lives have never been easy, and among the cultural references to the problems that our ancestors encountered we will find mainly issues of agricultural, medical and military nature. If in terms of agricultural aspects some of the problems were due to geographical conditions – the desert areas were not conducive to housing – the medical and military had a greater connection with the human will. Even though it took a long time for people to understand the importance of hygiene, it

is no less true that some of the epidemics and pandemics of past centuries have been spread as a result of hostile actions by some states. Thus, the Great Plague of the 14th century was propagated following Mongol attacks on a fortress in the north of the Black Sea; other animal diseases were the consequence of controlled movements of their contaminated populations across borders, etc.

Of all the dangers that accompanied humanity, the most frightening was that of widespread wars. Their chronology shows that there has not been a year in which people have not faced such disputes – small or large – and the effects on community development have usually been important. However, wars are conscious actions of political entities and a certain military-political context means that they do not start. In addition, there is a major problem in terms of the number of soldiers involved in such operations, because it directly influences the countries' power in related spheres, very important both in time and after those brutal confrontations.

All these three great dangers that influenced people's lives began to be reduced globally only after 1950. Basically, if we want to underline that division of history we must mention the advances that have been made in agriculture and medicine before the 20th century were partly annulled by the huge number of victims of the two world wars. Thus, the idea of good governance was one that could not be integral, because until the end of the fifth decade of the last century the issue of war nullified an important part of its action. Only after more than 100 million people have died in 30 years the governments had almost stopped large-scale military action; from that moment competition between countries begun to take place on more peaceful issues, mostly of an economic and administrative nature.

Governments have manifested themselves in the agriculture and medicine areas both from the perspective of research for more productive varieties and procedures capable of curing as many diseases as possible, subsidizing in various forms and percentages the individual subjects' action. However, we must emphasize that in both dimensions there is an important private component, which concerns not only the ownership of agricultural land or clinics, but especially people's behaviour relative to

the two spheres – from investments in agricultural equipment to preventive medical behaviour, etc. As a major result we must note the progress in agricultural techniques made on a global scale in recent decades, as well as the increase in life expectancy globally – 73 years[1] – related to 46 years in 1950[2]. We can say that governments have succeeded in ensuring certain good governance, and if we compare the situation with what has existed for millennia and centuries, we can consider that we really live in the best world that people have ever achieved.

One thing cannot be effectively prevented by individuals and government intervention is needed: this is called a pandemic. Pandemics are in fact the expression of the freedom of travel, because the last century technological progress has made it possible to transport long distances – hundreds of kilometres or more – for millions of people in one day. Therefore, any intelligent government strategist should have known that the danger of pandemics cannot be removed precisely as a result of this extraordinary mobility of people, and should have prepared an adequate response to any such situation, however unlikely it seemed to be.

2. The human sacrifices of the two world wars have brought an increasing public pressure on governments. Based on huge number of deaths, people demanded a better life, in which most of the issues that influence living standards were provided at high quality parameters, so that much of the problems that have affected people for thousands of years to be substantially diminished. Basically, there should be water supply in every house, there should be electricity, means of information and communication, fuel should be provided for heating homes and food

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[1] World Health Organisation, *Global Health Estimates: Life expectancy and healthy life expectancy*, available at https://www.who.int/data/gho/data/themes/mortality-and-global-health-estimates/ghe-life-expectancy-and-healthy-life-expectancy#:~:text=Globally%2C%20life%20expectancy%20has%20increased,reduced%20years%20lived%20with%20disability., consulted at 29th of June 2021.

[2] M. Roser, Es. Ortiz-Ospina and H. Ritchie, *Life Expectancy*, available at https://ourworldindata.org/life-expectancy, consulted at 29th of June 2021.

preparation, etc. Any conscious analysis of the governance idea in the 20th century reveals in fact that the quality of leading human communities starts from the public services provision to a high standard, and from here human societies can make a huge qualitative leap, based on which they can achieves higher moral goals[1].

A consequence of war decreasing as a direct means of solving problems was the movement of people growth across the borders. In this context, a situation was reached that was not predictable a few decades earlier – in the 19th century, more precisely. Specifically, the quality of life in a country was no longer the prerogative of its own government, but also of neighbouring countries, because investments come in large numbers in countries where there is good governance, but their proportion increases if neighbouring states are well governed too. No investor will be happy to come to a country with good governance, but which is surrounded by states with a high level of corruption and mismanagement, because the cost of good transport will increase the cost of investment.

Thus, it became necessary for countries to cooperate more, precisely in order to attract substantial investments. Basically, we are in the situation where the individual' freedom of movement has increased the pressure on governments, which are forced to take positive measures not only domestically, but also in the direction of international cooperation. This proved decisive for the Western European states community consolidation, which would then be consolidated by integrating most of the continent's countries after the collapse of communism.

It should be noted that alliances between countries are not easy to create, and their possibilities for cooperation are influenced by several factors – from a common history not very peaceful to certain rivalries between political leaders, etc. However, countries in the second half of the 20th century were forced to cooperate fairly loyally, regardless of

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[1] For a presentation of increasing public demand in the 20th century and their consequences read David Landes, *Avuția și sărăcia națiunilor: de ce unele națiuni sunt atât de bogate, și altele atât de sarace*, (Polirom Iași: 2013), pp. 362 – 368.

their political systems in medical matters. It was a necessity, after all, because mobility within each country – growing exponentially after 1945 – brought with it great dangers in terms of the spread of various microbes, bacilli, viruses, etc. Increasing international mobility was also a reality, even if it was not much politically encouraged, and as consequence countries were forced to accept a superior form of international medical cooperation. It was basically inevitable to increase cooperation but also from the perspective of generalizing medical protocols, as well as university specializations, so that the recognition of medical systems – from education, diplomas, to applications – becomes quasi-universal.

The collapse of the communist system only increases the mobility of people, the figures for the transport of people by air – the most easily quantifiable – being in the order of millions per day. Or, this increase in the movement of people brings with it the transport of diseases various forms, which would lead to the outbreak of regional epidemics, as they existed in the first two decades of this century. However, it was predictable for any man with a sense of logic that there would be a pandemic at some point, because the widespread mobility of the planet's population would have produced such a strict global result as an application of probability theory. No matter how much international cooperation in the medical field has increased, it could not cope with human mobility, because medical procedures are administrative and human interest is private. In the "dispute" between the area of the private interest applicability and the medical one (the latter having a public nature), the first always wins, and the consequences of this "victory" end up having consequences on the entire public environment.

In 2014 a whole volume about global risk governance in health underline that as globalization continues to blur borders and increases interdependence, risk transcends national borders, causing major challenges in risk governance. Recent risk literature converges on one aspect: risk assessment and risk management pose major challenges in all fields of our interconnected societies. The roles and responsibilities of actors and the structures and processes to assess risk, design responses, and apply measures, however, are often not clearly defined. While risk

interdependence and the increased complexity of the international environment require the formulation of global responses to global risks and risk governance processes to cope with them are emerging[1].

3. Although there have been warnings of possible pandemics – and we repeat, any person with logical thinking should keep in mind that at some point they become inevitable – in reality the governments were not prepared for this type of crisis. Lack of training usually means an inadequate regulatory framework for factual situations, a lack of equipment needed to combat the crisis, as well as a lack of coordination between political factors and those who actually fight threats of any kind. All these characteristics were easily observable in the conduct of almost all countries of the world. The only ones who did very well were those who were able to isolate themselves quickly from the rest of the world, and in these cases the decisive factor was the ability of the political factor to make decisions.

The crisis has raised two major issues. First is the importance of human freedom, which means that not every administrative measure is accepted by the citizens. The second problem that the pandemic brought to the spotlight was the model of society we have in the 21st century – one in which much of our lives are dedicated to hedonistic purposes. We must also be aware of the connection between the two aspects presented in this paragraph, namely that in the absence of freedom people do not have time to satisfy their own interest and pleasures. Thus, we find especially the aspect of administrative efficiency, insistently desired by each of us, which can be expressed by the formula: "if the public administration operates at high parameters in terms of quality and time to solve public affairs, then the citizen has more time for him to do what he wants".

Dictatorial regimes have among their main characteristics the fact that they do not allow a great freedom of man, trying to interfere even in the private life of the people – the communist examples from North

[1] Nathalie Brender, *Global risk governance in health* (Palgrave Macmillan: 2014), 2.

Korea, Albania, etc. are relevant in this respect. In this type of society, good governance actually means "the security of the ruling group that it will not lose power". For these types of state leadership, the pandemic was an excellent opportunity to consolidate power in their own countries, increasing the level of surveillance of citizens, and these tasks was fulfilled in the name of a noble goal: "protecting public health". Even if there is this medical purpose in the measures adopted by these regimes – we must admit that in the dictatorship restrictions can be strictly applied, and in many of these countries the pandemic has been brought under control in just few months – the absence of freedom does not allow a real debate about the citizens particular interest and what are the risks of not fulfilling it.

For democratic countries, where legality is a value and a daily principle, the pandemic has brought into question the concept of good governance. In essence, this concept refer to human freedom and their particular interests' promotion, because the simplification and effectiveness of administrative procedures allows man to have more time to devote to other activities that bring satisfaction and/or profit (artistic activities, overtime to earn more money, time spent with family, etc.).

However, blocking and controlling a pandemic cannot be done solely on the basis of measures that appeal to the goodwill of individuals, because they are not always able to understand the administrative measures meaning – or, for various reasons, do not accept them. It should be mentioned here that contemporary society is a very complex one, and the pandemic has blocked important economic activities, which in turn have influenced other sectors of the economy, thus affecting the incomes of important parts of the world's population. Thus, governments have been put in a position to accept that some economic sectors operate with major risks, because otherwise there would have been both an increase in poverty and possible major protests of those financially affected by the pandemic, and one of these situation results would have been even greater spread of the virus in bodies vulnerable because of declining daily caloric intake.

In addition, there is the psychological problem of the measures that restrict freedom' duration – the overall percentage of urbanization

causes hundreds of millions of people to be cramped in small spaces with few prospects of independent movement, which turns homes into quasi-prisons. Thus, unlike the pandemic of 1918 – 1919, when most of the Earth's inhabitants lived in rural areas, the main problem left by this contemporary medical crisis is that of human mental health. Thus, good governance will mean in the following years a resizing of the city – village relationship, but especially a concentration of medical expenses in a strictly high percentage to the psychological and psychiatric care of those who have been and will be affected by the pandemic.

Basically, we can consider that good governance in the coming decades will not only mean good administrative practices, but a change in the amount of public intervention in the private sector. It will grow in the economic sphere – to support the sectors severely affected by the pandemic reconstruction; will increase in the field of urbanism and the redesign of human communities, in the sense of offering the inhabitants of larger spaces in cities; and in the end, good governance will mean a policy to support people's mental health, by setting up programs that provide extensive and daily assistance to many people.

The medical consequences of the pandemic will transform the idea of good governance, including the public perception of this concept. Intervention in the economy is not accepted by supporters of certain political ideologies, but it is expected that there will be the slightest forms of opposition here, because governments are the only ones with the legal and financial leverage to act nationally for economic development.

However, major obstacles to good governance will be encountered in psychological and psychiatric care, which is essentially delicate and will face a major obstacle: not everyone affected by this pandemic will admit to suffering. But the assistance refusal does not mean that these people will not live and that they will not be able to manifest themselves problematically in their daily life, carrying out actions that may have significant human and financial costs. As medical care is only mandatory for people diagnosed with certain diseases, it is obvious that private interests will collide with a general psychological care program, although these (programs) must exist and be implemented in various forms.

Urban resizing will be the most complicated area of the good governance concept in the years to come. In view of the huge costs, but also the need to change the labour market at the national level, there will be deficiencies, delays and strong social dissatisfaction, and governments will pay the electoral costs of public dissatisfaction. However, all this operation must be done as quickly as possible and simultaneously with the other two mentioned above, because no government can afford the duration of this pandemic to be longer than it is now.

The national interest in this matter (pandemic) is not only to control and reduce to almost 0 the medical crisis we are in, but also to adapt our contemporary complexity to possible new pandemics, as well as to a possible long-term evolution of the Coronavirus crisis. In any situation in which different variants of the virus will continue to appear and spread, the political, administrative and especially legislative systems will be forced to adapt not only to the current realities, but also thinking in perspective.

As never before in history, private interest will be able to harmonize with the general interest through Internet technologies, which could allow – especially developed countries – to take stronger action on the future projections of nations. Good governance will mean in the future, however, a formula in which protection against non-military disasters should be a priority and which should affect as little as possible not only the economic capabilities of a country, but especially the mental health of its inhabitants.

CONCLUSIONS

Public administration – the art of turning big policy ideas into solid results – ranks among the very oldest of intellectual disciplines. Public administrators were managing government programs long before Plato and Aristotle worried about how they ought to do so.

Public administration was called in these years to take a tough exam in which it did not have enough political support, and the results

were not satisfactory[1], because years of unpreparedness revealed an important area of the good governance' concept – namely that of crisis prevention in a direction that was inevitable at some point in creating major problems on a global scale.

The fact that the pandemic has lasted for more than 18 months and that it does not foresee a quasi-total diminution of it forces the political systems to consider a new projection for the countries they represent. In the situation where this crisis will last for many years, the economic, urban, medical, etc. consequences will force governments not only to create plans, but also to implement them – in the directions we have specified in this article.

As an effect of this crisis, the idea of good governance began to change, both in terms of public perception, but especially of its reality and implementation. It is the duty of governments to understand the changes brought by this pandemic and to project long-term future plans for their countries so that citizens recognize that the good governance concept is not a political slogan, but especially a reality that adapts to any problem, preventing the appearance of more serious ones.

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CONSTITUTIONAL JUSTICE IN ROMANIA EVOLUTION AND PERSPECTIVES

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Abstract:

The supremacy of Constitution is a reality also due to the role of the Constitutional Court, as defined in article 142 paragraph (1) of the Constitution. The Constitutional Court's powers contribute essentially to the achievement of the lawful state and, therefore, a historical analysis of the evolution of this important constitutional institution is likely to highlight the legitimacy of the constitutionality control of the laws in Romania,but also its perspectives.

In our analysis, we are debating for the concept of constitutional justice, regarded from a historical point of view, which includes the main attribution of a constitutional court, namely that of controlling the constitutionality of the laws. From this perspective, we point out the main evolution moments of the constitutionality control of the laws in Romania, analyzing briefly the particularities of the constitutional regulations during the evolution of constitutional justice in our country. At the same time, we emphasize the contemporary features of the control of constitutionality of the laws in Romania, and we argue that guaranteeing the supremacy of the Constitution, through constitutionality control, must be seen in the broad sense and in terms of the attributions of the courts in this field.

We believe that the role of the Constitutional Court must be amplified by new powers, including through future revisions of the Fundamental Law, as this creates new guarantees regarding the reality of the principle of separation and balance of powers in the state, and obviously the guaranteeing of the supremacy of the Basic Law.

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I. SIGNIFICANCE AND FEATURES OF THE CONSTITUTIONAL JUSTICE

The supremacy of Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the control of constitutionality of laws, represent the main guarantee of the supremacy of Constitution, as expressly stipulated in the Fundamental Law of Romania.

Professor Ion Deleanu appreciated that "the constitutional justice can be considered, in addition to many others, a paradigm of this century."[1] The birth and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: the man, as a citizen, becomes a cardinal axiological reference of the civil and political society, while the fundamental rights and freedoms only represent a simple theoretical discourse, but a a normative reality; it is done a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the lawful state and, at the same time, a counterpart to the principle of majority; "the parliamentary sovereignty" is subjected to the supremacy of the law and, in particular, to Constitution, therefore the law is no longer an infallible act of Parliament, yet is it conditioned by the norms and values of the Constitution; and not the least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental foundations of the governed ones and not of the governors, as a dynamic act, in a continuous modeling and act of society".[2]

[1] Ion Deleanu, *Constitutional justice* (Bucharest: Lumina Lex, 1995), 5.
[2] For developments see Deleanu, *Constitutional justice*, 5,6.

The term "constitutional justice" or "constitutional jurisdiction" are controversial in the literature in specialty, the control of constitutionality of laws being preferred in particular. However, the notion of "constitutional justice" appears in Kelsen's work as "the jurisdictional guarantee of Constitution"[1]. Eisenmann also considers it to be "that form of justice or, more precisely, the jurisdiction that pertains to constitutional laws", without which the Constitution would be but a mere "political program, only binding morally". The same author makes the distinction between constitutional justice and constitutional jurisdiction. The "Constitutional justice" is the form through which the distribution of prerogatives between ordinary legislation and constitutional law is guaranteed, and the "constitutional jurisdiction" refers to the authority through which the constitutional[2] justice is achieved.

In Romanian literature, the notion of "constitutional justice" has come about mainly due to the contribution made by Professor Ion Deleanu[3] in this field. Without a thorough analysis of this concept, we consider that the constitutional justice is a legal category of special significance whose constitutional constituents are as follows:

a) designates all the institutions and procedures through which the Constitution supremacy is achieved.

b) a state body competent to carry it out with the duties provided by the Constitution and the law;

c) a set of technical means and forms of implementation with specific and exclusive features;

d) the purpose of the constitutional justice is to ensure the supremacy of Constitution.

There is no identity between the concepts of constitutional justice and, respectively, the constitutionality control of laws. The latter one is only a part of the first.

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[1] H.Kelsen, ”La garantie jurisdictionnelle de la Constituion”, in *Revue de Droit publique* (1928): 197 and next.

[2] For development see Ch. Eisenmann, *La Justice constitutionnelle de la Haute Cour Constitutionnelle d’Autriche* (Paris: PUAM et Economica, 1986)

[3] For developments see Deleanu, *Constitutional justice*, 9-12

In the sense of the above definition, the general features of the constitutional justice can be identified:

- it is a genuine jurisdiction but having some peculiarities over other forms of jurisdiction having in view this one's purpose;

- it may use common procedural rules, but also the own procedural rules consecrated in the Constitution, laws and regulations determined by the nature of the constitutional litigation;

- can be done by a specialized state body (political, judicial, or dual-nature), or by the common law courts;

- it is an exclusive justice because it has the monopoly of the constitutional litigation.

- it is not always concentrated because the common law courts may have perspectives in the area of constitutional litigation:

- the independence of the constitutional justice consists in the existence of a "constitutional statute" of the body implementing this type of jurisdiction, consisting in the independent statutory and administrative autonomy vis-à-vis of any public authority; the verification of its own competence, the prevalence of abuses of constitutional justice over any other judicial decisions: the independence and immovability of the judges and, in some cases, their designation using criteria other than those relating to the recruitment, appointment and promotion of career magistrates;

The control of constitutionality of the laws is the main form of constitutional justice and is a basis for democracy guaranteeing the establishment of a democratic government that respects the supremacy of the law and Constitution.

George Alexianu considered that legality is an attribute of the modern state. The idea of legality in author's conception is formulated as follows: all the state organs operate on the basis of a lawful order established by the legislator, which one must be respected.

The same author, referring to the supremacy of Constitution, fully affirmed and in relation to today's realities: "When the modern state organizes its new appearance, the first idea that concerns it is to stop the administrative abuse, hence the invcention of the constitutions and by judicial means the establishing of the legality control. Once this abuse is

established appears a new one, a more serious one, that of the Parliament. Then are invented the supremacy of Constitution and various systems for guaranteeing it. The idea of legality thus gains a strong strengthening leverage"[1].

An important aspect is also to define the notion of control of the constitutionality of laws. In the legal doctrine[2] was emphasized that the issue of this attribution must be included in the principle of legality. Legality is a fundamental principle of organizing and operating the social and political system. This principle has several coordinates: the existence of a hierarchical legal system on top of which is the Constitution. Therefore, the ordinary law must comply to Constitution in order to fulfill the condition of legality; the state bodies must carry out their duties in strict compliance with the observance of the competences established by the laws; the elaboration of the normative acts should be done by competent bodies, after a predetermined procedure in compliance with the provisions of the higher normative acts with legal force and with the observance of the law and Constitution by all state bodies.

In the doctrine, the constitutionality control of the laws was defined as: "The organized activity for verifying the conformity of the law with the constitution, and from the point of view of the constitutional law it contains rules regarding the authorities competent to make this verification, the procedure to follow and the measures that can be taken after this procedure[3] has been completed."

The analysis of the definition shows the complex significance of the constitutionality control of the laws. This is an institution of the

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[1] G. Alexianu, *Constitutional Law* (Bucharest: Schools' House Publisher, 1930), 71.

[2] On this meaning see Ion Deleanu, *Constitutional institutions and procedures* (Bucharest: C.H. Beck, 2006), 810; I.Muraru, E.S. Tănăsescu, *Constitutional law and political institutions*, Vol. II, (Bucharest: C.H. Beck, 2014), 191; Marius Andreescu and Andra Puran, *Constitutional law. General theory of the State*, Second edition (Bucharest: C.H. Beck, 2017), 205-206.

[3] I. Muraru and E.S. Tănăsescu, *Constitutional law and political institutions*, Vol. II, 191

constitutional law, which is the set of legal norms relating to the organization and functioning of the authority competent to exercise the control, as well as the set of legal rules having a procedural nature that regulate which ones may be disposed by a constitutional court.

At the same time, it is also an organized activity guaranteeing the supremacy of Constitution by verifying the conformity of the norms contained in the laws and other normative acts with the constitutional regulations.

In essence, the control of the laws' constitutionality requires the verification of laws' compliance as a legal act of the Parliament, but also of other categories of normative acts with the norms contained in the Constitution. The compliance must exist both formally (the competence of the issuing body and the elaboration procedure) as well as from the material point of view (the competence of the norm in the ordinary law must be in line with the constitutional norm).

II. AVATARS OF THE APPEARANCE AND EVOLUTION OF CONSTITUTIONALITY CONTROL

There are several factors that explain the emergence and evolution of the constitutionality control of laws, of which we mention:

a) *The inconsistency between Constitution and the laws*. This compliance of the law with the Constitution is not a given or an absolute presumption. Both theory and practice have shown that due to the dynamics and peculiarities of the legislative process, there may be inconsistencies between the law and Constitution. Thus, by giving effect to groups of political interests, which usually belong to the majority, the Parliament can adopt a law that contravenes the constitutional norms. For the same reason, the government could adopt unconstitutional normative acts.

In other cases, the legislative technique regulated by the Constitution may not be respected by the Parliament, which would lead to inconsistencies between the law and Constitution.

b) *The necessity of interpreting the Constitution and the laws in view of establishing the conformity of the right with the constitutional norms.*

The normative law-making activity must be continued with norms implementing work; in view of their application, the first logical operation to perform is their interpretation.

Both the Constitution and the law are presented as a set of legal norms, but these norms are expressed in the form of a normative text. Therefore, what is the object of interpretation are not the legal norms, but the text itself of the law or Constitution. A legal text may contain several legal rules. From a constitutional text a constitutional norm can be deduced by interpretation. The text of Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. By interpreting are identified and determined the constitutional norms.

It should also underline that a Constitution may contain certain principles which are not clearly expressed *expresis verbis*, but they can be inferred through the systematic interpretation of other norms.

In the sense of the above, the specialized literature stated: "The degree of determination of the constitutional norms through the text of the fundamental law can justify the necessity of interpretation. The norms of the Constitution are well suited to the evolution of their course, because the text is inexorably inaccurate, formulated in general terms. The formal superiority of Constitution, its rigidity, prevents its revision at very short intervals, and then interpretation remains the only way to adapt the normative content, usually older, to the constantly changing social reality. The meaning of the constitutional norms being by their very nature, that of maximum generality, its exact determining depends on the will of the interpreter." [1]

The scientific justification of interpretation results from the need to ensure the effectiveness of the norms contained both in Constitution

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[1] I. Muraru, M. Constantinescu, E.S. Tănăsescu, M. Enache and Gh. Iancu, *Interpretation of Constitution, Doctrine and Practice* (Bucharest: Lumina Lex, 2002), 67.

and the laws, by means of the institutions which carry out mainly the activity of interpreting the norms enacted by the author.

These institutions are primarily the judging courts and constitutional courts.

Verifying the conformity of a normative act with the constitutional norms, institution that represents the constitutionality control of the laws, does not mean a formal comparison or a mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures for interpreting both the law and Constitution.

Therefore, the necessity of interpreting the Constitution is a condition of its application and for ensuring its supremacy. The constitutionality control of the laws is essentially an activity for interpretation of both the Constitution and the law. It is necessary to have independent public authorities that have the competence to interpret the constitution and in this way to examine the conformity of the law with the Constitution. Within the European model of constitutional justice, these authorities are the Constitutional Courts and tribunals.

c) *The applying of the principle of separation and balance of powers in the state. Avoiding the abuse of parliamentary power*

The limits of Parliament's power to legislate are determined by the constitutional norms determining the competence and the legislative procedure. Another limit is the need to respect the supremacy of Constitution in terms of the contents of the norms enacted by the Parliament.

Consequently, the constitutionality control of the laws is the practical way for verifying the compliance with the Constitution's supremacy by the Parliament and it constitutes a counterpart to its powers in the legislative matter.

The constituent legislator and the ordinary legislator must find the most appropriate procedures to respond to two major requirements: first, the need not to obstruct the exercise of the legislative function of the Parliament by conferring exaggerated powers in matter to other state authorities, and, on the other hand, the need to ensure, within strictly defined limits, the compulsoriness of the decisions of some constitutional courts for the Parliament.

The necessity of the control of constitutionality of the laws is in fact the expression of the need to guarantee the supremacy of Constitution in relation to the activity of the Parliament.

If the chronological character is concerned, the constitutionality test was first made in England by Eduard Cohe through his judgment decision in 1610 in Bonham case, as chief justice. The usefulness of constitutionality control was then demonstrated by Alexander Hamilton in the U.S. in 1780: "If there were to be a pre- reconcilable difference between the laws and Constitution, it would of course be preferable to the one that has a superior validity and compulsoriness or, in other words, the constitution must be preferred to the law ... No legislation act contrary to Constitution can be valid."[1]

The one who frequently raises the issue of controlling the constitutionality of laws by a political body is the famous French lawyer and politician Siéyes. In his speech in the 1791 Convention of France, he called for the creation of a political body that would cancel out of office or at the request of those concerned, of any act or any law that would be contrary to Constitution. Moreover, this organ even had a Constituent Assembly role.

From a historical perspective, it is of particular importance the judicial control of constitutionality established in the United States at the beginning of the nineteenth century, although the Constitution does not regulate procedural rules.

The evolution of the constitutionality control of the laws in the U.S. can be divided into two periods. The first period begins with the adoption of the Constitution in 1787 and ends in 1886.

During this period, in the matter of constitutionality, the judges verified in particular whether the ordinary legislator respected the competence conferred by Constitution in the sense of not being legally enforced on matters prohibited through constitutional norms. The judges could not annul a law as unconstitutional, but could only to implement its application in the case before the court.

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[1] Alexianu, *Constitutional Law*, 72.

The Supreme Court pronounces in the *Marbury affair vs. Madison*, for the first time in a case of this nature, declaring the federal Constitution to be the supreme law of the state and removing an act of the Congress contrary to the federal Constitution. The decision of the Court is written by Judge John Marshall and forms the basis on which is based the American jurisprudence on constitutionality control.

The reasoning attributed by the American judge is the following: the judge is meant to apply and interpret the laws. The Constitution is the supreme law of a state that must be applied with priority to any other law. The Constitution, being a law, is to be interpreted and applied by the judge, including to a particular case forming the subject of the judgment.

In case the law does not comply with constitutional norms, the latter ones will be applied because of the supreme character of the Constitution.

The second period begins in 1883 with a famous decision of the Supreme Court in Massachussets in the Wiegman litigation. The judges' powers increase in matter of constitutionality. The Supreme Court is no longer confined to verifying a law in terms of respecting the legislature's constitutional competence or in regard to the observance of procedures. Starting with this moment, and until now, the justice in the matter of constitutionality control examines the law in terms of its opportunity, its rationality and its economic and social justification. Thus, through the procedure of constitutionality control, the judiciary power examines the entire activity of the Parliament and removes all measures that are deemed to be contrary to the legal order in the state. In this way, justice is a guarantor of the supremacy of Constitution and of the observance of the principle of separation of powers in the state, "as the control and mutual supervision of the powers are the very essence of the existence of a state"

But the American model of constitutional justice is not without criticism. Among the most significant ones we mention:

a) verifying the compliance of the law with the constitutional norms is a constitutional litigation that differs from the ordinary legal disputes, the latter ones being the object of settling of the common or specialized courts of law. In contrast to these, a constitutional litigation can only be solved by a constitutional judge;

b) the legal effects of the constitutionality control occur only between the parties involved in the process. In the absence of a parliamentary procedure of law reviewing, we reach the paradoxical situation to let in force an unconstitutional law;

c) the ordinary jurisdictional procedure is incompatible with the specificity of a constitutional litigation;

d) There is the danger of transforming the justice into a judges' ruling, and thereby breaking the principle of separation of the powers in the state. "The judiciary authorities become, unwillingly a branch of the legislative power, or even worse, a real governing power, an authority above the others." [1]

Therefore, several theoretical, institutional and political considerations have led to the establishment of a control of constitutionality of the laws through a specialized body, which is the European model in this field.

From these considerations, shown in the literature in specialty[2] we can mention two:

a) the political regime of a parliamentary or semi-presidential type existing in most European countries leads to a dominant position of the parliamentary majority, that fulfills the governing. The judicial reviewing of the constitutionality of laws is not a genuine counterpart related to the power of the Parliament. It is necessary to carry out the constitutionality control of the laws through a specialized body, which is, as the case may be, either a counterbalance to a parliamentary majority too strong – expressively, volunteering or a substitute for a non-existent parliamentary majority.

b) the control of constitutionality of the laws through a specialized body ensures the correct acceptance and application of the principle of separation of the powers in the state. In this sense, Hans Kelsen[3] said: "The guaranteeing of the Constitution implies the

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[1] I. Deleanu, *Constitutional Justice* (Bucharest: Lumina Lex, 1995), 38.

[2] See Deleanu, *Constitutional Institutions and Procedures*, 805; Muraru and Tănăsescu, *Constitutional Law and political institutions*, 269

[3] H. Kelsen, *The pure doctrine of the law* (Bucharest: Humanitas, 2000), 110-111

possibility of canceling the acts contrary to it, and not by the body that adopted them, which is considered a free-creator of law, and not a law-enforcement body, but by another organ, different and independent of the legislative one and any other authority".

The European model of constitutional justice is institutionally characterized in the constitutional courts or tribunals.

In the interwar period, this model was noted in Austria (1920), Czechoslovakia (1979), Spain (1931) and Ireland (1938).

After the Second World War are established the constitutional courts and tribunals in most European countries: Italy (1948), Germany (1949), Turkey (1961), Portugal (1976), Spain (1978) etc.

Among the Eastern European countries that have this model of constitutional justice we mention: Romania, Poland, Hungary, Czech Republic, Croatia, Macedonia, Russia, Ukraine, Lithuania, etc.

In case of France, the constitutionality control is carried out by a dual, political and judicial body, the French Constitutional Council. This is made up of the former presidents of the republic, still living, as well as of nine members appointed for a 9 years unique mandate. The members of the Constitutional Council shall be appointed as follows: three members by the President of the State, three by the Senate President and other three by the President of the National Assembly. The President of the Constitutional Council is appointed by the decision of the President of the Republic. In the competence of this Council fall other responsibilities outside the control of constitutionality of the laws.

In our country, the control of the constitutionality of laws has developed marked by the national particularities and the successive application of the two models presented above.

Thus, Cuza's statute established in article 12, that the state and constitutional laws are placed under the protection of the weighing body. Therefore, this Chamber of Parliament could verify the conformity of a law with the Constitution.

The 1866 Constitution did not regulate the control of constitutionality of the laws.

However, the provisions of Article 93 of the Constitution, according to which the Lord "sanctions and promulgates the laws" and

that, he "may refuse his sanction." Consequently, the head of state could refuse to promulgate a law if he considered it unconstitutional. Obviously, it is not a genuine control of constitutionality of the laws, but it is a precursor to such verification. As long as the 1866 Constitution was in force, the head of state never made use of this procedure.

The control of constitutionality of the laws done by a judging court rather than by a specialized institution, different from the judiciary power, has also been accepted on the European continent. The constitutional history mentions a Romanian priority in this case. Thus, during the period 1911-1912, the Ilfov Tribunal and then the High Court of Cassation and Justice had the right to verify the constitutional conformity of the laws in the litigation known as the "trams affair" in Bucharest.

Interestingly, the reasoning used by Ilfov Tribunal and by the High Court of Cassation and Justice in motivation of the possibility to carry out the Constitutionality control on a pretorian basis. In essence, the recitals were the following: (1) The court did not of its own motion take the jurisdiction to rule on the constitutionality of a law and to annul it, since such a procedure would have constituted an interference of the judicial power into the powers of the legislature. As a consequence, the court assumed this competence because it was asked to verify the constitutionality of a law; 2) On the basis of the attributions that are given, the judiciary power has as its main mission the interpretation and application of all laws, whether ordinary or constitutional.

If a law invoked is contrary to the Constitution, the court can not refuse to settle the case; 3) There is no provision in the 1866 Constitution which specifically prohibits the right of the judiciary power to check whether a law is in conformity with the Constitution. The provisions of Article 77 of the Constitution are being invoked, according to which a judge, according to the oath, is obliged to apply the laws and the Constitution of the country; 4) unlike ordinary laws, the Constitution is permanent and can only be revised exceptionally. Being the law with supreme power, the Constitution is imposed by its own authority and therefore the judge is obliged to apply it with priority, including in case

where the law on which the litigation is settled is contrary to the Constitution[1].

The decisions of Ilfov Tribunal and the High Court of Cassation and Justice were well received by the experts of the time. Here's a short comment: "This decision was a great satisfaction for all people of law. It is a great step forward in advancing this country towards progress, because it consecrates the principle that the Constitution of this state, its foundation, the palace of our rights and freedoms, must not be despised by anyone. We are proud that it has been given to our justice the privilege to show even to the justice of the Western countries the true way of progress in the matter of public law."[2]

For the first time, the constitutionality control of the laws was regulated by the Romanian Constitution in 1923, by article 103, adopting the American model. "Only the Court of Cassation in unified sections has the right to judge the constitutionality of the laws and to declare inappropriate those that are contrary to the Constitution. The judgment on the unconstitutionality of laws is limited to the case alone."

Consequently, the control of constitutionality of the laws was the exclusive competence of the Court of Cassation in unified sections. It could be exercised only by way of the exception of unconstitutionality invoked during the trial of the litigation. At the same time, the pronounced ruling had legal effects only between the parties in the trial and had the power of a rex judecata only in the case solved.

Also, the constitutionality of laws is judged after the litigation has passed all levels of jurisdiction. This procedure was an extraordinary way to appeal a judgment. The provisions of article 29 of the Law of the Court of Cassation stipulated only one exception when the applicant accepted the suspension of the trial of the case matter so that for the Cassation Court to decide in advance on the constitutionality of the law whose application was required.

At the same time, through these constitutional regulations, the transition from the "diffuse" judicial control, assumed by all courts, to a

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[1] See the *Judicial Courier* No. 32, (April 29th , 1912): 373-376

[2] N.D. Comşa, ”The notifications” in *Judicial Courier* No.32 (April 29th 1912): 378.

"concentrated" judicial control, assigned to a single court, namely the Court of Cassation, was made in unified sections. Also, the decision given in that procedure has effects only on the case and between the parties in litigation, and could not have legal effects *"erga omnes*".

The constitutionality control of the laws was governed identically by the Romanian Constitution in 1938, by the provisions of article 75.

In the post-war period, the constitutionality control of the laws was practically no longer regulated. The provisions of article 24 letter j) of the 1952 Constitution stated that the supreme representative body, the Grand National Assembly, has in its competence "the general control over the implementation of the Constitution", which included the right to examine the law's compliance with Constitution.

Similarly, the provisions of Article 43 (point 5) of the Constitution adopted in 1965 established the competence of the Grand National Assembly to exercise general control over the implementation of Constitution, but these provisions regulated more specifically the competence of the supreme representative body in respect of the constitutionality control of laws: "Only the Grand National Assembly decides on the constitutionality of the laws ".

The constituent lawmaker of the post-war period of the totalitarian state renounces the American model, as well as to the principle of separation of the powers in the state and entrusts the constitutionality control to a political body.

The Romanian Constitution in 1991, that restores the values of democracy and of the lawful state, regulates initially the constitutionality of laws in Article 140-145, according to the European model, the competence being entrusted to the Constitutional Court, this one being constituted as an independent public authority.

III. REALITIES AND PERSPECTIVES OF CONSTITUTIONAL JUSTICE IN ROMANIA

In Romania, the constitutional justice is carried out by the Constitutional Court. The core of the matter are the provisions of article 142-147 of Constitution and those contained in the Law no. 47/1992 on

the organization and functioning of the Constitutional Court[1]. However, as we shall see below, the constitutional justice is not an exclusive attribute of the Constitutional Court, being only its most important component the constitutionality control of laws, to which are added the exclusive competencies conferred by Constitution and special laws.

The constitutional provisions through which the Constitutional Court of Romania became a reality were accepted after extensive parliamentary debates during the discussion of the Constitution draft. It is useful for our scientific approach to succinctly mention the maturity of these parliamentary talks, as a result of which the Constitutional Court has become a reality. The Parliamentary Committee on the Drafting of the Basic Law has made Title IV to be consecrated to the "Constitutional Council" under the influence of the French constitutional system.

The debates in the constituent assembly can be systematized, as shown in the literature in speciality, into four great ideas: "namely, a) the elimination of the institution, without any variant; b) the abolition of the constitutional council, with the entrusting of its controlling mission to the courts; c) entrusting a constitutional review to a commission; d) acceptance of the control of the laws' constitutionality, exercised by a distinct authority, council, court or constitutional court".[2]

Finally, the Constituent Assembly decided to create a specialized judicial body, namely the Constitutional Court. The essence of the reasoning behind this decision was as follows: "The Constituent Assembly has decided to institutionalize this form of control of constitutionality of the laws. Such control is inherent to the lawful state and democracy. In the post-war period, all the European states that have adopted constitutions have entrusted the control of constitutionality of the laws, not to the courts, but to a special and specialized body, so that the model offered in the project is a European model. By its makeup and its attributions, the Constitutional Court is not a "superpower", nor is it expensive – in relation to other institutions - through its nine members.

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[1] Republished in the Official Gazette no. 807 on December 3rd , 2010.

[2] I. Muraru and E. S. Tănăsescu (coordinators), *Romania's Constitution. Comments on the article* (Bucharest: C.H. Beck, 2008), 1370.

Entrusting the control of constitutionality of the laws of the Supreme Court of Justice would result in the transformation of the jurisdictional body into a political body, the overordination of the judicial authority, the stimulation of arbitrariness on its part, the return to a form of desuet control, long time outdated in most of the democratic countries world "[1].

The doctrine has synthesized the following features and functions of the Constitutional Court:

a) *It is no other power in the state nor does it take any of the functions of the three powers*. The Constitutional Court is a typical example of non-formal and non-rigid interpretation of the theory of separation of powers in the state. The Constitutional Court cannot formally be classified into any of the three classical powers of the state but it contributes to the balance between them.

b) *It has a dual nature: political and jurisdictional*. The political nature derives from the way of designation of judges and from some attributions concerning the verification of the observance of Constitution in the procedure for appointing the President of Romania, the organization of the referendum, the mediation of the constitutional conflicts between the public authorities, the verification of Constitution's observance by the political parties, or in general, to verify the compliance with Constitution by some public authorities.

It has a jurisdictional nature because the members of the Constitutional Court act as veritable judges. At the same time, in the exercise of its functions, the Court applies a number of jurisdictions governed by the framework law for the organization and functioning which is supplemented by some regulations of the Civil Procedure Code. Also, the jurisdictional nature arises from the attributions of the Constitutional Court, especially in the field of constitutionality control of the laws and other normative acts.

c) *The role of the Constitutional Court as a public authority is to be the guarantor of the supremacy of Constitution*. This feature expressly results from article 142 paragraph (l) of Constitution. The Constitutional

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[1] Muraru and Tănăsescu (coordinators), *Romania's Constitution. Comments on the article*, 1373.

Court is not the only guarantor of Constitution, a very broad category that also characterizes the function of the Head of State. Thus, the provisions of article 80 paragraph (2) of Constitution show that the President of Romania is watching over the observance of Constitution. Our Constitutional Court is the guarantor of the supremacy of Constitution, an expression that underlines the foundation of the Court's functions.

d) It is the public authority that supports the good functioning of the public authorities in constitutional relationships, of separation, balance, collaboration and mutual control. In the sense of this feature, by amendments to the Constitution as a result of a new revision a new attribution was introduced to the Constitutional Court, namely: it solves the legal conflicts of constitutional nature between the public authorities [article 146 letter e) of the Constitution]. In order to achieve this, the Constitutional Court is independent of any other public authority; it only obeys the Constitution and its organic law (article l paragraph. (3) of Law no. 47/1992, republished]. The independence of the Court implies its right to decide on its competence and, moreover, the jurisdiction of the Constitutional Court cannot be challenged by any public authority. Therefore, there can be no positive or negative conflict of competence between the Constitutional Court and another public authority.

e) *The Constitutional Court is the only authority of constitutional jurisdiction in Romania* [article l paragraph. (2) of Law no. 47/1992, republished]. The Romanian constituent lawmaker has adopted the European model in the sense that constitutional justice is carried out by a single authority. The courts have some attributions that materialize in the right of appreciation of the admissibility of some unconstitutionality exception, but this does not invalidate the Court's monopoly on the constitutional justice, since only this public authority has the competence to resolve the constitutional disputes.

f) *The organization, operation and exercise of the duties shall be carried out in compliance with the principle of legality*. Our constitutional court exercises exclusively the powers provided by article 146 of the Constitution and those regulated by the organic law. The Court is not a supra constitutional court, its role is to interpret and apply the constitutional and law provisions.

In the same meaning, the provisions of Article 2 of Law no. 47/1992, republished, shows that the Constitutional Court ensures the constitutionality control only of the laws, international treaties, regulations of the Parliament and ordinances of the Government. The unconstitutionality can only be ascertained if the procedures of these normative acts violate the provisions or principles of the Constitution [article 2 paragraph (2) of the Law no. 47/1992, republished].

g) *The structure of the Constitutional Court is determined by the Constitution and the Law no. 47/1992.* As the Constitutional Court is independent in regard to any public authority, in a particular case only this institution can decide whether or not has the competence to resolve the constitutional dispute. Moreover, its competence cannot be challenged by any public authority (article 3 paragraph (3) of Law no. 47/1992, republished]. The Code of Civil Procedure regulates the resolution of negative or positive conflicts of jurisdiction between the courts. Taking into consideration the normative norms mentioned above between the Constitutional Court of Romania and, on the other hand, a court or other public authority, conflicts of jurisdiction cannot arise, because the exclusive competence in the matter of constitutional verification of the laws is in the right of the Constitutional Court, and this monopoly of constitutional jurisdiction cannot be challenged. The Constitutional Court has the power to decide on its jurisdiction in a specific case, but it cannot decline its jurisdiction in favor of another public authority in case the Constitutional Court is noticed with a request under conditions other than those stipulated by the Constitution or the organic law, the petition will be dismissed as inadmissible.

h) *In the exercise of its powers, the Constitutional Court regulates a work of interpretation of the law and Constitution*. The Constitutional Court cannot amend, complete or abrogate a law.

In its old drafting, before the revision of the Constitution, the Law no. 47/1992 prohibited the Constitutional Court to interpret the normative acts that are subject to constitutionality control. Naturally, the current regulation has removed this ban because the activity of verifying the compliance of normative regulations with the provisions of the

Constitution made by the constitutional judge is in essence also a work for the law enforcement based on the interpretation of the legal norms.

The Constitutional Court participates in the achievement of the legislative function in the state, but not as a positive legislator, yet as a negative legislator whose purpose is to eliminate the "unconstitutionality venom" from a normative act. Therefore, by its attributions, the Court is not subrogated to Parliament's activity, because the amending, supplementing or abolishing of a law is an exclusive attribute of Parliament

i) *The Constitutional Court "supports the good functioning of the public authorities in constitutional relationships of separation, balance and mutual control"*. The principle of separation and balance of the powers in the state with all the criticisms expressed by some authors remains the foundation of the democratic exercise of state power and the main constitutional guarantee for avoiding the excess or abuse of power by any state authority.

The relationships between the state authorities are complex, but they must also ensure their proper functioning while respecting the principle of legality and supremacy of Constitution. In achieving this goal, it is very important to maintain the state balance in all its forms and variants, including as a social balance.

The separation and equilibrium of the powers no longer concern only the classical powers (legislative, executive and judicial). To these powers are added others that give new dimensions to this classic principle. The relationships between the participants to the state and social life can also generate conflicts that need to be resolved to maintain the balance of powers. Some constitutions refer to public law litigations (German Constitution - Article 93), to conflicts of jurisdiction between the state and autonomous communities, or conflicts of powers between state powers, between the state and regions and between regions (Constitution of Italy - Article 134).

România's Constitution speaks about the legal conflicts of constitutional nature between public authorities [(art. 146 lit. c)] and regulates the mediation function between the powers of the state exercised by the President.

The Constitutional Court is an important guarantor of the separation and balance of state power because it solves the constitutional legal conflicts between public authorities and through its attributions in the matter of the constitutionalilty control previous to the laws and the verification of constitutionality of the Chamber's regulations, it intervenes in ensuring the balance between the majority and the parliamentary minority, assuring effectively the right of the opposition to express itself.

j) *The Constitutional Court is a guarantor of the observance of the fundamental rights and freedoms*. In principle, three are the essential constitutional guarantees of the citizens' rights and freedoms established by Constitution:

a) the supremacy of Constitution;

b) the rigid nature of Constitution

c) citizens' access to the control of constitutionality of the law and to the control of lawfulness of the acts subordinated to the law.

In Romania, the procedure for the unconstitutionality exception provides the indirect access of the citizens to constitutional justice.

The judicial control is an important way of guaranteeing the supremacy of the fundamental law, because by the nature of the attributions of the courts, it interprets and enforces the law, which also implies the obligation to analyze the conformity of judicial acts subjected to the judicial control with the constitutional norms. The courts therefore have competences in ther matter of constitutional justice. We are considering not only the general obligation of the judge to observe and apply the constitutional norms or the powers conferred by the law to notify the constitutional court with an exception of unconstitutionality but in particular the possibility to censure a legal act in terms of constitutionality.

The recent doctrine and jurisprudence in the matter examines the jurisdiction of the courts to verify certain legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with excess power.

The unconstitutionality of a legal act can be ascertained by a court if the following conditions are met cumulatively:

1. the court to exercise its powers within the limits of competence provided by law;

2. the legal act may be individual or normative, may be mandatory or optional;

3. that in the case does not exist the exclusive jurisdiction of the Constitutional Court to rule on the constitutionality of the legal act;

4. the settlement of the case depends on the legal act that is criticized for nonconformity;

5. there is a reasonable, sufficient and pertinent reasoning of the court regarding the unconstitutionality of the legal act.

In case of the cumulative fulfillment of these conditions, the limits of the courts' attributions are not exceeded, but, on the contrary, the principle of supremacy of the Constitution is applied and efficiency is given to the role of the judge to apply and interpret the law correctly. Such a solution is also justified in relation to the role of the judge in the lawful state: to interpret and enforce the law.

The accomplishment of this constitutional mission, which is particularly important and difficult at the same time, requires the judge to apply the law in accordance with the principle of the supremacy of Constitution, therefore to control the constitutionality of the legal acts that form the subject of the litigation brought to justice or that is applied to the settlement of the case. The application of legal acts shall be carried out by the judge taking into account their legal force and observing the principle of the supremacy of Constitution. In this respect, worth mentioning the provisions of Article 4 paragraph (1) of Law no. 303/2004 obliging the magistrates that through their entire activity to ensure the supremacy of the law .

Another issue is to know what solutions the courts can issue, in compliance with the above conditions, when they ascertain the unconstitutionality of a legal act. There may be two situations: *In a first hypothesis*, the courts may be directly invested in verifying the legality of a legal act, as is case for the administrative litigation. In this case, the courts can determine by decision the absolute nullity of the legal acts on the grounds of unconstitutionality. *The other situation* concerns the hypothesis that the courts are not directly invested with verifying the

legal act criticized for unconstitutionality, but that legal act applies to the settlement of the case brought to the court. In this case, the courts can no longer dispose the annulment of the unconstitutional legal act, but they will no longer apply it for the settlement of the case.

SOME CONCLUSIONS

In our opinion, it is necessary that the role of the Constitutional Court as guarantor of the Fundamental Law to be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature in speciality that a possible improvement of the constitutional justice could be achieved by reducing the powers of the constitutional[1] litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of exercising its attributions in its charge, according to Constitution, by assuming the role of a positive legislator.[2] Reducing the powers of the Constitutional Court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as consequence the elimination of the risk of misconduct of those attributions. Not in this way it is achieved within a lawful state the improvement of the activity of a state authority, but by seeking legal solutions for better performing of the duties that prove to be necessary to the state and social system.

Proportionality is a fundamental principle of the law explicitly consecrated in the constitutional, legislative regulations and international legal instruments. It is based on the values of the rational justice and equity and expresses the existence of a balanced or appropriate relationship between actions, situations and phenomena, being a criterion for limiting the measures disposed by the state authorities to what is

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[1] Genoveva Vrabie, "The juridical nature of the Constitutional Courts and their place within the public authorities system", in *Journal of Public Law* no.1 (2010): 33.

[2] We are referring for exemplifying to the Decision no.356/2007, published in the Official Gazette no.322 on May 14th 2007 and to the Decision no. 98/2008 published in the Official Gazette no. 140 on February 22nd, 2008.

necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess power of state authorities. Proportionality is a basic principle of the European Union law being explicitly consecrated in the provisions of Article 5 of the Treaty on the European Union. [1]

We consider that the express regulation of this principle only in the content of the provisions of Article 53 of Constitution, with applying on the restriction of the exercise of some rights, is insufficient to give full meaning to the significance and importance of the principle for the lawful state.

It is useful, in a future revision of the fundamental law that, at article 1 of the Constitution to be added a new paragraph stipulating that *"The exercise of state power must be proportionate and non-discriminatory"*. This new constitutional regulation would constitute as a genuine constitutional obligation for all state authorities, to exercise their powers in such a way that the measures adopted be within the limits of discretionary power recognized by law. At the same time it is created the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and Government, by the constitutionality control of the laws and ordinances, using as a criterion the principle of proportionality.

In the attributions of the Constitutional Court may also be included the one to rule on the constitutionality of administrative acts exempted from the legality control of the administrative litigation courts. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers to and the provisions of Law no. 544/2004 of the administrative litigation, are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction on the exercise of the fundamental rights and freedoms or with the violation of some important constitutional values.

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[11] For developments see Marius Andreescu, ”Proportionality, principle of European Union law”, in *Judicial Courier* no. 10 (2010): 593-598.

For the same reasons, our Constitutional Court should be able to pronounce on the constitutionality and the decrees of the President for establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any verification of legality or constitutionality, the practice has shown that in many situations the Supreme Court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented the normative acts by acting as a true legislator, violating the principle of separation of powers in the state[1]. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider that it is necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

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INDIVIDUAL FREEDOM IN THE CONTEXT OF THE RIGHTS AND FUNDAMENTAL FREEDOMS

Florina MITROFAN[1]

Abstract:

The current study emphasizes the analysis of the individual freedom as part of human rights, starting from the idea that the individual freedom represents an area in which the constitutional and criminal norms are in a tight and direct connection.

The dimensions of the individual freedom are given by the constitutional norms, while the criminal and criminal procedural norms offer a practical and effective value for these dimensions.

The legal framework in which the issue of individual freedom is placed provides, as a consequence, the legal protection of the citizen with regard to this right.

Key words: *freedom; individual; rights; fundamental freedoms; law.*

INTRODUCTION

The Romanian Constitution contains provisions that constitute the legal basis of the legal institution of individual freedom, as a fundamental right of the citizen and also establishes sufficient guarantees, even if at the level of principle, these being supplemented by additional regulations from other branches of law.

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Freedom in its general sense concerns the ability of people to act without restraint and is an invaluable social value given the fact that it gives the opportunity to capitalize on all legitimate and rational qualities, attributes, interests and aspirations of human beings, within the limits allowed by law. In a democratic society, the state being the political body that has the power and decides on its institutionalization, legally and effectively guarantees the freedom and equality of individuals, proceeding to its own limitation, Hegel emphasizing that the idea of law is freedom. On the other hand, equality can only exist between free people, and in turn freedom can only exist between people whose equality is legally enshrined[1].

Freedom, as a possibility of movement in space and time, both as a natural phenomenon and as a socio-human state, has always been a matter of utmost concern both for the natural sciences and for philosophy, art, religion and last but not least, for the socio-political and legal sciences, a sense in which the most enlightened minds of all times have contributed through their often contradictory ideas to the potentiation with new and generous valences of the content of the concept of freedom.

The idea of recognizing, examining human rights has been central to the concerns of many sages throughout history[2].

THE REFLECTION OF THE PROTECTION OF INDIVIDUAL FREEDOM IN THE DOCTRINE

The correlation between equal rights for all citizens and the recognition of the rights and fundamental freedoms has been emphasized in all international documents in the area of human rights, starting with the Universal Declaration of Human Rights and continuing with the universal documents, as well as with the regional ones.

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[1] Nicolae Popa, *Teoria generală a dreptului* (Bucharest: Actami, 1998), 21

[2] Ioan Muraru and Gheorghe Iancu, *Drepturile și îndatoririle constituționale*, Part 1 (Bucharest: IRDO, 1992), 42

The doctrine emphasized the idea that the recognition of human rights and fundamental freedoms derives from the belonging of individuals to a certain state, to a certain community[1].

Legal protection must be achieved, first and foremost, at the domestic level, which is a very important condition for any democratic government, since without the inclusion of human rights in constitutional norms, without appropriate, concrete measures provided for in national law to guarantee them by the state, civil rights and freedoms are inefficient and therefore ineffective. So, the procedures and mechanisms that can ensure the legal protection of human rights internally derive from the national legislative system, from the internal norms of the state.

It is necessary to invoke the principle enshrined in Art 20 of the Romanian Constitution, according to which "Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions". This is the fundamental constitutional principle in the field of legal guarantee of human rights in our country. It is the basis of the entire policy of the Romanian state and is reflected in the activity of state authorities and institutions that are meant to contribute to ensuring the promotion and protection of the rights and freedoms of citizens[2].

The long and sinuous history of individual freedom, the permanent conflicts between law and theory, on the one hand, and the practice of public authorities, on the other – a practice that has not infrequently registered abuses and illegalities – sometimes forgetting

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[1] Ioan Vida, *Drepturile omului în reglementările internaționale* (Bucharest: Lumina Lex, 1999), 21

[2] Ioan Muraru, "Dispoziții constituționale și penale privind liberatatea persoanei. Terminologie și seminificații juridice" in *Despre Constituție și constutuționalism* (Bucharest: Hamangiu, 2006), 162

(unfortunately too often) that the authorities must be at the service of the citizens and not the other way around, have imposed the formulation of constitutional rules whose application should not be hindered by interpretations and speculation. The brief explanation of the notions used in Art 23 becomes necessary, however, especially since the constitutional provisions will imply a correlation with the criminal ones[1].

This article has a complex and relatively thoroughly regulated normative content compared to the level of generality usual in the case of fundamental laws. In its first paragraph, Art 23 of the Constitution uses two concepts, namely that of individual freedom and that of personal safety. These two notions are not one and the same, they do not form a single legal category, although they are and must be used and explained together. In the context of Art 23 of the Constitution, the individual freedom concerns the physical freedom of the person, his right to behave, behave and move freely, not to be held in slavery or any other form of servitude, not to be detained, arrested or detained except in the cases and under the conditions provided for by the constitution and laws. Individual freedom is the constitutional expression of the human natural state, man being born free. Society has an obligation to respect and protect human freedom. That being said, it should not be understood here that individual freedom would be an absolute right. Like all subjective rights, it knows limits of exercise, the first of which is the free exercise of the rights of other subjects of law. Therefore, it is carried out in the coordinates imposed by the rule of law.

Violation of the rule of law by the individual entitles public authorities to restrictive interventions, which implies, where appropriate, depending on the seriousness of the violations, even some measures directly concern the person's freedom such as searches, detentions, arrests.

The repressive action of public authorities to restore the rule of law is and must be conditioned and clearly delimited, so that no person

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[1] Mihai Constantinescu, Ioan Muraru, Ion Deleanu, Antonie Iorgovan, Ioan Vida, *Constituția României – comentată și adnotată* (Bucharest: Official Gazette Publ.-house, 1992), 56

who is innocent is the victim of abusive actions or possibly determined by purely political reasons. Thus comes the notion of security of the person who expresses all the guarantees that protect the person in situations where public authorities, in application of the Constitution and laws, take certain measures concerning individual freedom, guarantees that ensure that these measures are not illegal. This system of guarantees allows the repression of antisocial or illegal acts, but at the same time provides the innocent with the necessary legal protection. However, the notion of individual freedom has a larger scope than the security of the person. The security of the person can also be seen as a guarantee of individual freedom, regarding the legality of the measures that can be ordered by the public authorities, in the cases and under the conditions provided by law[1].

The constitutional text compels the legislator to establish expressly and explicitly both the cases and the procedures by which restrictions on individual freedom can be brought.

With regard to the establishment of cases and procedures, the legislator will have to take into account that Art 1 Para 3 of the Constitution provides that: "human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed".

The provisions of Art 5 of the ECHR are intended to protect the physical freedom of any person against arbitrary or abusive arrest and detention. The notion of "freedom" refers primarily to a person's physical freedom. The principle of respect for a person's freedom is essential in a democratic society, and no one can be deprived of his or her freedom arbitrarily. However, from the principle of guaranteeing freedom, there may be exceptions provided by law and executed in accordance with the law. In certain cases, in particular in connection with the protection of public order, deprivation of liberty is permitted.

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[1] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru and Elena-Simina Tănăsescu, *Constituția României revizuită – comentarii și explicații* (Bucharest: All Beck, 2004), 40-41; Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituțional și instituții politice,* 13th Edition, 1st Volume (Bucharest: C. H. Beck, 2008), 165-166

Protection of the person's freedom also implies the existence of guarantees of the detained person: the possibility of challenging the measures taken against his or her freedom, the right to compensation in case of illegal detention, etc.[1].

CONCLUSIONS

From what is presented, the idea that emerges is that, in any democratic state, the purpose of the guarantees related to individual freedom is to allow the defense against any arbitrary infringements brought to the person's freedom.

The security of the person can also be considered as a guarantee of individual freedom, all the more so as it concerns the legality of the measures that may be ordered by public authorities, in the cases and under the conditions provided by law, a legal framework that must not come into force. contradiction with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms, nor with the jurisprudence of the European Court of Human Rights.

The principle of protection of individual liberty contributes, along with other constitutional principles, to the constitutionalizing of law and to the consolidation of the rule of law.

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[1] Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului*, 2nd Edition (Bucharest: C.H. Beck, 2006), 96

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THE TRANSLATIONAL EFFECT OF THE CONTRACT IN THE LIGHT OF THE NEW CIVIL CODE

Dumitru VĂDUVA[1]

Abstract:

The new Civil Code maintains the organization of the regime of the translational effect of the contract between the parties as it has been stated by the Civil Code of 1864. Being an effect specific to one of the species of obligations, the obligation to give, seems surprising its regulation among the general effects of the contract. Considering that the execution of this effect takes place by law, at the moment of concluding the contract, real effect, which derogates from the general regime of execution of obligations (to do and not to do), which has them through the personal performance of the debtor, performed by voluntary payment or, if necessary, forced execution, the organization of the translational effect within the general effect of the contract is rational.

The regime of this effect is also maintained, except for the amendment brought by the new Civil Code regarding the part that bears the risk of losing the good until its delivery to the acquirer. The new Civil Code puts the alienator at risk of losing the property (res perit debtors).

Key words: *the effect of the contract; translation effect; obligation of the give; the risk of losing the good; the effectiveness of the acquisition of the good in its successive alienations by the same owner.*

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1. GENERAL PRESENTATION OF THE TRANSLATIONAL EFFECT AND THE CURRENT SYSTEM OF THIS EFFECT IN THE REGULATION OF THE NEW CIVIL CODE

Section 6 *Effects of contracts* (Art 1270-1294 of the Civil Code), Part 1 "Effects between the parties" (Art 1270-1279 of the Civil Code) states the general effect of the contract between the parties, its mandatory force. The legislator of the new Civil Code also organized in this framework the effect of a particular operation, the "Establishment and transfer of real rights" (Art 1273 Civil Code). The philosophy of the legislator of the Civil Code from 1864 was thus preserved, which regulated in Section I "General Provisions" regarding the general effect of the contract – the binding force of the contract (Art 969) – and the translational effect of real rights (Art 971 Civil Code from 1864).

1.1. The binding force of the contract, one of its general effects

The new Civil Code states, in its title regarding the sources of obligations, the general theory of the contract as source of obligations, by organizing it as an ensemble of general rules applicable to all contracts, regarding their establishment and effects, being of concern those about the general effect of the contract. Unlike the special contracts which generate special effects such as the transfer of property of the goods, transfer of use of the goods etc., all have a common effect, which is why it is generally called: the binding force of the contract.

This effect is mainly generated by the legal nature of the contract. The basis of the obligation of the contract is the will of the parties[1], considering that they are the ones who decided its formation, but ultimately the law establishes the obligation of the contract, because it is the one that attaches its binding force by the rule of Art 1270 of the Civil

[1] Paul Vasilescu, *Drept civil. Obligațiile* (Bucharest: Hamangiu, 2017), 470; Iosif Robi-Urs and Petruța-Elena Ispas, *Drept civil. Teoria obligațiilor* (Bucharest: Hamangiu, 2015), 114

Code[1]. Without the binding character given by law, the contract would not be a legal instrument while the species of contracts derive their legal effectiveness from this general effect: the binding force of the contract. Having this effect dictated by its nature as legal instrument, the contract binds the subjects who have undertaken to produce legal effects, obligations (to give, to do or not to do), i.e. the debtor is held personally, with constraint, to by the creditor. The binding effect of the contract is known from the Middle Ages though the wording "*pacta sunt servanda*", this is why the doctrine also named it the principle of the binding force of the contract[2].

The general theory of the contract states only its general effect, applicable to all contracts: the binding force of the contract (Art 1270 of the Civil Code) and not an obligation or other. However, as can be seen, one of the types of obligations is regulated in the rules on the binding force of the contract: that of giving, in relation to the transfer of real rights.

Considering that Section 6 "Effects of the contract", Part 1 "Effects between the parties" (Art 1270-1279) states the general effect of the contracts: its binding force, at first sight it is surprising the organization of the translational effect of the contract (art.1273 Civil Code) within this paragraph. What is the reason why the legislator regulated the translational effect and the establishment of real rights in the section on the general effect of the contract?

On the other hand, if the legislator chose to regulate the general regime of the translational effect of real rights, the obligation to give, we might think that he must also organize the general regime of the obligation to do, but such a regulation does not exist.

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[1] Ioan Adam, *Drept civil. Obligațiile. Contractul* (Bucharest: C.H. Beck, 2011), 320-321

[2] Liviu Pop, Ionuț-Florin Popa and Stelian Ioan Vidu, *Curs de drept civil. Obligațiile* (Bucharest: Universul Juridic, 2015), 81

1.2. The reason of stating the translational effect of the contract within the paragraph on the binding force of contracts

The only explanation for the regulation of the general regime of the translational effect, specific for the obligation to give, is the fact that, unlike the obligation to do (and to not do, being also a specie of the obligation to do), which is executed according to the general regime of obligations, stated by Title V "Execution of obligations", from the same Book V "Obligations" (voluntary payment or forced execution etc.), the translational effect of the obligation to transfer the real rights is not subordinated to this regime, but to a different one: the right execution, concomitant with the formation of the contract. In other words, the transfer of rights does not take place through the debtor's private benefits, but takes place by law, from the law, as well as the binding force of the contract, an effect that also springs, founded, on the law.

Summa divisio, the obligations born from the contract are: *dare*, *facere* and *non facere*, namely the obligation to transfer the rights and the obligation to do (not to do), the last one being a so-called obligation, because its performance refers to a prestation from the debtor, thus it is subjected to the general regime of obligations stated by the Civil Code. On the other hand, the obligation to give, the obligation to transfer ownership of a certain good between the parties, is currently executed by law, from the moment the contract is formed, the transfer of ownership of the shown goods being consensual.

In Roman law this was a personal obligation, because the transfer of the right did not take place by law but by a personal performance of the debtor, in principle by tradition, ie the handing over of the good or right. Today, the obligation to give produces real effect, ie it is executed without a performance of the debtor (personal obligation). However, this is only an execution in principle of the obligation to give, because for the transfer of real estate rights the obligation to give generates an obligation, i.e. a personal effect, proper to the obligation, and the translational effect takes place through a personal benefit, the tabulation of the translative legal act.

By this rule of principle, organized within the binding effect of the contract, the legislator makes the transition from goods, especially real rights over goods, Book III "On goods" to obligations, Book V "On obligations" to obligations.

In the special law of contracts, this effect is applicable in most contracts that have as object the transfer of property: sale, exchange, donation, contribution to the company, etc.

2. GENERAL LEGAL REGIME OF THE TRANSLATIONAL EFFECT OF PROPERTY OVER A GOOD

2.1. The transfer or establishment of the right to property (solo consensus)

According to Art 1273 Para 1 of the Civil Code, "Real rights are constituted and transmitted by agreement of the will of the parties, even if the goods have not been handed over, if this agreement concerns certain goods (...)". This rule, being a general effect, applies to all contracts having as their object the establishment or transfer of real rights.

A. The principle of establishment and transfer of the right to property

According to Art 1273 Para 1 of the Civil Code, real rights are established and transferred through the simple agreement of the will of the parties, regardless if the goods have or have not been handed over, being sufficient that the parties to conclude the contract over a specified good or, in case of gender goods, the transfer also takes place by right at the moment when the individualization of the goods on which it was agreed to be constituted or transferred the property took place.

This principle is applicable not only for the transfer of the property right, but also for other real rights, as specified by the first paragraph above mentioned. It also follows from the second paragraph of that article that that principle of the transfer of rights also applies to other

rights, such as the right to claim. The transfer of rights other than real rights, in principle of the rights of claim, but also of the intellectual ones, is called assignment, expressly mentioned in the text shown.

We remind you that through the legal execution of the translational effect of the contract, in reality only the transfer of the prerogative of the property called the right of disposition (*abusus*) takes place. However, in addition to abuse, the property is also made up of fruit picking and use (*fructus* and *usus*). Art 1273 Para 2 states that the fruits of the good or right belong to the owner at the time of the transfer of property or, where appropriate, of the assignment of the right.

For the execution of the transfer of all the prerogatives of the property right, the text of Art 1483 of the Civil Code completes the text of Art 1273 Para 1-2 stating that, "(1) The obligation to relocate the property also implies the obligations to hand over the good and to preserve it until handing over".

With regard to the transfer of real rights over immovable property, the same Art 1483 specifies in paragraph 2 how this transfer is executed "With regard to the real estate registered in the land register, the obligation to relocate the property also includes the obligation to hand over the necessary documents for the registration".

B. Exceptions

The law specifies some rules in which the transfer also takes place by law but not at the time of concluding the contract but at another time, either determined by the parties or determined by the nature of the goods. What is essential here is the fact that the translational effect takes place by law but depends on the execution, as a rule, of an obligation by one of the parties to the contract.

According to Art 1273 Para 1 of the Civil Code "The real rights are constituted and transmitted by the agreement of will of the parties, (...)" or by the individualization of the goods, if the agreement concerns gender goods. Consequently, in addition to the contract, the agreement of will, the transfer of ownership of the goods takes place by right but after the goods subject to the agreement have been individualized.

At the same time, according to paragraph 3 of the same article, "The provisions on land registers as well as special provisions concerning the transfer of certain categories of movable property shall remain applicable".

As shown in the introduction of the translational effect, it takes place, in principle, only for movable goods, for real estate the translational effect takes place by registering in the land book the contract.

Finally, the parties may provide for another time of transfer of real or other rights, for example, in case of transfer of property with payment of the price in installments or in case of transfer of property with reservation of title, the translational effect takes place at the time of payment of the price or of the final rate.

Also, the law states another moment of transfer of the property right for the case in which the object of the transfer is someone else's good or of future goods or of the goods sold by model or catalogue etc. or if the transfer is subjected to certain conditions and burdens.

3. THE RISK OF LOSING THE GOOD. THE PRINCIPLE OF BEARING THE RISK OF LOSS OF THE GOOD BY THE DEBTOR OF THE OBLIGATION TO HAND OVER

The regime of transfer of ownership of the goods must also include the rules on its effectiveness, in the event that until the execution of the handing over the obligation the debtor of this obligation is unable to execute it due to circumstances outside it: fortuitous event and force majeure.

The legal regime of the obligation in the situation shown is called: the risk of loss of property. Given that there may be a greater or lesser interval between the time of the transfer of ownership of the property and that of its transfer, for example, in the event that the person from whom the transfer of the property took place is at a distance from the recipient, during this interval there is a risk that the good will be destroyed, damaged, etc., without the fault of the debtor of the obligation to hand over. Who shall bear the risk for the loss: the one who transferred the

property right even though he is no longer the owner because by the translational effect the property was transferred by right from the date of concluding the contract, or the purchaser, who became the owner of the property from the moment shown, even though he did not take possession of the good?

We mention that the loss of the property is due to a case of force majeure, i.e. it is not attributable to any of the parties. Otherwise, if it were imputable to the seller or the buyer, the rules of loss no longer apply, but those of the contractual liability for the non-execution of the obligation to deliver, respectively the pickup of the good.

If the risk of loss is borne by the alien, he will no longer be able to claim payment of the price; if it is borne by the acquirer, he will be obliged to pay the price, even if he cannot enjoy the good he has purchased.

A. The principle of bearing the risk of the loss of the good by the debtor of the obligation to hand it over (*res perit debitorii*)

According to Art 1274 Para 1 of the Civil Code, "In the absence of a contrary stipulation, as long as the good is not handed over, the risk of the contract remains with the debtor of the obligation to hand over, even if the property has been transferred to the acquirer. In case of accidental loss of the property, the debtor of the obligation to hand over loses the right to counter performance, and if he received it he is obliged to return it.

Another application of the principle of *res perit debitorii* is the hypothesis provided in paragraph 2 of the same text which specifies that the risk will be borne by the purchaser if he is delayed, does not execute the obligation to pick up the asset.

In this sense, according to this text "However, the delayed creditor takes the risk of accidental loss of the property. He cannot be released even if he proves that the good has perished and if the obligation to hand over has been executed in time".

B. Exception. The parties may agree that the risk be borne by the owner of the good (*res perit dominus*)

According to Art 1274 Para 1, the principle of *res perit debitorii* is not of public order and the parties may agree upon another rule.

Also, certain legal rules derive from this principle. For instance, in the supply contract, when the object of the supply is transported through a carrier, it is stipulated that the delivery is considered to be executed on the date on which the goods are handed over to the carrier (Art 1767 Para 3 of the Civil Code). In other words, the goods circulate at the risk of the purchaser.

4. THE EFFICIENCY (OPPOSABILITY) OF THE TRANSFER OF THE MOVABLE GOOD BETWEEN THE SUCCESSIVE OWNERS OF THE SAME GOOD

The legislator regulates by Art 1275 of the Civil Code, the opposability of the title of property of the successive sub-acquirers of the same movable property, having a common author.

In the event of successive disposals of a movable property of the same person to several sub-acquirers, each of them is the owner through the translational effect of the right, their contract being the property title. There is the problem of the opposability of their title to the other sub-acquirers, in other words, the opposability of the translational effect of one sub-acquirer to the other. Intuitively, we should reason that the title of the first buyer is opposable because he is the owner and that subsequent alienations made by his author, from whom he acquired the property, are ineffective because he sold the property to another.

However, the legislator does not give efficiency to this reasoning but to the principle of publicity of the property title over the movable good.

Following this reason, in the hypothesis of the conflict between the property titles of several successive sub-acquirers of the same movable property, the law gives priority to the title of the one in good faith if he made his title public, publicity which according to the nature

of the goods is made by public exercise of possession over that property, application of the principle that the possessor is the presumed owner.

If no holder is in possession, the law prefers the one who has publicly manifested his quality of ownership by exercising legal action to oblige the alienator to hand over the property, the plaintiff thus obtaining possession of the property.

In this meaning, according to Art 1275 of the Civil Code, "(1) If a person has successively transferred to several persons the property of a tangible movable property, the one who acquired in good faith the effective possession of the property is the holder of the right, even if his title has a later date. (2) The acquirer who, in good faith, at the date of taking possession, did not know and could not know the obligation previously assumed by the alienator. (3) If none of the acquirers has obtained the effective possession of the tangible movable property and the claim of each person to hand over the property is due, the one who first notified the court will be preferred".

CONCLUSIONS

The regulation of the translational effect of real rights, specific to the obligation to give, within the regime of the effect of the contract between the parties (Section 6, of Book V *On obligations*, Title II *Sources of obligations*, Chapter I *The contract*) is justified on the basis that this effect takes place by right and not by its execution by a personal benefit of the debtor, organized in Title V of the same book, for the obligations to do or not to do.

The new Civil Code preserves the systematization made by the old Civil Code regarding the organization of the regulation of this effect within the general effect of the contract as a source of obligations as well as its regime, with one exception.

The novelty brought by the legislator of the Civil Code from 2009 regarding the translational effect of the contract is the preservation of the burden of the risk of loss of the good by the debtor of the obligation to hand it over. In the old Civil Code, the risk of losing the property until it was handed over as an alien was borne by the acquirer (*res perit*

domino). In the new Civil Code, the risk of loss of the property until its delivery is borne by the alienator (*res perit debitorii*).

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JUDICIAL PRECEDENTS OF INTERPRETATION OF HCCJ – INSTRUMENTS FOR THE UNIFICATION OF JUDICIAL PRACTICE

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Abstract:

One of the problems faced by the administration of justice system (both in Romania and in other European countries) is the non-unitary application of the law to similar cases, the judges being sovereign, in principle, in terms of interpretation and application of the law in the factual situation presented to the court.

In the present study, we show how the interpretation decisions given by the HCCJ, pursuant to Art 126(3) of the Romanian Constitution, become mandatory for all courts of all levels. These decisions, having a common body with the interpreted law, become true judicial precedents for interpretation for all subsequent similar cases.

Key words: *unitary judicial practice; interpretation of the law; High Court of Cassation and Justice; judicial precedents.*

Unlike the system of common Anglo-Saxon law, in continental law the judicial precedent has no relevance regarding the obligation of the judge to give the same solution to a similar factual situation, which led to the different resolution of these cases.

Even the Court of Justice of the European Union in its case law shows that "*in any legal system there is inevitably an element of judicial interpretation* [...]"[1].

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"*The complexity of some cases, the Constitutional Court states in a decision*[2]*, can sometimes lead to different applications of the law in the practice of courts. In order to eliminate possible errors in the legal qualification of certain factual situations and to ensure the unitary application of the law in the practice of all courts, the institution of appeal in the interest of the law was created by the legislator* […].

Ruling on an appeal in the interest of the law, the supreme court contributes to ensuring the supremacy of the Constitution and the laws, through their unitary interpretation and application throughout the country, which is likely to materialize another fundamental principle, provided in Art 16 of the Constitution, on equal rights of citizens. Therefore, it is inadmissible for persons in equal legal situations to be subject to different legal regulations".

By adopting Law No 219/2005 regarding the approval of G.E.O No 138/2000 regarding the amendment and completion of the Code of Civil Procedure, Art 329 is completed with Para 3, ordering that "*The resolution given to the legal issues judged is mandatory for the courts*"[3], thus returning to the binding nature of these decisions.

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[1] Decision of the Court of Justice of the European Union, 22 November 1995, aplication case C.R v United Kingdom

[2] Decision of the Constitutional Court no. 1014 of 8 November 2007, published in the Official Gazette of Romania, Part I, no. 816/29 November 2009

[3] By Decision No 1014 of 8 November 2007 published in the Official Gazette of Romania, Part I, no. 816/29 November 2009, the Constitutional Court has rejected the exception for unconstitutionality of Art 329 Para 3 final thesis of the Code of Civil Procedure, exception raised, ex officio, by the Mures Tribunal – Civil Section in the application file no. 758/102/2007. In this decision, the Court states that the Decision no. 528/2 December 1997, published in the Official Gazette of Romania, Part I, no. 90/26 February 1998, has rejected the exception for unconstitutionality of Art 25 let d) and Art 31 of the Law no. 56/1993 on the Supreme Court of Justice (currently repealed by the Law no. 304/2004 on judicial organization), stating that "The principle of submitting the judge only to the law, according to Art 123 Para 2 of the Constitution [Art 124 Para 3 of the revised Constitution], does not have and cannot have the meaning of different and even contradictory application of the same legal provision, depending exclusively on the subjectivity of the interpretation belonging to different judges. Such a conception would lead to the consecration, even on the basis of the independence of judges, of solutions that could represent a violation of the law, which is inadmissible, since, the law being

In codified legal systems, according to the French model[1], the judge is not allowed to refuse to rule if the law is ambiguous, obscure or incomplete.

A consequence of the judgment of certain situations based on such a law may attract, without a doubt, a non-unitary judicial practice considering that also in the new Code of Civil Procedure[2] it is provided in Art 5, with the marginal title "Duties regarding the reception and settlement of requests", that "*Judges have the duty to receive and solve any request within the competence of the courts, according to the law. No judge can refuse to judge on the grounds that the law does not provide, is unclear or incomplete*".

The mechanisms created by the legislator, to come to the aid of judges in such cases, are the appeal in the interest of the law and the decision to prior resolve a new legal issue.

The High Court of Cassation and Justice has the obligation conferred by the fundamental law to resolve or clarify legal issues that have been solved differently by the courts, respectively if it is notified of a new legal issue, which has created "contradictory debates".

Art 517, respectively Art 521 of the Code of Civil Procedure provide that the effects of these decisions of the High Court are binding on all courts "from the date of publication of the decision in the Official Gazette of Romania, Part I".

The Constitutional Court stated that "*the establishment of the binding nature of the resolutions given to legal issues judged by appeal*

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the same, its application cannot be different, so the intimate conviction of the judge cannot justify such a consequence". By the same decision, the Court also stated that "Ensuring the unitary character of judicial practice is imposed by the constitutional principle of equality of citizens before the law and public authorities, including the judiciary, because this principle it would be seriously affected if in the application of one and the same law the solutions of the courts were different and even contradictory".

[1] By repealing the procedure of the legislative report on 18 March 1800, thus offering validity to the Tribunal of Cassation, established in 1790 and legislatively mentioned in 1804, in Art 4 of the Civil Code: "*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*".

[2] Republished in the Official Gazette of Romania, Part I, no. 247/10 April 2015

in the interest of the law only serves to give efficiency to the constitutional role of the High Court of Cassation and Justice, contributing to the consolidation of the rule of law"[1].

The basis of the authority of these interpretative decisions on the courts, which have the role of fixing the jurisprudence, by unraveling their meaning and unitary application of legal norms, results from:

- the need for unity and legal security that must characterize social relations;

- high scientific standing – we bring as an argument in this sense the fact that the High Court of Cassation and Justice rules on the notifications of resolving legal issues through panels formed according to a distinct procedure according to Art 516, respectively Art 520 of the Code of Civil Procedure and the fact that "in order to draw up the report, the president of the panel will be able to request from some recognized specialists the written opinion on the legal issues solved differently" (Art 516 Para 6 of the Civil Procedure Code) or which give rise to contradictory discussions;

- their publication in the Official Gazette of Romania;

- the judges' desire to solve, in the same way, similar cases;

The operation of interpretation is the procedure of clarifying the meaning of the existing legal norms, so the content of such a "*sui generis*" judgment of the HCCJ is "grafted" on these unclear, incomplete or lacunary legal norms, forming a common body with them in a single set. They can be dissociated only by modifying, abrogating or ascertaining the unconstitutionality of the legal provision that was the object of interpretation (Art 518 and Art 521 Para 4 of the Civil Procedure Code).

These decisions to interpret a legal text can be incorporated into it, in general and impersonal means, and applied immediately, repeatedly

[1] Constitutional Court, Decision No 1560/2010, published in the Official Gazette of Romania, Part I, no. 139/24 February 2011

and imperatively, as it enjoys the *erga omnes* obligation as well as a law, we logically deduce that they are sources of law[1].

G. Buta appreciates that "Regarding the jurisprudence of the Constitutional Court, it should be emphasized that, according to Art 147 Para 4 of the Romanian Constitution, the decisions of the Constitutional Court are published in the Official Gazette and from the date of publication, they are generally binding and apply only for the future, which means that they contain all the elements characteristic of a general and imperative norm, from which it can be concluded that the jurisprudence of the Constitutional Court – unlike the jurisprudence of the courts, but similar to the decisions issued by the United Sections of the High Court of Cassation and Justice in solving appeals in the interest of law – *is a source of law*, court decisions making a common body with the Constitution that it interprets".

These procedures are similar to the reference for a preliminary ruling, the judgments of the Court of Justice of the European Union in this case being binding on the courts of the Member States of the Union[2].

The national judge involved in solving a dispute must go beyond the "screen of domestic law"[1] and take into account the conventionality of the ECHR[2] and the decisions of the European judge.

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[1] Gheorghe Buta, "Jurisprudenţa, o nouă veche provocare", in *Revista Romana de jurisprudenta*, no.2 (2011); Claudia Cliza, *Drept administativ* (Bucharest: ProUniversitaria, 2010), 38; Betinio Diamant, "Jurisprudenţa, ca izvor de drept în sistemul de drept", in *Studii de drept românesc* no. 1-2 (1999): 197-199 – here the author reminds of the guiding decisions of the former Supreme Court which were mandatory for the other courts. For other authors, these are secondary sources of law, in this meaning see also Grigore-Rădulescu, Irina. "Despre jurisprudenţă şi precedent judiciar din perspectiva izvoarelor dreptului", in *Pandectele Române* no. 2 (2014): 77

[2] Ioana Nely Militaru, *Trimiterea prejudicială in fata Curtii Europene de Justitie* (Bucharest: Lumina Lex, 2005), 220-223; Ioana Nely Militaru, "Competenţa Curţii Europene de Justitie", in *Revista romana de drept comunitar* no. 1 (2004): 43–60; Ioana Nely Militaru, "Actele susceptibile de trimitere prejudiciară în faţa Curţii de Justiţie a Comunităţilor Europene", in *Revista Română de Drept Comunitar*, no. 2 (2004): 61; Ioana Nely Militaru, *Dreptul Uniunii Europene. Cronologie. Izvoare. Instituii, ed. A II a* (Bucharest: Universul Juridic, 2011), 268; Valcu Elise, *Drept comunitar institutional*, Editia a III-a, revazuta si adaugita (Craiova: Sitech 2013): 81 si urm.

As a conclusion, we consider that these are judicial precedents of interpretation, given the fact that they are mandatory for all courts.

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[1] Ioan Deleanu, "Redimensionarea funcţiei jurisdicţionale", in *Revista Dreptul* no. 8 (2006): 17

[2] The Romanian judicial authorities are obliged to take into account the provisions of the European Convention on Human Rights and to apply the jurisprudential solutions of the bodies of the Convention generated by them, regardless of whether they were pronounced in cases concerning Romania or, in most cases, in litigations concerning the other States Parties to the Convention. Corneliu Bârsan, *Convenţia Europeană a Drepturilor Omului, Comentariu pe articole*, 1st Volume: *Drepturi si libertăţi* (Bucharest: All Beck, 2005), 103

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CONDITIONS FOR ESTABLISHMENT OF TAX AGENTS IN ACCORDANCE WITH THE LAW OF SOME COUNTRIES AND PROPOSALS FOR IMPLEMENTATION OF VIETNAM LAW

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Abstract *:*

Tax agency is a concept that has been mentioned for recent years. According to the 2020 statistics of the General Department of Taxation, since its establishment, there are more than 500 tax agents. The establishment of such a tax agent is quite small comparing to practical needs. The article specifically outlines a number of conditions for establishing a tax agent in Japan and Korea. Compares with the conditions for establishing a tax agent in Vietnam. Based on the equivalent economic and social conditions, a number of conditions are proposed to improve the Vietnamese law on the conditions for establishing tax agents.

Key words: *tax law; tax; tax agent; tax agency law; tax agency establishment; international experience.*

INTRODUCTION

Tax agency is not a new concept in Vietnam because it has been regulated by legal documents since 2006. On finding out what a tax agent

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is in Article 20 of the Law on Tax Administration No. 78/QH11 dated November 29, 2006 of The 11th National Assembly, the 10th session also wrote the concept of tax agency. Accordingly, a tax agent is "A tax procedure service business organization is a conditional service business enterprise established and operating in accordance with the Law on Enterprises, carrying out tax procedures. according to the agreement with the taxpayer". Next, according to the legal documents of Vietnam, the phrase "tax agent" appeared in Circular No. 28/2008/TT-BTC dated April 3, 2008 (hereinafter referred to as Circular 28) guiding the practice of registration and management of tax procedure service practice activities, the organization of the examination, granting and revocation of tax procedure service practice certificates, then Point a, Section 1.1 of this Law stipulated that: "*This Circular applies to: Service business enterprises established and operating under the Law on Enterprises that fully satisfy the practice conditions of tax procedure service business organizations (hereinafter referred to as: general tax agent)*". Until Circular No. 117/2012/TT-BTC dated July 19, 2012 (hereinafter referred to as Circular 117) guiding the practice of tax procedure service, it was more specific in Clause 3, Article 2 of this Law. Tax agent is an enterprise that satisfies all conditions to provide tax service business according to the provisions of the Law on Tax Administration and other relevant laws.

On May 19, 2017, Circular 51/2017/TT-BTC of the Ministry of Finance (hereinafter referred to as Circular 51) was issued, amending and supplementing a number of articles of Circular No. 117/2012/TT-BTC of the Ministry of Finance dated 19/07/2012 guiding the practice of tax procedure services has improved on the concept of tax agents, specifically Circular 51 has amended a part of Circular 117/2012/TT-BTC mentioned above: Tax agent is an enterprise or a branch of an enterprise that satisfies all conditions to provide tax service business according to the provisions of the tax administration law and other relevant laws. However, this concept is still general and has not described the nature of tax agents yet.

On January 26, 2021, the Ministry of Finance issued Circular No. 10/2021/TT-BTC replacing the above circulars on tax agents as follows: Tax agents are enterprises or branches of enterprises that satisfy all

requirement, conditions and have been granted a certificate of eligibility for business in tax procedure services.

In summary, through the above documents and additionally from the perspective of the writer, a tax agent can understand: a tax agent is an enterprise or a branch of an enterprise that is eligible to operate following the tax law and plays the intermediary role as taxpayers in carrying out tax procedures or some other services with tax administration agencies, which include fees from taxpayers. Through the concept of tax agency, the writer learns about the legal establishment of the following two entities: the first is that a tax agent is an enterprise or a branch of an enterprise providing tax services, and the second is that an employee of a tax agent is allowed to practice as a tax agent. The establishment of these two subjects is the main goal of the writer's research in the references in other countries.

1. SOME LEGAL PROVISIONS FOR ESTABLISHING TAX AGENTS IN JAPAN AND KOREA

International experience is one of the bases for the writer to compare laws to clarify the advantages and disadvantages of Vietnamese law. Thereby, the drawing of some lessons to orient the development of tax agents in Vietnam is increasingly complete in terms of law and has a parallel promotion mechanism in practice. In each specific period, learning about progressive legal regulations is a preparation for the rapid but sustainable development of Vietnamese tax agency legislation and development in line with the world trends. The writer chooses two countries with oriental culture close to Vietnam such as Japan and Korea because these two countries have a developed tax agency model and a fairly complete legal management system.

Japan's experience, the Japanese Tax Agency Law was promulgated in 1951 and completed after four amendments and supplements to perfect the law on tax agents:

Firstly, raise the professional spirit of tax agents by defining the tax agent's mission to society in the Tax Agent Law to increase the tax agent's activity associated with social development. According to Lac

Viet dictionary, a mission is "*an important task that must be performed and completed*". Defining the mission makes it easy for the tax agents to determine their goals, to determine what to do for that goal. The mission makes the work of tax agents sacred and beneficial to society. In addition, the mission is a valuable guideline that illuminates when facing difficulties in the profession, creates confidence in the present and future for practitioners of tax procedures.

Article 1 of the Law on Tax Agents of Japan stipulates that "*The mission of a tax agent is to be a person with tax expertise, a completely independent and fair stance; based on the provisions of the tax declaration and payment regime, meet the trust of taxpayers and ensure the fulfillment of tax obligations in accordance with the provisions of tax law*"[1]. Then, in Article 1-2 of the Law on Certification of Tax Accountants of Korea, it also stipulates the mission "*any tax accountant, as a public tax professional, is tasked with protecting the rights and interests of the taxpayers and the mission to contribute to the conscientious performance of a tax accountant's duties in paying taxes*"[2]. Both legal concepts of tax procedure services show that: tax service providers must have tax expertise, independence and fairness based on tax law to be dedicated to clients and guarantee the tax obligation to the State.

Thus, due to the nature of the tax procedure service which is highly personal, it requires high professional skills as well as tax and accounting knowledge of tax agent staffs. When you have knowledge and skills, then being dedicated to customers is also essential. Besides, defining the profession's mission as a tax agent partly help tax service workers see their important role in the development of tax obligations to the State.

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[1] Report of the General Department of Taxation at the seminar on the topic *"Japan's experience in activities related to coordination with tax service organizations"* taking place from 07/12 to 11/12/2009, [p.3,4]

[2] Article 1-2 of the Korean Tax Agency Law, http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=24910&type=sogan&key=5, [accessed 26/03/2021]

Second, establish personal tax agents. According to a report at the seminar of the General Department of Taxation[1] on "*Japan's experience in activities related to coordination with tax service organizations*", the number of individual tax agents in Japan is about 70,000 people and tax agent legal entity has about 1,300 companies. In Vietnam, individual tax agents do not exist, legal tax agents have more than 400 businesses, so the number is so small, compared to the number of tax agents in Japan. Not until 1942 did the Japanese tax agency system begin to take shape, the law on tax filers was enacted[2]. In 1997, it was stipulated that a tax agent is a person who is eligible to work as an independent assessor.

Thus, the work of tax agents is becoming more and more assigned over time. The addition of independent assessors makes the demand for tax agency services increasingly expanded. Tax agents have many opportunities to increase revenue and affirm their position in the financial sector. Therefore, the strengthening of capable, professional and independent personal tax agents is also one of the factors that make tax agency services develop. A personal tax agent was born on its own behalf and operates independently, regardless of the company's structure and organization and a series of legal issues about the company, as a result, it will reduce many administrative procedures.

Third, regulations on legal capital. According to Korean law, the legal capital is at least 200,000,000 Won[3] (equivalent to 3,79,000,000 VND)[4]. The legal capital of a tax agent ensures the operation of the tax

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[1] Nguyen Thi Vinh Luong, *"Japan's experience on activities related to coordination with tax service organizations"*, report at the workshop of the General Department of Taxation on 25/12/2009

[2] Nguyen Thi Vinh Luong, "*Japan's experience on activities related to coordination with tax service organizations"*, report at the workshop of the General Department of Taxation on 25/12/2009

[3] Article 16-6 of the Korean Tax Agency Law *"The capital of each tax accounting corporation shall be at least 200 million won"* http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=24910&type=sogan&key=5 [accessed 16/04/2021]

[4] State Bank of Vietnam, Korean won exchange rate against Vietnam dong, http://www.sbv.gov.vn/webcenter/portal/en/menu/rm/tg?_afrLoop=390808916872631#%40%3F_afrLoop%3D390808916872631%26centerWidth%3D80%2525%26leftWidth

agent without affecting the legitimate interests of the taxpayer. That means, taxpayers are guaranteed that when they sign services with a tax agent, their interests will be guaranteed. Any wrongdoing in tax service procedures will be compensated by the tax agent. Therefore, taxpayers will feel secure in doing their business tasks. Moreover, tax agency activities can also give advice on the benefits of preferential policies to taxpayers.

Fourth, the standards of practice, the evaluation mechanism, and the strict testing of qualifications of tax agent staff in Japan. To receive a certificate, individuals must register and pass an exam with a two-part exam covering major content: Contestants must choose the correct answer to the content of the subjects such as financial accounting, management accounting, auditing and corporate law. After the individuals pass the first part of the test, they can participate in the second essay exam with the contents of subjects such as accounting, auditing, corporate law, tax law and an elective subject (Business Management, Economics, Civil Law or Statistics). After being granted a certificate, tax agent staffs must be periodically re-examined, in case an individual does not pass the knowledge part, he will be disqualified[1]. Meanwhile, in Vietnam, the standard content of the exam only includes two subjects, Tax Law and Accounting, and there is no requirement to re-evaluate certified individuals. The practice standards of Vietnamese tax agents only take two exams and the knowledge from multidisciplinary colleges, which makes the quality of tax agents not as high as Japan.

Fifth, there is a regulation that lawyers in the tax-related economic field are exempt from the exam when registering for a tax practice certificate exam. This is scientific and proper. Specifically, in Article 3 of the Korean tax agency law: The person who meets the following conditions will become a tax agent employee: First, pass the exam for the certification of a tax accountant. Second, be qualified as a

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[1] Artice 8. Examination Subject, etc. of Certificate Public Accountant Examination. Certificated Public Accountant Act, Japan (up to the revisions of Act No.99 of 2007)

lawyer. [This is fully amended by Act No. 9348, January 30, 2009]. Thus, the standard that a qualified economic lawyer is exempted from the tax law exam is also specified in Vietnam's Circular 117 in 2012, but Circular 10 in 2021 omits this content. .

In conclusion, through some legal experience of Japan and Korea on the establishment and operation of tax agents, Vietnam will have a comprehensive view in process of building a Vietnamese tax agency law. Learning the good things, the trends that have been experienced through a process of countries developed economies will help Vietnam to limit mistakes and create a superior tax agent law, make this service in our country speed up, strong and effective.

2. SOME LIMITATIONS AND SOLUTIONS TO IMPROVE THE LAW ON THE ESTABLISHMENT OF TAX AGENTS IN VIETNAM

In Vietnam, there are many factors in law, policy and actual demands that make the development speed of tax agency services in Vietnam not high. With a number of about 586 tax agents, comparing to 561,064 enterprises, it is clear that the number of tax agents is still not enough to meet actual needs. Through learning experiences from some countries, the writer proposes some limitations and solutions to improve the law on the establishment of tax agents in Vietnam.

2.1 Regarding the conditions for establishing a tax agent

The conditions for establishing a tax agent in Vietnam are generally similar to those of international law. The following are some limitations and corresponding solutions to complete the law on conditions for establishing tax agents:

The first limitation: There is no regulation at the time of establishment on legal capital to ensure the responsibility of a legal service business entity when a violation occurs. According to the current regulations on the establishment of tax agents, there is no requirement that tax agents have legal capital. Legal capital is the minimum capital that an enterprise must have as prescribed by law to establish an

enterprise and during the business process, the enterprise's equity capital must not be lower than the legal capital. The regulation of legal capital by some industries is to protect the interests of consumers and creditors of businesses operating in those industries. Legal capital increases the confidence to use tax agents more. Legal capital is a measure to ensure that tax agency services are provided with quality assurance. If this guarantee is destroyed, the service provider, in case it affects the legitimate interests of the taxpayer, must quickly have finance to meet the payment as soon as possible.

Solution: The legal capital should be regulated for tax agency business. Legal capital has also been regulated in a number of financial industries such as banking business, securities guarantee, insurance, security services, real estate business, debt collection services, etc. Tax is also a service related to finance. Hence, the regulation of legal capital as a condition for establishing tax agents is necessary and appropriate. The fact that Vietnamese tax agents stipulate capital when establishing a tax agent will ensure more confidence for users of this service. In addition, it also help to raise awareness and responsibility for tax agents when providing services to taxpayers. How much legal capital is depends on studying the actual situation and refer to countries with similar characteristics.

Legal capital is also regulated in accordance with regulations in developed countries such as Korea. The Law on Tax Agents of Korea stipulates that the legal capital is at least VND 3.79 billion. In Vietnam, financial industries such as banks which have a majority of legal capital of billions of dong or the business of debt collection services, which also requires a legal capital of two billion dong. For Vietnamese tax agents, the taxpayers' demand for tax agents is still not high, so it is necessary to bring it to consideration and have a roadmap to stipulate a specific, reasonable, and practical legal capital. To summarize, there should be a regulation on legal capital for tax agents, and the specific capital level must be carefully considered based on an integrated assessment of many factors and must ensure that the requirement does not have a great impact on the development of a highly social model such as a tax agent.

The second limitation: There is no regulation on the establishment of a personal tax agent. The limitation of no regulation

makes the services which need to do tax procedures of small individuals, incur a few times a year or a few years before tax payment arises. These individuals sometimes do not even know where the tax office is, do not know how to pay taxes, especially civil transactions which related to the transfer of the second land use rights. These individuals rarely have a taxable income and in Vietnam, most of tax agents are companies, which makes them have more difficult in accessing than the flexibility of individual tax agents. Therefore, that makes a large number of individual customers unable to contact tax agent services. The fact that there is a need to use tax agency services but tax agents can not provide them and meet the needs because the provisions of the law are not flexible and suitable to actual needs, which also makes the tax agent's revenue not high and can not encourage people with practice certificates to practice.

Solution: There should be regulations on the establishment of personal tax agents. Building a personal tax agent model is one of the trends that Vietnam needs a roadmap to perform. Individual tax agents operate independently and are solely responsible for their own activities. The rights and obligations of individual tax agents are also specified. The expansion of this model will contribute to a rapid increase in the number of tax agents. In addition, the restriction of corporate procedures also makes the individual tax agent model less burdensome in terms of administrative procedures other than tax procedures. Create the basis for a more dynamic competitive individual tax agent model. Comparing the data of individual tax agents with legal tax agents, it is found that: in Japan, individual tax agents have about 70,000 people, legal tax agents have about 1,300 companies.

Thus, the number of individual tax agents is more than 53 times the number of legal tax agents. With such a large number of personal tax agents, it is possible to quickly capture small market shares such as the market share of customers who are individuals paying personal income tax or small and medium enterprises. Promoting the personal tax agent model is extremely necessary in Vietnam because the number of businesses is increasing, as of August 2019, there are about 560,000 businesses operating. Due to the large number of businesses, tax returns are quite large. The number of more than 500 tax agents currently does

not really meet the demand for tax declaration services. In short, the establishment of a personal tax agent is necessary. However, the roadmap and related regulations need to be carefully studied in order to develop the personal tax agent force in the future in a sustainable way.

The third limitation, there are no regulations on the mission of tax agents, no tax laws

Solution: when establishing a tax agent, the tax agent's mission must be specified and there must have tax law because the tax agent's mission is specified in the tax law. This makes the tax agent industry's belief in the value of serving the country even greater and more responsible. In addition, the introduction of the tax agency law contributes to improving the value of the current circulars.

2.2 Regarding the exam conditions for granting tax agent practice certificates to tax agent employees

Limitations: there are few exam regulations (only include two subjects) and there is no mechanism to check the quality of knowledge after obtaining a practising certificate. Furthermore, subjects with other majors taking the exam with a very low tax-related course (only 7% of the total number of lessons) do not have enough basis to improve the quality of tax agent staff. These restrictions will create tax agent staff who are not qualified enough to practice tax procedures. The fact that the exam is less because the writer compares it with the exam of the Japanese tax agent (4 subjects). The quality of tax agents will not be high if only two subjects are taken, so taxpayers, especially small and medium-sized enterprises, do not hire tax agents to do anything, they only need an accountant with a university degree who can do this procedure. Without any outstanding advantages, a person with a tax agent certificate will not have the opportunity to be trusted by taxpayers. In addition, it is not advisable to remove the subject of economic lawyers who are exempt from tax law subject of Circular 10 in 2021 compared to Circular No. 117 in 2012, according to the writer. This subject has 4 years of studying economic law, 2 years of practicing economic law, it is very necessary to take advantage of tax law to practice as a tax agent.

Some solutions:

First, the eligibility requirements need to take more than two subjects. Due to the nature of the tax declaration, in addition to the procedures and papers (invoices, vouchers, etc.), it is also necessary to make tax accounting to calculate the correct tax amount. Therefore, the level of tax procedures requires more advanced knowledge, so in addition to the two subjects of tax and accounting, it is also required to take additional related skills. It is possible to refer to exam subjects in Japan such as management accounting, business law, auditing, and an elective subject (Corporate administration, economics, civil law or statistics). Choosing more tax agent exams is necessary, because it will increase the professional qualifications and knowledge of the authorized representative of the tax agent, and increase the confidence of the taxpayer. Once a tax agent has low-qualified staff, no one wants to hire a tax service, so the growth of tax agency service is really not high even though the market demand is very necessary.

The choice of additional exam subjects should also be considered in accordance with the educational program in Vietnam, especially statistics, informatics, and foreign languages because these subjects will help tax agents work faster thanks to application of information technology and international scientific information on tax finance, tax accounting in addition to domestic regulations. Because the more international the transaction is, the more opportunities we have to develop the country's economy and tax agent service staffs also have to improve their knowledge and expertise to meet the current human resource situation in Vietnam, which is a lot but not specialized.

Second, it is advisable to remove candidates with little tax expertise to participate in the tax agency exam. This removal reduces the number of non-specialists participating in tax services. The regulation of subjects eligible to participate in the tax agency exam that who has other major and has the total number of units (or lessons) of subjects in finance, accounting, auditing, and analysis of financial, tax activities from 7% on the total course (or lessons) of the whole course or more" is a general rule, unclear meaning and depends on the reviewer subjectively when comparing what is the same. 7% when the subjects at schools are

taught differently. These regulations make it hard to create a team of professional tax agents, the number of 7% curriculum is not good because it is very low. The removal of subjects with other majors and the very low number of identical courses in tax mentioned above are necessary to focus on tax and tax accounting major subjects, then the quality of tax agency services will be higher, which helps to have more financial transparency.

Third, the law should further stipulate that subjects who have a tax agent certificate after three years from the date of receipt of a tax agent certificate must retake the exam. The re-examination helps the tax agent's knowledge to be constantly strengthened and increased belong with the numerous documents of the General Department of Taxation. Besides, it helps tax agent staff avoid mistakes and errors caused by not updating their knowledge related to tax. Then, tax service providers are more responsible for their self-training to ensure their quality and taxpayers will have more confidence in service quality for long-term cooperation with tax agents. In addition to the regulations that after being granted a certificate, a person practicing in a tax agent must re-examine every 3 years, subjects who can not pass will be dis-qualified. The re-examination of knowledge aims to urge tax agent staff to constantly learn to improve the quality of consulting services for customers.

Therefore, the examination must not be loosen, it must be strict. Updating current knowledge is essential to improve the quality of tax agent staff. The three-year re-examination period is neither too short nor too long to test your knowledge of tax agency services. For the specific exam schedule and re-registration procedures, it is necessary to study more to suit changes in tax policy or the work of tax authorities, the work of tax agents.

Fourth, the old regulations that economic lawyers are exempt from tax law should be kept.

Circular No. 10 in 2021 compared to Circular No. 117 in 2012 according to the writer is not recommended. This subject has 4 years of studying economic law, 2 years of practicing economic law, it is very necessary to take advantage of tax law to practice as a tax agent.

Increasing the ability to comply with tax laws is essential for proper and intensive tax compliance in the practice of tax procedures.

CONCLUSIONS

Vietnam's economy has been developing recently, it is very necessary to learn from international experiences to perfect Vietnamese law, especially in the field of tax agents. I have found that Japanese and Korean laws have shown a lot of good things, as lessons for Vietnam Law to follow. Besides, through studying the laws of Japan and Korea, I have found 4 limitations. Then I have provided 7 solutions to improve Vietnamese law on tax agents. I hope my research will help tax agents to develop well in Vietnam in the future.

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HOTEL MANAGEMENT CONTRACT FROM THE PERSPECTIVE OF ROMANIAN LAW COMPARED TO THE LEGISLATION APPLICABLE IN OTHER COUNTRIES

Laura-Ramona NAE[1]

Abstract

"HoReCa"[2] is used in the hospitality industry, referring simultaneously to: accommodation and food services (food and drink)[3]. The sector of hospitality includes: accommodation units - hotels, motels, hostels, chalets, boarding houses, apartments and houses authorized for accommodation services, campsites and other accommodation structures, food and beverage service (public catering) restaurants, pubs, bars, pizzeria, cafes, fast food, confectioneries, pastries, catering and other forms of organizing public catering.

The consumer in the HoReCa sector benefits from rest, relaxation, visits, holidays[4], food and drinks in specially arranged spaces[5], including catering services[6].

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[2] https://www.gastroprofis.ro/ce-inseamna-horeca/ Horeca- is an abbreviation for 3 words: Hotels, Restaurants and Cafes (Catering), used mostly in Europe, namely in Scandinavia, Benelux and France. Later this acronym, "HoReCa", was used to describe the activity of Hotels, Restaurants and Canteens, today being used for Hotels, Restaurants and Catering, because it is considered that spaces such as cafes and canteens can be included in the category of restaurants.

[3] A 1 daisy boarding house that offers accommodation services is part of the Horeca industry as well as a 5 star hotel

[4] Hotels with accommodation

[5] Restaurants and similar

[6] Food at home

Over the last few years, the global expansion of tourism services[1], globalization and the new generation's inclination to travel, the development of air transport but also the increased financial possibilities of consumers, have led to increased consumer demand that has led service providers to improve their business[2].

Thus, the benefits did not take long to appear: a market with a growing added value, a clientele that can be loyal and a great potential for promotion[3].

***Keywords**: service providers; consumers; accommodation; globalization; HoReCa industry.*

PRELIMINARY INFORMATION

Within the development of the Horeca industry, respectively the improvement of the quality of products and services offered by its providers, the number of customers / beneficiaries who accessed this sector also increased, becoming more demanding in terms of services offered by hoteliers. The result was the opening of several 4 and 5 star hotels[4].

A 5-star Hotel must provide its customers with services at quality standards, which implicitly leads to increasing the income and profitability of that hotel, but only under the conditions of efficient

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[1] Elise Valcu, „Sustainable Development and Sustainable Tourism in the European Union“, in *The Annales of the "Ştefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration*, volumul 9 no.2 (10) (2009).

[2] According to the national statistical classification of economic activities in Romania (acronym “CAEN CODE”), the provision of services within Horeca is found in the following caen codes: Hotels and other similar accommodation facilities- 5510; Restaurant- 5610; Event catering activities - 5621; Other food activities nec 5629; Bars and other beverage service activities - 5630. Order no. 337/2007 on the classification of activities in the national economy of Romania, published in the Official Gazette, Part I no. 293 din 03/05/2007

[3] https://www.gastroprofis.ro

[4] https://www.dcbusiness.ro/hoteluri-in-romania-cele-de-cinci-stele-ocupa-un-loc-ruinos_608622.html#. Although there is no standard rating system for hotels, the properties gain a five-star distinction by offering their guests experiences that meet or exceed even the highest expectations of comfort, decor, service and luxury.

management. Subject to international hotel chain operators[1], they offer both brand franchise services and management services for the respective hotel.

1. ENSURING THE MANAGEMENT OF A HOTEL'S ACTIVITY

Large hotel chains - in the 5-star category - require management contracts rather than franchise contracts. Although there is no standard rating system for hotels, the properties gain a five-star distinction by offering their guests experiences that meet or exceed even the highest expectations of comfort, decor, service and luxury.

The activity of a hotel is ensured by a company which is registered in the (public) register of companies in a certain country, on the basis of a title deed on the building (hotel) respectively on the construction and land or on the basis of a lease.

The company takes decisions regarding the activity of the hotel, through its management body: the general meeting of its shareholders / associates as well as through the board of directors.

The company's administration may delegate its management to the General Manager (according to art. 143 of Law 31/1990, Companies Law, republished and amended) including the power to represent the company in relation to third parties, and the Board of Directors retains the power to represent the company in relation to its directors (according to art.143 index 2 of the same law). The Board of Directors of the company will represent the company in relation to third parties and it is in court.

Hotel owners (4 and 5 star) for example, are often faced with this choice to balance the possible benefits of using a reputable international hotel brand, the associated costs and obtaining and maintaining the brand standards imposed by the franchisor.

[1] Hilton, Marriott, Rezidor, Accor, IHG etc.

Currently, this decision is essential because the ability to obtain financing and / or maintain profit and reach the thresholds of return on investment in a company.

Thus, the management body of a hotel have the possibility to manifest their option as follows:

1. for an autonomous operation, not mandatory on the basis of a certain brand but on the basis of a hotel management contract;
2. for an operation under the auspices of a renowned international brand, for example under a franchise agreement, under which the hotel - has the status of franchisee (franchisee) and the international chain of hotels under which the hotel will operate - has the status of Franchisor. International hotel chains usually offer high-performance services, which are characterized by specialized knowledge, high levels of professional competence and managerial expertise, as well as other services that require the use of centralized reservation systems.
3. for an autonomous, internal management system, ie. to be managed by a general director also called general manager, based on a management contract
4. for an external management system, imposed by the franchisor.

There are two types of hotel management service "providers": international hotel chain operators and independent operators, according to the HVS evaluation index[1].

The reputation and standard level of the owner of a brand, as well as the spending restrictions of the hotel owner, are key elements in establishing and negotiating a franchise agreement or a management contract. Many hotel chains offer both options depending on the location of the hotel property, size, facilities, duration of commitment, brand level and other associated factors. The choice of a franchise contract or a management contract by the hotel owner is required to benefit from the brand within his property, as well as the possibility of a low cost[2].

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[1] https://www.hvs.com/article/9035-hvs-european-hotel-valuation-index-in-depth-insights-2021

[2] Valcu, „Sustainable Development and Sustainable Tourism in the European Union“

Therefore, the negotiation process of such a contract is quite extensive.

2. HOTEL MANAGEMENT CONTRACT VERSUS FRANCHISE AGREEMENT.

Both in a national and international context, in the corporate development of international hotel companies[1]- The Choice between Management Contracts and Franchise Agreement - it is discussed to ensure the management of the activity, at general management level, based on a hotel management contract versus franchise agreement.

Hotel Management Contract (HMA)

The owner of the hotel or the management of the company may decide that the hotel in question shall operate on the basis of a management contract concluded with another company. Whether it works or not, under a franchise agreement (under the auspices of a brand), the hotel owner aims to:

- have access to quality management and specialized know-how and, consequently, increase the profitability of the hotel or
- the hotel to operate on its own; a legal entity being the one that will ensure the management activity of the hotel owned, based on the hotel management contract: “An administration contract is an arrangement according to which the operational control of a business is conferred by a contract to an enterprise performing the necessary managerial functions in exchange for a fee. A management contract may involve a wide range of functions, such as the technical operation of a production facility, personnel management, accounting, marketing and training services."[2]

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[1] Elise Valcu, Brief consideration of the impact of the regional development policy ond tourism in Romania, The Annales of the "Ştefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration; volumul 9, nr.2 (10)/2009.

[2] https://ro.xcv.wiki/wiki/Management_contract, accesed at 13.06.2021, 14:26

Internationally, we meet such hotel management companies, which manage small or medium-sized hotels.

In this case, the person who will ensure the effective operation of the hotel, will be responsible for the management of the hotel by providing supervision, direction and expertise, by contract. It will take over all hotel operations for and on behalf of the hotel owner (company) for a fee. The hotel brand[1] is the manager, and the owner of the hotel (company) is the managed owner.

The parties thus sign a hotel management contract for a certain hotel brand[2], accordingly, the hotel owner (company) will bear all the risks of operating the hotel.

These risks involve the payment of taxes and duties related to the state budget, for example: brand taxes, incentive taxes, marketing taxes, distribution and loyalty taxes, IT taxes, etc.

The hotel management contract is a complex contract, it must include clauses regarding: the parties, the object and the term of the contract. The contract mainly has two components: the initial term (usually 10 years) and the contract renewable period.

In hotel international practice, the term of these hotel management contracts has been reduced, extending by only 5 years, as competition between operators in the hotel market has increased and hotel owners have become more demanding on the obligations that hotel managers must respect them.

It is to a hotel owner advantage to have a shorter initial contract term, which to be extended later with successive renewal periods, if it proves ineffective to perform such a type of contract within his hotel property.

The main obligations of a hotel manager are as follows:

- daily administration of a hotel operation (hotel reception, restaurants, technical maintenance, housekeeping, housekeeping of raw materials and materials, kitchen, etc;

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[1] For exemple: Marriott, IHG, Hilton, Accor / SBE

[2] For exemple: Ritz Carlton, Sheraton, Sofitel

- the preparation of the hotel's revenue and expenditure budget (hereinafter referred to as the "BVC") as well as the effective management of the property in accordance with the approved BVC;

- drawing up the organizational chart for the organization and functioning of the departments within a hotel, recruitment and administration of its employees;

- drawing up the commercial policies and procedures for establishing the sales tariffs for the services that will be provided by the hotel in favor of its clients;

- carrying out activities to promote the hotel property, the services offered by it;

- upkeep (maintenance) and effective operation of hotel property;

- monitoring the receipts and payments for the services provided by the hotel in favor of its clients (accommodation and / or catering services, etc.);

- preparation and transmission of periodic reports (usually daily, based on high-performance and specialized software, implemented within the hotel for this purpose) to the hotel owner, in order to permanently monitor the hotel activity; compliance with hotel brand standards.

The management fees of the contract are the following: the initial basic fee and the performance fee.

a. *The initial basic fee*. It is calculated on the basis of a fixed percentage of the turnover generated by that hotel property. This tax is levied and collected from the hotel owner, regardless of whether or not the hotel has made a profit from providing services to its customers. This percentage usually varies between 2% -4% and depends on several factors[1].

b. *performance fee*. The hotel owner is primarily interested in making a profit from its operation and, in order to encourage the hotel manager so named on the basis of the hotel management contract, to

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[1] For example: The type of hotel operator (in the case of hotel operators, higher fees are charged in proportion to costs); the size of the hotel (the higher the hotel itself, the lower the fees charged)

make a profit. The latter is remunerated in part, with a percentage of the final result, called the performance tax[18].

The contract must also include:

- *ending clauses of the contract*. If this contract does not prove efficient in the operation of the hotel property, the parties provide the "performance clause" according to which the contract may end at the initiative of the owner, after 2-3 years from the date of its due conclusion. According to this clause, the hotel management companies have the possibility to remedy in a certain period of time this situation of non-performance, from the moment of finding it by the parties. By using this clause in the contract, the performance of that hotel is compared with the performance of other similar hotels in that hotel market (competitive set)[1].
- *the "investment reserve" clause*, according to which a fund is set up by withholding a percentage of the hotel's turnover[2], which is deposited in a bank account (based on a guarantee contract or deposit), and which subsequently the manager of the hotel can use it for technical repairs and maintenance of the hotel property.

For this, indicators are used, for example: the occupancy rate of the compared hotels, the average price of the sold room and the existence of each hotel, the gross operating profit, etc.

In this respect, the manager appointed on the basis of the hotel management contract, has the obligation towards the hotel owner, to provide him with an investment plan[3].

From this perspective, the hotel owner wants to minimize all these investment costs, in order to increase the profitability of the hotel, and the hotel manager is interested in increasing them, in order to keep

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[1] For this, indicators are used, for example: the occupancy rate of the compared hotels, the average price of the sold room and the existence of each hotel, the gross operating profit, etc. The percentage retained varies between 3% and 5% each year, depending on the age of the hotel.

[2] The percentage retained varies between 3% and 5% each year, depending on the age of the hotel.

[3] For example: renovation works, replacement of the carpet for hotel halls, purchase of new linen sets for hotel rooms, etc.).

the hotel in a better working condition, without complaints or dissatisfaction of its customers.

-*other regarding clauses:* the level of involvement of the owner in the hotel property activity, hotel insurance, finality of hotel investment, working capital, settlement of disputes and conflicts in court, personal data protection, confidentiality, etc.

Advantages and disadvantages of the hotel management contract, in the situation that it is also franchised at the same time:

The advantages for the hotel owner are:

-the minimum experience required; no operational team or managerial effort is required;

-easier to finance with a strong brand and an operating company;

-easy access to design, development, support in terms of organizing the activity of the international hotel chain; profit record after payment of all taxes and duties.

The disadvantages for the hotel owner are:

-the impossibility to control the effective, daily activities of the hotel;

-operational risks assumed versus too large hotel market;

-risks resulting from operating losses plus taxes payable;

-lack of control over the reputation of the international hotel chain.

The advantages for the company that ensures the management of the hotel are:

- increasing the power of the hotel brand with a minimum investment;
- increasing the structure of organizing the management activity;
- revenues resulting from branding and management, with a minimum investment;
- the opportunity to earn business incentive fees; low market risk;
- greater connectivity to local hotel markets; more flexible contractual conditions regarding: term, insurance, rent, etc; no additional hotel administration fees are charged.

The disadvantages for the company that ensures the management of the hotel are:

- limited / conditional income from the payment of taxes and duties;
- incentive fees conditioned by a major risk related to the hotel market;

- dependence on the hotel owner regarding investments, detrimental risk of the hotel brand image;
- when a hotel owner signs the franchise agreement with one company and the management contract with another company, and the fees resulting from these two different contracts exceed those charged by hotel chain operators offering the same, but in a single package.

In conclusion, the hotel management contract is quite cumbersome in terms of improvement, being the result of long-term and often expensive negotiations, essentially related to all aspects of hotel ownership, which can incorporate both access to the hotel brand and referring to the obligations of the company that ensures the hotel management.

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THE COVID-19'S IMPACT ON COMMERCIAL CONTRACTS – HARDSHIP, LESION OR FORCE MAJEURE ?

Florin-Georgian CREȚU [1]

Abstract:

The existence of a pandemic affects, without a doubt, the economy of a state. The speed of the virus spread, as well as the autorities efforts to prevent and stop the phenomenon generates adverse effects in the contractual relations.

This paper has the purpose to briefly study the effects generatet by the pandemic on the matter of contractual relations through the causes of validity (lesion) and non enforcement (ope legist contract termination, judiciary termination of the contract), but also through the enforcement's dinamic (suspension of the contract's enforcement). Also, throught it's content, this papers lists the main legal troubles that arised in the doctrine.

Key-words: *pandemic; lesion; hardship; risk in contracts; safeguard.*

PROLEGOMENA

Traditionally[1], it was shown that "*commercial law is the liveliest part of the private law*", this feature resulting in the characteristics of the

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commercial relations, in spite the the monistic theory[2] adopted by the actual Civil code. These relations have as an essential feature, besides it's parties and object, the celerity, the need to sell, buy, provide services in a high content in a short amount of time. From this assertion, it derives a feature of the contract's formation mechanism, the principle of consensuality being in this matter much more autonomous and appliable.

ASKING THE QUESTION

The problem that we face here involves the study of the implications and the effects generated by the Covid-19 pandemic on commercial contracts that are in the stage of execution, through reference to the risk theory and the hardship, but also the problem of formation of the commercial contracts, speaking in this last hypothesis about a "*forced consent*".

COVID-19 – FORCED CONSENT IN CONTRACTUAL MATTERS ?

After how it can be deduced, the commercial professionals realise their activity with difficulties, due to the restrictions imposed by the stat of emergency/alert[3]. The sphere of the targeted persons consists in providers, distributors and beneficiaries.

The working hypothesis is as follows: the decline of providers orders, that worsen the onerosity of the contracts (more precise, of the derived object[4] of the contract). In this sense, it is not foreign to our

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[1] Stanciu D. Cărpenaru, *Tratat de drept comercial român. Ediția a V-a, actualizată* (Bucharest: Universul Juridic, 2016), 18; in the same sense, see Vasile Nemeș, *Drept comercial. Ediția a 3-a revizuită și adăugită* (Bucharest: Hamangiu, 2018), 5-7.

[2] Cărpenaru, *Tratat de drept comercial român*, 18; Nemeș, *Drept comercial*, 5-7

[3] For details on the legal nature of Romania's President acts that establish the state of war, siege of emergency, see Marius Andreescu and Andra Puran, *Drept constituțional. Teoria generală a Statului* (Bucharest: C.H. Beck, 2016), 163.

[4] For the notion of *derived object of the contract*, see Liviu Stănciulescu, *Dreptul contractelor civile. Doctrină și jurisprudență. Ediția a 3-a revizuită și adăugită* (Bucharest: Hamangiu, 2017), 56 and Gabriel Boroi and Carla Alexandra Anghelescu,

domain the possibility of using some intermediates in the process of selling, that are named distributors and that can charge commissions that are to be found in the whole price of the contract, resulting in an increase in price. On the other hand, we speak about the beneficiary that, also affected by the imposed restrictions, has to suffer increased costs.

In order to understand the gravity of this general situation, considering the fact that restrictions concern economic operators from different areas[1], we will shed some light on some normative acts. The first one is the Order 6985 from 2021[2], adopted by the Emergency Situations Department, which provides in art. 6 pct. 3: "*In the area mentioned at art. 1 par. (2), are forbidden the following activities: ... the activity with public by economic operators that carry out activities consisting in preparation, commercialisation and consume of alimentary products and/or alcoholic and nonalcoholic beverages, like restaurants and coffee shops, including bars, in the outside and in the inside of buildings*". The same normative act provides in art. 7 par. 1:"*It is limited the program of work with people for economic operators from the domain of commercialisation of alimentary and non alimentary products until 9 p.m., with the exception of the pharmacies, that can have a non-stop program and in which their personnel will serve the clients through a window".* The same regulation is, with some modifications, applicable on the Order no. 6983 from 2021[3], adopted by the Emergency Situations Department, that states in art. 6 par. 1 as following:"*The obligation for all economic operators that undertake activities which constitute commerce/providing services indoors and/or outdoors, public or private, to organise and to undertake their activity in mondays, tuesdays, wednesdays and thursday, between 6 and 21, and in fridays, saturdays*

Curs de drept civil. Partea generală. Ediția a 2-a revizuită și adăugită (Bucharest: Hamangiu, 2012), 165.

[1] So that they are severely disadvantaged compared to other economic operators from outside the quarantine area.

[2] On establishing of the area quarantine for the Dridu commune, Ialomița county (M. Of. no. 388 from 14.04.2021).

[3] On the prolonging of the quarantine for Cornetu commune, Ilfov County (M. Of. no. 388 from 14.04.2021).

and sundays, between 6 and 18, is prolonged, with the following exceptions: a) in the interval 18,00-6,00 the economic operators can be active only in relation with other economic operators that do home delivery; b) pharmacies, gas stations, economic operators that do home delivery, as well as economic operators that undertake transport of people on the road and use a vechicle with a camacity that is more that 9 seated places, including the seat of the driver, and economic operators that undertake operations in goods transportation on the roads that use vechicles with a mass grater than 2.4 tones can contiunea their activity in a normal work regieme, with the requirement of respecting the sanitation rules". Par. 2 provides that:"*It is to be limited the number of people that can enter in shops/supermarkets/hypermarkets to a maximum of 30% of capacity, with the requirement of respecting the physical distancing*", par. 3 states that "*In the case of commercial centers/commercial parks, the persons access is limited so that to be assured 8sq/person, with respecting of the distancing norms*" and, finally, par. 5 provides:"*Agents/economic operators from that undertake commercial operations with non alimentary products, like retailers of construction materials, will temporary suspend their activities, saturdays and sundays, until the provisions of the present order will expire*", this normative act establishes visibly more severe measures.

Finally, the problem that arises is if this state can attract the voidance of the contract concerning the beneficiary which sees himself in the situation to accept a contract in disadvantageous, exhibiting a "forced consent".

Sedes materiae is in art. 1221 and 1222 of the Civil code[1].

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[1] Law no. 287 from 2009 on the Civil code (M.Of. no. 409 from 10th of june 2011). Thus, according to art. 1221:"*(1) There is a lesion when one of the parties, profiting from the state of need, from the lack of experience or from the lack of knowledge of the other party, stipulates in its favour or in the favour of another person a profit that is of a considerable bigger value, at the contract's formation, than the value of its own obligation. (2) The existence of the lesion is appreciated also in relation with the nature and the purpose of the contract…*" and, according to art. 1222:"*The party who's consent was vitiated through lesion can demand, at its choice, the annulment of the contract or reduction of its own obligations with the value of the damages that the victim may be*

Etymological, the concept of lesion comes from the latin term l*aesio*[1], which signifies the idea of a damage[2] or a wound, the institution in this case being qualified as a civil delict[3].

Following the general theory of major's lesion, the studied problem seems to fit in the framework laid down by the Civil code. The increase in price generates a disproportion between the circulaton value of the product/service and the paid price. On this aspect, the situation fully respects the subjective outlook of the major's lesion, the legal regime not being foreign to the party (in relation to the rule of *nemo censetur ignorare legem*, considering the normative framework of the restrictions) from which results the deficiency, the state of need of the beneficiary, certainly known[4] the the provider. But, in order to speak about lesion, as a consent vice, we should not limit only to this condition. Thus, the simple generation of a disproportion in value does not offers the right to petition a court, but the lesion must also respect the threshold provided in the art. 1222 par. (2), basically, the damages must value more that half of the obligation executed or promised by the damaged party.

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entitled to. (3) With the exception stated by art. 1221 par. (3), the annulment action is admissible only if the lesion exceeds half of the value that it had, at the moment of the contract's formation, the promited profit or the executed profit by the damaged party. The disproportion must subsist ultil the date of the annulment petition. (3) In all cases, the court may mentain the contract if the other party offeres, in an reasonable fashion, a reduction of its own debd against the injured one or an increase of its own obligation. The provisions of 1213 concerning the adaptation of the contract remain appliable".

[1] Sache Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395. Analiză critică și comparativă a noilor texte normative* (Bucharest: C.H. Beck, 2013), 214.

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[3] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici and Ioan Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664* (Bucharest: C.H. Beck, 2012), 1283.

[4] Boroi and Anghelescu, *Curs de drept civil. Partea generală. Ediția a 2-a*, 159-160; It's about a "speculative conduct" from the party that stipulated the exaggerated obligation. In this sense, see Neculaescu**,** *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 226; Baias, Chelaru, Constantinovici and Macovei**,** *Noul Cod civil. Comentariu pe articole art. 1-2664*, 1283.

Also, given the fact that we speak about the annullment of the contract[1], sanction that targets the formation of the contract, the formulation in art. 1222 par. (2) appears to be superfluous, concerning "*at the moment of the contract's formation*". In the same sense, the provisions of art. 1222 were criticised[2] justly for the usage of the phrase "*by lesion*", because "*not the lesion damages the consent; it is the consequence of the contract so formed*".

In continuation, problems arise concerning the admissibility condition[3] stated by art. 1222 par. (2) second thesis. Although we speak about a consent vice, the lawmakers have stated a time extention of the disprorportion between the value of the parties obligations until the moment the damaged party petitions to the court.

The problems have as the object either the prices fluctuation, either the possibility of the application of the compensation concerning different contractual relations.

Concerning the prices fluctuation, in appeareance it could be stated that it's required a global analysis of the period between the moment the contract was formed and the moment the court is petitioned, in order to determine *in concreto* if the causal chain between the unloyal conduct[4] of the party that profited from the state of need and the lesioned party. In this sense, there might be two solutions: the first one takes in the consideration *dies a quo* the moment the contract is formed and *dies ad quem* the moment the court is petitioned, situation in which the judge may report to these moments, and the second solution implies taking into consideration, not only the aforementioned moments, but also the intermediate intervals in which although the continuity requirement might be "lost", the court may consider it as fulfilled. Moreover, the court may reject the claim, on the last hypothesis, based by non fulfilment of the said condition, because, by interrupting, the condition of

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[1] According to art. 1246 par. (1) of the Civil code:"*Every contract formed without respect to the valability requirements demanded by law for its availlable formation is subjected to voidance, if the law does no provides another sanction"*.
[2] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395***,** 230.
[3] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395,* 231.
[4] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395,* 215.

the damage would be removed. I believe that it should be applied the first hypothesis and the judge will have to refer both to the value of the obligations at the time the contract was formed and to the date of the petition, even if the fluctuations are determined by changes of the economy or of the laws. The justification is given both by the principle according to which the person that fights against a damage should be preferred to the person that follows an advantage (*qui certat de damno vitando anteponendus est ei qui certat de lucro captando*) and by the initial state of the party being in "*the state of need, the lack of experience or the lack of knowledge*", *a fortiori* it would be unjust for the damaged party to be sanctioned because of a random event. Lastly, the assertion is sustained both by the provision of art. 1224 from the Civil code, that excludes from the sphere of anullment action for lesion the aleatory contracts, and the provision of art. 1488 par. (1), that establishes the principle of monetary nominalism[1].

Concerning the interruption of the causal chain through compensation (because the parties can prevail by this institution either in an action, either in an exception[2]) the situation is a bit different from the fluctuations thesis.

Quod erat demonstrandum. The following question arises: the application of compensation *ope legis* hinders *per se* the applicability of lesion ? The answer can only be circumstantial. Thus, according to art. 1617 of the Civil code:"*(1) The compensation opperates by law as soon as the are two debts that are certain, liquid and demandable, no matter their source, and that has as object an ammount of money or or a quantity of fungible goods that are of the same nature*". It is established

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[1] Liviu Pop, Ionuț-Florin Popa and Stelian Ioan Vidu, *Curs de drept civil. Obligațiile* (Bucharest: Universul Juridic, 2015), 529.

[2] In the doctrine, it was shown that the concept of exception (substance defence) concerns "*objections against the fundament of the pretention*", this being the distinction between defences *lato sensu* and defences *stricto sensu*. In this sense Gabriel Boroi and Mirela Stancu, *Fișe de procedură civilă* (Bucharest: Hamangiu, 2019), 306; Viorel Mihai Ciobanu, Trăian Cornel Briciu and Claudiu Constantin Dinu, *Drept procesual civil. Ediția a II-a revăzută și adăugită* (Bucharest: Național, 2018), 329-331; Mihaela Tăbârcă, *Drept procesual civil. Vol. II* (Bucharest: Universul Juridic, 2013), 248-250.

in this way the legal compensation that intervenes *ope legis* as soon as all of the conditions are fulfilled[1]. In such a situation, it is obvious, at least formerly, the inadmissibility of the annulment action for lesion. But, reported to the subjective element of the lesion, I believe that the said institution will not be applicable. According to art. 1618 lit. a) of the Civil code:"*Compensation does not take place when: a) the debt has its source in an act done with the intention to damage another*", thus, at least from the perspective of the damaging creditor, the compensation will not operate and admitting the thesis according to which the said institution operates concerning the damaging debtor's debt is inacceptable, given the fact that reciprocity is specific to compensation.

In another key, we could discuss also the provision in the art. 1617 par. (3) from the Civil code which states:"*Any party can give up, expressly or tacitly, the compensation*". In essence, I believe that it cannot be about giving up the benefit of the compensation in this matter, given the fact that it was established[2] that the provisions of art. 1617 par. (3) must be interpreted as a convention through which the party gives up the compensation. In the motivation of the said interpretation, it was shown[3] that "*it would be unreasonable that a debtor to renounce the compensation, which, practically, would empty of content many of the reasons of practical utility of this legal institution*", to this argument, by reporting to our subject – the subjective element of the lesion and with consideration to art. 1618 par. (1) let. a) from the Civil code – I would also add the hypothesis in which if we would accept such a legal construction, we would break the principle according to which *nemo plus iuris ad alium transferre potest quam ipso habet*, in which the lesionaire creditor cannot prevail by the institiution of compensation.

Fine primi assumptione. Finally, it must the shown the fact that the pandemic cand be, circumstantially, in the hypothesis of the lesion.

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[1] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile,* 541-543; Bazil Oglindă, *Drept civil. Teoria generală a obligațiilor* (Bucharest: Universul Juridic, 2017), 403.
[2] Oglindă, *Drept civil. Teoria generală a obligațiilor,* 403.
[3] Oglinda, *Drept civil. Teoria generală a obligațiilor,* 403.

Although some authors[1] interpreted in the sense of inadmissibility of the lesion in the situation of a free[2] and conscious consent from the lesioned debtor, I still believe that the manifestation of will must be carefully examined. The opinion of the mentioned authors has as a premise, most likely, the principle of contractual freedom. This assertion can be also sustained by the principle according to which *neminem laedit qui suo iure utitur*.I consider that we should not adopt a solution of extreme inapplicability of the lesion in such hypotheses, but we should carefully examine the intention of the debtor. In this sense, if there is an *animus donandi*[3], the petition must be rejected, but, if the lesioned debtor did not wish to do a generosity[4] he only was in a difficult situation, which would constitute a "*state of need*" under the art. 1221, I believe that the lesion is applicable. This last assertion is also based on the reason itself of existence, the debtor expresses a conscious consent, the agent understands that he makes a legal act, but can or cannot evaluate properly the consequences of the act. Moreover, the law does not require that the debtor not to know these consequences, but the law only demands, firstly, the existence of a disproportion between the party's obligations and, secondly, and a bad faith of the lesionaire creditor, this being the reason that, amongst the different hypotheses, is present "*the state of need*", in this case the debtor can be aware of all the aspects of the legal act.

COVID-19 – HYPOTHESIS OF *PER SE* APPLICATION OF RISK THEORY ?

Sedes materiae generalis: art. 1351, art. 1557 and art. 1634 from the Civil code.

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[1] Baias, Chelaru, Constantinovici and Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664,* 1283

[2] I consider that it must be examined, mostly, the requirement of the conscious consent, because the usage of the construction *freely but vitiated consent* in not antithetic. A free consent is a non vitiated consent, no matter the vices.

[3] Being, in essence, an indirect donation.

[4] The situation can be described as a simulation in form of disguise.

Sedes materiae specialis: O.U.G. no. 29 from march 2020[1].

As we have already shown[2], the effects of the pandemic can target both the formation of the contract and its enforcement. The lesion targets the formation of the contract, but the risk theory and the hardship affect the enforcement of the contract. In essence, this distinction was identified[3] in the doctrine, in which it was established that "*in the case of hardship, the change that affects the benefits takes place during the execution of the contractual obligations, being unforeseeable at the time of the formation of the contract*". Also, the difference between the force majeure and hardship consists in their effects, the force majeure causing either the de jure termination of the contract, either the possibility of application of the usual remedies for non enforcement of the contract, when the hardship generates either the renegociation/adaptation of the contract, either the termination of the contract by the court[4].

Finally, in order to establish *in concreto* if the situation generated by the pandemic can constitute a case of force majeure, it is needed a short analysis of legal provisions that regulate this institution, with a particular look on the situation of the small and medium-sized enterprises[5].

According to art. 1351 par. (2) from the Civil code "*the force majeure is any external, unforeseeable, absolutely invincible and unavoidable event*". For the analysis, we shall retain as requirements of the force majeure the external origin of the event and its unpredictability, invincibility and inevitability. Thus, if the external origin[6] of the event

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[1] Concerning some economic, fiscal and budgetary measures (M.Of. no. 230 from 31st of march 2020).

[2] See *supra.* p. 148

[3] Neculaescu**,** *Izvoarele obligațiilor în Codul civil art. 1164-1395,* 389; in this sense, see Pop**,** Popa and Vidu**,** *Curs de drept civil. Obligațiile,* 128, the author Ionuț-Florin Popa names the hardship *„an a posterior lesioni*".

[4] Neculaescu**,** *Izvoarele obligațiilor în Codul civil art. 1164-1395,* 389; in this sense, see Pop**,** Popa and Vidu**,** *Curs de drept civil. Obligațiile,* 128

[5] For a detailed analysis of the concept of enterprise, see Cărpenaru, *Tratat de drept comercial român,* 34-40.

[6] For details on the lagislation before the New Civil code, see Neculescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395,* 612.

does not cause discussions, there must be made some remarks on the last tree conditions of the force majeure. The unpredictability of the event must be bound to the bonus pater familias rule, the text not requiring an absolute diligence, but a reasonable possibility of anticipation[1]. Unlike the unpredictability, the invincibility and inevitability of the event must be asolute. Therefore, there will be needed an *in abstracto* outlook, taking into consideration the most diligent and prudent person[2]. A last discussion has in its sight the problem when a person that pleads force majeure has generated the risky situation. Thus, in this sense, it was justly shown that in such a case "*the negligence absorbs the force majeure*"[3], based on the fact that "*if the event could have been foreseen and has not been foreseen, the defendant remains liable, as long as is negligent, just like if the event was not invincible, the person who did not is negligent and, therefore, liable*"[4].

Considering these theoretical ideas, we will study next the situation of the small and medium-sized enterprises.

Art. X par. (3) from the O.U.G. 29/2020 states as following:"*It is presumed to constitute case of force majeure, according to the present ordinance, the unforeseeable, absolutely invincible and unavoidable circumstance that art. 1.351 par. (2) from the Civil code referes to, that results from an action of the authorities, taken in implementing the measures imposed by the prevention and combat of the pandemic caused by the infection with the COVID-19 coronavirus, that affected the activity of the small and medium-sized enterprise, jeopardy attested by an emergency situation certificate. The presumption can be overthrown by the interested party through any probation means. The unforeseeable character is in relation with the moment at which the affected legal*

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[1] Pop, Popa, and Vidu, *Curs de drept civil. Obligațiile.* 348-349; Oglindă, *Drept civil. Teoria generală a obligațiilor*, 168.

[2] Pop, Popa, and Vidu, *Curs de drept civil. Obligațiile.* 348-349; Oglindă, *Drept civil. Teoria generală a obligațiilor*, 168.

[3] Mihail Eliescu, *Răspunderea civilă delictuală* (Bucharest: Academiei, 1972), 211, *apud.* Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 613.

[4] Eliescu, *Răspunderea civilă delictuală*, 211, *apud.* Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 613.

relation was created. There will not be considered unforeseeable the measures imposed by the authorities, according to the normative act that established the emergency situation". In essence, the legal text repeats, mostly, the provisions of the Civil code concerning the force majeure, transposing them in a relative presumption. For the analysis, it is very interesting the expression "*that results from an action of the authorities, taken in implementing the measures imposed by the prevention and combat of the pandemic*", which clearely bears reference to at the different interventions from the authorities that the enterprises ar subjected to, subsequent to the moment that the normative act which established the emergency state was adopted. The basis of the legal text can only be the ideea of economic sustainability, quickness and probation ease.

Following, the law provides a supplementary condition, unlike the common law, that being the fact that the affected activity must be certified through an emergency situation certificate. According to art. 12 of the First annex of the Decree no. 195/2020[1] "*The Ministry of Economy, Energy and Business Environment issues, on demand, to the economic operators whose activities are affected by the COVID-19 context emergency situation certificates, based on justificative documents*". For the application of this text was adopted the Order no. 791/2020[2], normative act that lays down the procedure of issuing the emergency situation certificate and the effects of such an issuing. Without too many details, the certificates are of two types, type 1, blue, for the situation in which the enterprise's activity was totally or partially suspended, based on the authorities decisions, during the emergency state, and type 2, yellow, for the situation in which the profit influx dropped with at least 25% in march 2020, compared with the profit influx in the january-february 2020 period.

[1] On establishing the state of emergency in the territory of Romania (M.Of. no. 212 din 16.03.2020- repealed at 15.05.2020).

[2] On issuing of the emergency situation certificates to the economic operators whose activities are affected by the Sars-CoV-19 pandemic (M.Of. no. 248 from 25.03.2020).

O.U.G. 29/2020 relates the applicability of the force majeure presumption by efforts to negotiate, to adapt, the contract, as art. X par. (2) states.

Finally, I believe that the aforementioned provisions could be referred to as a relative and conditioned legal presumptionn, following different rules that the ones laid down by the Civil code, having as purpose the protection of the contractual relations, through establishing some safeguarding methods that are similar to the hardship.

Considering what we have mentioned, now we need to understand what are the effects of qualifying the pandemic situation as force majeure.

Ab initio we have to state that the general situation caused by the pandemic fits in the framework of the *fortuitous impossibility to enforce the contract*, at list at first sight. After how justly it was shown[1], the impossibility to enforce the contract may be found in all kinds of obligations: *dare, facere* or *non facere*. Besides the legal operation that concerns a transfer/constitution of a *ius in re* or providing services, it must be also taken into account the object of the obligation[2].

The doctrine[3] distinguishes between the absolute impossibility and relative impossibility. There is an absolute impossibility, according to art. 1577 par. (1) from the Civil code, "*when impossibility to enforce the contract is total and definitive and concerns a significant contractual obligation…*". *Per a contrario*, the relative impossibility is either when it does not concern the whole contract, either when it is not definitive.

In the analysis, it characterises the situation of absolute impossibility the institution of *contract termination by law*[4] from the moment the event occurs, in this sense art. 1577 conditions this termination by the way an important contractual obligation was affected, similar to the conditions under which the dissolution operates, case in

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[1] Oglindă, *Drept civil. Teoria generală a obligațiilor*, 169.
[2] See the doctrine cited *supra***.** 148, footnote no. 3.
[3] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 256-257.
[4] For the basis on which this institution may represent a *caducity*, see Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 259.

which it will not be needed any notification to the contracting party, in order for the extinctive effect to occur.

Unlike the absolute impossibility, the relative impossibility is susceptible for debate. Thus, for the contracts that do not transfer property, the solution is given by art. 1557 par. (2) from the Civil code, in which sense the creditor has a *potestative right* to choose either to suspend his own obligation, either to dissolute the contract if, in this last case, either the time period (in case of a temporary impossibility), either the amount that was not executed meet the requirement of importance. The aforementioned text seems to be in contradiction with the provisions of art. 1634 par. (3) from the Civil code, that state :"*When the impossibility is temporary, the enforcement of the obligation is suspended for a reasonable time, depending on the duration and the results of the event that caused the impossibility of inforcement*". In contrast with art. 1634, we conclude that art. 1557 should have priority, because it offers a vast array of rights.

Following, it is needed to make a distinction between the state of emergency, which is a case of force majeure, and the aptitude of the state of alert to be a case of force majeure. The distinction is extremely important, given the fact of the lower degree of intruding with the person's rights that the state of alert involves. In this sense, if in the matter of the state of emergency the situation is relatively clear (the law providing even an indirect probation ease), the situation is not the same in the case of the state of alert. In our opinion, it is to be paid attention to both the precontractual negotiations and the *apriori* legal framework.

Starting from this work hypothesis, we must state that the cases in which the debtors would seek exoneration on the grounds of fortuitous impossibility to enforce the contract, benefiting from the pandemic, are not few. In this sense, we consider that the court that has to decide on the applicability/non applicability of the contractual risk should examine the debtor's aptitude to foresee,through the lens of the legislative framework (*exempli gratia* contracting an obligation hard to honor, because of the restrictions), but also from the standpoint of potential infections that could determine, in a short time period, stricter quarantine measures. Thus, after this examination, the court observes a relative impossibility to

foresee, we can speak of the risk theory, but, in the opposite situation, when the debtor knew about the existence of the restrictions and, consequently, he accepted a virtual possibility of enforcement impossibility, the force majeure will not be applicable, because it infringes the principle according to which *nemo auditur propriam turpitudinem allegans*.

Problems also arise about the legal nature of the obligation. If it is about a contract that creates obligations that consist in *dare* (especially in contracts that transfer property), will be applicable the rules laid down by art. 1247 from the Civil code, meaning that as long as the good was not delivered, the risk will remain in charge of the obligation's debtor (*res perit debitori*)[1], but if we speak about about obligations that consist in *facere* (contract of enterprise for services) or obligations that consist in *non facere* (non competition clause, against an indemnity[2]) will become applicable the aforementioned rules[3].

A last issue subjected to this analysis is the situation generated by the framework agreements. *Sedes materiae is represented by the provisions of art. 1176 from the Civil code, that states as follows:"The framework agreement is the contract through which its parties agree to negotiate, to conclude or to maintain contractual relations whose elements are determined by the said agreement. The way of enforcement of the framework agreement, especially the timpe and the volume of the benefits, and, if it's the case, the price of those things, are stated through subsequent conventions*"

Considering that we speak about a permisie norm, the parties can agree even the price of eventual contracts that are to be formed subsequently (it is cited, as being the most frequent framework agreement, the distribution contract[4]). Thus, it is to be known what are the effects of the risk theory on the framework agreements, with relation

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[1] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile,* 260-261.
[2] For details, see Dan Țop, *Tratat de dreptul muncii* (Bucharest: Mustang, 2018), 241-242.
[3] See *supra.* p. 160.
[4] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 50, see footnote no. 6.

to the subsequent contracts and with an outlook on the pleading of force majeure in the case of the subsequent contracts. The solution that we propose is the following:it would not be applied the sanction of *termination by law* of contract or of dissolution, through the effect of *accessorium sequitur principale*, but, considering the independence of the subsequent contracts[1], we could uphold, at most, a determination of the factual basis against the force majeure, by the *a priori* initial obligation of *facere*[2], case in which we could prevail by the *unpredictability* of the event at the time of the agreement's formation, only if it would stipulate the price or ther elements (agreen in the subsequent contract) affected by the pandemic.

It also must be shown that in the eventuality in which the *derived object of the contract* consists in *res genera*, according to art. 1634 par. (6), the debtor cannot plead the fortuitous impossibility to enforce the contract, because *genera non pereunt*. Also, the text states *formal probation rules*[3]. In this manner, according to par. (5), the debtor has the obligation to notify the creditor, in a reasonable term, the existence of the event that is a force majeure, under the sanction of paying damages.

Finally, we believe that the situation caused by the pandemic, in order to be considered as force majeure, must be subjected to a study of the requirements of this legal institution,the simple statement of an impossibility to enforce the contract and even the legal presumption of force majeure (when its applicability is denied) must not drive the court to a *per se* decision through which the liability is removed. This assertion is also based on how close the conditions of applying the presumption of force majeure is to the ones that the hardship requires, the law imposing a notification, in order to renegotiate, an not only the notification of the creditor concerning the event. Not lastly, it will also be taken into consideration the eventual permissive nature of the norms that regulate

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[1] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 50, see footnote no. 6.

[2] On the legal nature of the obligation derived from a framework agreement, see Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 63.

[3] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 261.

this matter, in which, based on the contractual freedom, the parties can limit or even amplify the effects of an exonerating clause.

COVID-19 AND THE HARDSHIP

If in the case of risk theory, the requirements are more severe, in the case of the hardship, these can be proven with more ease, as we will see. Without too many details, as we stated[1], the difference between lesion and hardship is the moment in which the contractual imbalance operates. At first sight, the difference between the force majeure and the hardship consist in the requirement of the absolute invincibility and inevitability. After this, we can also add the effects[2] caused by the two institutions – the force majeure causes either termination by law of the contract, either the suspension or the dissolution of the contract, whereas the hardship causes adaptation and, as *ultima ratio*, termination of the contract (it's a termination ordered by the court, and not by the law, like in the case of force majeure).

Sedes materiae is represented by the provisions of art. 1271 from the Civil code. Thus, after it reiterates[3] the *pacta sunt servanda* principle, par. (1) brings forth the idea of contractual justice[4], concept that signifies the fact that "*in lack of an opposite stipulation, the expenses and the costs determined by an unforeseeable situation are not the burden of a single party*"[5].

From a procedural standpoint, after how it was just illustrated[6], the hardship represents an exception from the principle of disponibility. Also, some problems arised concerning the pleading of hardship. In this

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[1] See *supra.* p. 161.
[2] See *supra.* p. 161.
[3] Oglindă, *Drept civil. Teoria generală a obligațiilor*, 92.
[4] Baias, Chelaru, Constantinovici and Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664*, 1331.
[5] Baias, Chelaru, Constantinovici and Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664*, 1331.
[6] Boroi and Stancu, *Fișe de procedură civilă*, 11.

sense, some authors[1] stated that, in order to be possible to adapt or terminate the contract, the court should be petitioned with either a counterclaim petition, either an usual petition. Thus, if the hardship is pleaded as a substantial defence, the solution is different, in the way that the court might reject the petition as groundless, if the defence of the defendant is just[2]. Starting from this ideea, we affirm the fact that the solution was different in the case-law and we quote the Civil decision no. 85/2021 by Local Court of Cluj Napoca[3], in which the court argues that "*Concerning the demands of the defendants to reject the whole of the plaintiff pretentions or to reduce these pretentions to an amount established by the court, caused by a hardship in the time of the enforcement of this contract, the court believes that, without petitioning in counterclaims, it cannot accept this demand*".

The hardship is intrinsically to the rule of *contractus qui habent tractum successivum vel dependentia del futuro rebus sic stantibus intellingitur*[4], according to which the committed obligations are conditioned by the maintaining of the existing situation at the time when the contract was formed. "*Anytime these conditions change substantially, it is presumed that the will of the parties is to renegotiate the enforcement of the contract*"[5]. Although, in the classical doctrine, the court could not (in case of hardship) balance the rights and the obligations of the parties, the court having only a role in the interpretation of the contract, being "*a servant of the contract*"[6], today these rules are fundamentally changed, compared to the old legislation[7].

However, next we will proceed to study the requirements imposed by the law, in order for hardship to pe applied and to see in the situation caused by the pandemic can fit in this framework.

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[1] Oglindă, *Drept civil. Teoria generală a obligațiilor*, 98.
[2] Oglindă, *Drept civil. Teoria generală a obligațiilor*, 98.
[3] Decision no. 85/2021, availlable on www.rolii.ro
[4] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 388.
[5] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 388.
[6] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 388.
[7] Where the hardship did not had an express regulation, but it was incidentally found in different normative acts.

Thus, from the provisions of art. 1271 par. (3) from the Civil code, the requirements are the following:

1. The existence of a change in the circumstances, caused after the formation of the contract. In other words, " *the posteriority*"[1], being clear that the pandemic meets this criteria.

2. "*The fundamental change of the circumstances, as well as the fact that its extent was not and could not be reasonably foreseen by the debtor, at the moment of the contract's formation*" – "*the hardship*"[2]. We can see a similarity of the hardship with the force majeure, both institutions involving a "*reasonable*" assessment and, thus, bringing in sight the concept of *bonus pater familias*. We should not overlook that it is not to be excluded an absolute impossibility to perform, because, as we had show, the hardship is not incompatible with the fortuitous impossibility to perform the contract[3]. Not lastly, this legal text was justly critiqued[4], because "*the expression "its extent" cannot refer to circumstances that cannot be measured*". This requirement can be met *a fortiori* when the obligor may prove the change of the circumstances through the presumption of force majeure.

The change of the circumstances must be an *exceptional* one, the term "*exceptional*" signifying "*a legal metaphor, that announces the attributes of the change of the circumstances*"[5].

It must be also noted that within the meaning of "*was not and could not be reasonably foreseen*" can reside different manifestations of contractual liberty. The index clauses and the revision clauses are not foreign to commercial relations. The index clauses are used to "*correlate an economic value with another, in order to maintain in time the real value of the obligations*"[6]. By opposition, the revision (or hardship) clauses do not produce the effect of adaptation, but only create the

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[1] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 129.
[2] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 129.
[3] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 129.
[4] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 395.
[5] Baias, Chelaru, Constantinovici and Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664*, 1331.
[6] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 129.

obligation for the parties to renegotiate the contract[1], this being the main difference between the two aforementioned mechanisms. Thus, if the parties have stipulated such a clause, "*the matter of hardship is fully settled, according to this clause*"[2].

3. "The debtor did not took the risk for the change of the circumstances and it cannot be reasonably derived that he took this risk" – "Not taking the risk"[3]. The first hypothesis concerns an express will and the second one is deduced either from the interpretation of the contract[4], either "*by using of a of a foreseeing standard that every person has*"[5].

4. The last requirement concerns an aspect of procedure, "the previous negotiation of the contract becomes a requirement for petitioning the court...and not an effect of the hardship"[6]. In this sense, art. 1271 par. (3) let. d) demands the obligor to try "*in a reasonable term and with good-faith*" to negotiate, "*in order to reasonably and fairly adapt the contract*". Thus, given the fact that the doctrine intensifies the procedural character of this obligation, I believe that not performing this obligation makes art. 193[7] from the Civil procedure code[8] applicable and the petition should be rejected as inadmissible. The reason for behind art. 1271 par. (3) let. d) can only be the idea of *safeguarding*[9] the contract and

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[1] D. Philippe, *La clausula Rebus Sic Stantibus et la renégociation du contrat dans la jurisprudence arbitrale internationale* (Paris, 2006), *apud.* Oglindă, *Drept civil. Teoria generală a obligațiilor*, 95.
[2] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 130.
[3] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 130.
[4] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 130.
[5] Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 391.
[6] Baias, Chelaru, Constantinovici and Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664*, 1331.
[7] According to par. (1), "*Petitioning the court can only be done after doing a preliminary procedure, if the law expressly states it. The proof of doing the said procedure will be annexed to the petition*".
[8] Law no. 134/2010 on the Civil procedure code (M.Of.no. 247 from 10th of april 2015)
[9] Oglindă, *Drept civil. Teoria generală a obligațiilor*, 98.

to give priority to the freedom of the parties, according to the *favor contractus* principle[1].

Coming back to the effects caused by the pandemic, I believe that we have to take into account a few considerations shown by the doctrine. This, it was asserted[2] that the hardship should not be reduced to the matter of inflation, the author Cristina Zamșa proving that the hardship has a wider domain. Also, another author[3] asserted that "*the bankruptcy or the decrease of economic power of the debtor, caused by exceptional changes, due to the fact (bad) way he conducts his business, cannot be considered exceptional changes, because they lack the requirement exteriority*"[4]. Not last, some other authors[5] have adopted a more relaxed perspective, in the sense that, although the hardship concerns, as a rule, the problem of onerous, commutative, synallagmatic and *pro rata temporis* contracts, the hardship could also be applicable to *uno ictu* contracts, only if the element that affects the contractual balance concerns the enforcement of the contract, not its formation.

Concerning the solutions the court can deliver in a case of hardship, these are laid down by the law and consits in either adaptation of the contract, in order to fairly distribute the losses and the benefits, that result from the change of circumstances, between the parties, either the termination of the contract. Although the norms gives the court the aptitude to order any of the two solutions, we adhere to the opinion according to which[6] the adaptation of the contract must be the first option, the court having to make sure that the principles of legal security

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[1] For details on this principle, see Pop, Popa and Vidu, *Curs de drept civil. Obligațiile*, 185.

[2] Baias, Chelaru, Constantinovici and Macovei, *Noul Cod civil. Comentariu pe articole art. 1-2664,* 1331.

[3] Paul Vasilescu, *Drept civil. Obligații (în noua reglementare a noului Cod civil* (Bucharest: Hamangiu, 2012), 457 *apud.* Neculaescu, *Izvoarele obligațiilor în Codul civil art. 1164-1395*, 393.

[4] Vasilescu, *Drept civil. Obligații*, 458.

[5] Boroi and Anghelescu, *Curs de drept civil. Partea generală. Ediția a 2-a*, 213.

[6] Oglindă, *Drept civil. Teoria generală a obligațiilor*, 98.

and *favor contractus* are respected. Also, the adaptation may consist[1] either in "*adjusting some contractual gains*", either in "*adjusting some ways of performing*". Anyways, the termination of the contract is one with *ex nunc*[2] effects, in which "*the court's interventionism make the hardship and the fortuitous impossibility to perform both alike and different, at the same time*"[3].

Finally, we have to shed some light on the advantages that the hardship involves, by opposition with the risk theory, concerning the requirements. After how we have illustrated[4], the risk theory cannot be applied when it comes to *res genera*. Such a prihibition does not opperate in the case of the hardship. At the same time, the requirement of an absolute invincible and unavoidable event is not needed in order to use the institution of hardship, thus the hardship, from this perspective, si much more favourable. But, from the standpoint of the generated effects, the risk theory brings, mainly, either to the termination by law, either to suspension of performing one's obligations, and, secondary, to the dissolution of the contract (this last one being the result of the creditor's *potestative right*). By opposition, the hardship targets with priority[5] the adaptation of the contract and, it this can't be done, its termination[6].

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[1] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile,* 131.
[2] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile,* 131.
[3] Pop, Popa and Vidu, *Curs de drept civil. Obligațiile,* 131.
[4] See *supra.* 167.
[5] See *supra.* p. 167 and p. 168.
[6] For an practical application of the distinctions between these two institutions, see the Civil decision no. 2085 from 28th october, adopted by Alba Iulia Local Court, in which the plaintiff demanded the application of the risk theory, based on his impossibility to access a credit, in order to pay the price of the contract, and the court ruled as follows:"*The difference, however, between risk events and the events that cause hardship is one of measure: if overcoming the fortuitous obstacle, by the debtor, can't be made, no matter how much money he would spend with this purpose or with an enormous amount, then it is a case of impossibility to perform. If overcoming the obstacle can be done only with an excessively sum, given the circumstances, then we are in a case or excessive onerosity*", www.rolii.ro

CONCLUSIONS

The situation generated by the pandemic creates legal effects of great importance. Thus, these effects can target the whole path of the contractual relations, from the moment of their formation (the lesion) and to the moment of termination (the hardship and the risk in contracts).

It also must be broth into discussion the considerable attention that the court must proceed with, in order to correctly enframe the demands and the defences of the parties and to eliminate the eventual procesual rights abuses that the debtors can use[1].

Finally, reiterating the principle of safeguarding the contractual relations, even if it would be proven the applicability of the force majeure (in essence, we consider the hypothesis of relative and temporary impossibility[2]), of the lesion or of the hardship, the court, with respect to the principles of disponibility and its active role, should choose to maintain and adapt the contract, and only if such a solution would be inoperable, to rule for termination.

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[1] As an example, see the Civil decision no. 1649 from 2nd of april 2021, adopted by the Arad Local Court, concerning the special procedure of payment ordinance, in which the court ruled as following:"*There cannot be accepted the debtor's arguments on the adaptation of the contract, based on the reason of the pandemic, because, although it represents an event that could not be foreseen in an objective manner by any individual, this event appeared much later after the obligations that the creditor requested their payment became exigible*", www.rolii.ro

[2] Because, as we have shown for the hypothesis of the absolute and total impossibility, the contract is terminated by law.

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UNION AND TRANSPOSITION LEGISLATION ON PROCEDURAL GUARANTEES GRANTED TO SUSPECTED, ACCUSED OR WANTED MINORS

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Abstract:

Juvenile delinquency is an indisputable truth in society, the way minors are treated as suspects or defendants in international jurisdictions differ from state to state, but we can say at least theoretically that they focus mainly on a process re-education of minors to the detriment of a punitive action, of actual punishment. However, the reality leaves room for many issues to be analyzed regarding the observance of the rights recognized to minors and serious violations against them, facts that justify the interest of the European Union to ensure comprehensive legislation to be transposed at national level to ensure their protection and social reintegration.

Ke y words*: juvenile delinquency; re-education; reintegratio; protection.*

INTRODUCTION

The issue of juvenile justice is an open and sensitive issue in Romania and beyond. From violations of the rights of minors in the trial to serious violations of fundamental rights, the lack of legislative solutions regarding their reintegration into society and a considerable

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recidivism rate. We now have a system that focuses more on sanctioning and less on re-education, ignoring the fact that, in fact, minors are victims rather than criminals. equally inefficient, the alternative punishments available to the courts being extremely low or overlooked, especially due to the lack of sufficient human and logistical resources to ensure their efficiency.

In order to understand the phenomenon, it is necessary to analyze the notion of "procedural guarantees", which represent the rights recognized to the person during the criminal process in all its stages: *criminal prosecution*[1], phase aimed at gathering the necessary evidence on the existence of crimes, identification the perpetrators of the crime and the establishment of their criminal liability, *the procedure of the preliminary chamber*[2] in which the verification and competence of the court, as well as the verification of the legality of the administration of evidence and the performance of acts by the criminal investigation bodies , *the trial* [3]presupposes that the court solves the case, *the execution of the sentence* [4]is the stage in which the final decisions of the courts become executory.

Another important aspect to analyze is the notions of "suspect", "defendant", and "wanted person".

The suspect is the person in respect of whom, from the existing data and evidence in question, it results the reasonable suspicion that he committed an act provided by the criminal law. The person against whom the criminal action has been initiated becomes a party to the criminal proceedings is called the defendant, and the wanted person is the person on whom an arrest warrant or a European arrest warrant has been issued.

[1] Article 285 Criminal Procedure Code
[2] Article 342 Criminal Procedure Code
[3] Article 349 Criminal Procedure Code
[4] Article 550 Criminal procedure Code

LEGISLATION ON PROCEDURAL GUARANTEES GRANTED TO SUSPECTED, ACCUSED AND WANTED MINORS

The legislative framework must be analyzed by referring on the one hand to the Union normative framework, which in the matter of procedural guarantees of suspected or accused minors is represented by Directive 2016/800 / EU, and on the other hand at national level by the regulations of the Criminal Code.[1] Code of Criminal Procedure[2] and Law no. 254/2013, amended and updated on the regime of execution of sentences and preventive measures of liberty. Directive 2016/800 / EU, is a legal instrument that regulates a set of applicable procedural guarantees:

- Children or minors who are suspected or accused in criminal proceedings,
- Minors who are subject to the procedures of the pre-trial detention warrant, respectively the European arrest warrant,
- Minors who did not initially have the status of suspects or accused persons, but who acquire this status during interrogations carried out by the judiciary under the laws of the Member States,
- Persons who at the time they began to be the subject of criminal proceedings were in a state of minority, ie they were under the age of 18, but during the criminal investigation, or during the trial they turn 18 years old..

This directive was transposed in Romania by the norms contained in the Criminal Code and the Code of Criminal Procedure, in conjunction with Law 254/2013 with subsequent amendments and annotations on the regime of execution of sentences and custodial measures, so when minors are informed about that they are suspected or accused in a particular case they must be informed and that they enjoy the following rights:

[1] Articles of Title V „The minority"

[2] Articlesod Title IV, Chapter III looking „The procedure in cases with minor offenders".

1. The right of the holder of parental responsibility to be informed of the accusation brought against the minor.[1]

Specifically, the legislator identified for minors, suspects or defendants, both during the criminal investigation and during the trial, procedural rights they have, as follows: According to art.505 of the Code of Criminal Procedure in the criminal investigation phase is provided that, when the suspect or defendant is a minor who has not reached the age of 16, in any confrontation or hearing of the minor, the criminal investigation body summons the parents, guardian, curator or person in whose care and supervision the minor is temporarily ,,.

Also, according to art. 508 of the Code of Criminal Procedure regulates the fact that "at the trial of the case, the probation service, the parents of the minor, the guardian, the curator or the person in whose care and supervision the minor is temporarily.

2. The right to assistance by a lawyer at all stages of the criminal proceedings and the right to confidentiality of discussions with the lawyer[2]

The participation of a lawyer is mandatory in the proceedings against a minor defendant. He will act in such a way as to ensure that the rights of the minor are respected and that he is informed about what is happening and what can be expected in the future.

An important aspect is the fact that the legal representative can inspect all the documents of the case after the conclusion of the investigation. During the investigation, he may also examine the documents prepared in relation to the procedural actions he was entitled to attend. Defender's rights include the right of the legal representative to be present, to request information, to submit proposals and to seek redress. against court decisions.

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[1] Article 5 EU Directive 2016/800 on procedural guarantees for children are persons suspected or accused in criminal proceedings.

[2] Article 6 EU Directive 2016/800 on procedural guarantees for children are persons suspected or accused in criminal proceedings

3. The right to privacy

Records and records of minors are always confidential, and court hearings with minors or minors involved must be held in the absence of the public. Thus art. 509 para. 1. of the Code of Criminal Procedure provides that the court hearing in the case of minors is not public, and para. 3 of the same article adds that when the defendant is a minor under the age of 16, the court, if it considers that the administration of certain evidence may have a negative influence on the minor, will order their removal from the hearing. Under the same conditions, parents or persons with the right of representation may also be temporarily removed from the courtroom.

4. The right to an individual assessment[1]

The individual assessment of the minor is performed by a qualified staff, following a multidisciplinary approach and where appropriate, with the involvement of the holder of parental responsibility. the family and social environment from which it comes or any other vulnerability specific to the minority. Individual assessment is required because it aims to establish the individual characteristics that can be used by judicial authorities.To establish the appropriateness of taking a measure of deprivation of liberty in respect of a minor, to take any decision or measure in the course of criminal proceedings, including in the event of a waiver of the conviction. Juvenile hearing rooms in police stations and in court should make them feel comfortable, an environment that facilitates the expression of young people is also important, as are police officers and those working in courts to know how to speak and hear children.

[1] Article 7 of Unional Directive

5.The right to medical examination[1]

The state must ensure that minors deprived of their liberty have the right to a medical examination without undue delay, especially in order to assess the child's general mental and physical condition. The medical examination is non-invasive and is performed by a doctor or a professional. The results of the medical examination shall be taken into account in order to determine the minor's ability to be interrogated, to other acts of investigation or to gather evidence or any measures taken or expected to be taken against the minor.

6. The right to limit deprivation of liberty, with the possibility of discussing alternative measures, including the right to periodic review of detention.[2]

In the case of juvenile offenders, it is important that the proposed educational measure respects the principle of progression, so that initially, a less severe educational measure must be applied. Only if it does not have the desired results and the minor commits a new crime, only then should the educational measure become more coercive. In the Romanian legal system, the following non-private or, as the case may be, deprivation of liberty educational measures are regulated in ascending order of gravity*:*

NON-CUSTODIAL EDUCATIONAL MEASURES[3]

A minor who has committed a criminal act but is under the age of 14, as well as a minor between the ages of 14 and 18 who has no discretion at the time of committing the crime cannot be held liable. they apply special protection measures, such as supervision, placement in special centers. The measure will be taken by the Commission for Child

[1] Practices and rules on the juvenile justice system in Romania - project carried out by UNICEF in collaboration with the Ministry of Justice.

[2] Article 123 Law no. 254 of 19 July 2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings,

[3] Penal Code –Chapter II „The regime of non-custodial educational measures“, articles 117-123.

Protection, if there is the consent of the legal representative or by the judge. And in the case of minors between 14-18 years who had discernment at the time of committing the crime, one of these measures may be used depending on the gravity of the wrongful act:

The civic training internship consists in the obligation of the minor to participate in a program with a maximum duration of 4 months, in order to help him understand the consequences of the act committed and to make him responsible for his future behavior. The organization of the program and the supervision are done under the coordination of the Probation Service, together with CMBRAE.

The supervision consists in the control and guidance of the minor by the Probation Service within its daily program, for a period between 2 and 6 months in order to ensure his participation in school or vocational training courses and to prevent activities or contact with animites. people who could affect the process of correcting it.

The daily assistance consists in the obligation of the minor to respect a program established by the Probation Service for a period between 3 and 6 months, which contains the schedule and conditions of activities and prohibitions imposed on the minor. During the performance of non-custodial educational measures, the court may impose on the minor one or more obligations, respectively - to follow a course of school preparation or professional training, not to exceed without the consent of the Probation Service, the territorial limit established by the court, not to be in certain places or at certain manifestations sports, cultural or other public gatherings established by the court, not to approach and communicate with the victim or his family members, with the participants in the commission of the crime or with other persons established by the court, to appear at the Probation Service , on the dates set by it, to submit to measures of control, treatment or medical care.[1]

[1] Juvenile justice from a to z - publication. developed within the AWAY project „Alternative Ways to Address Youth“, 2018.

EDUCATIONAL MEASURES DEPRIVING OF LIBERTY[1]

The internment in an educational center is established for a period between 1 and 3 years and consists in the admission of the minor in a specialized recovery institution, where he will follow a program of school training and professional training according to his skills, as well as training programs. social reintegration**.**

The detention in a detention center is established for a period between 2 and 15 years and consists in the detention of the minor in a specialized recovery institution, with guard and supervision regime, where he will follow intensive social reintegration programs, as well as programs school training and vocational training, according to his skills. The conditions of the minor's hospitalization in a re-education center, the components of the enforcement regime must be adequate to the physical, mental and human conditions that distinguish juvenile offenders from adults. Obviously, these enforcement measures are milder for minors than for adults.. The design and adoption of measures included in the enforcement regime must start from the underlying factors among juvenile delinquency, which are related to the profound changes that have altered the functions of family, school, community, which have reduced parental training and authority. The enforcement regime must find solutions to the deficiencies in the educational process carried out by the family or at school, the minor's lack of social experience, which translates into a complete misunderstanding of the social significance of his dangerous conduct, the negative influence of adults on minors or the ongoing process. development and knowledge of minors.

CONCLUSIONS

The question I wanted to raise in my paper is, "Should minors be treated like adults in court?" and my answer is "NO". Suffering the consequences and taking responsibility are important elements, but learning these notions through punishment or harsh treatment even for an

[1] Penal Code – Chapter III „The regime of educational measures depriving of liberty“

adult is illogical. On the principle, "Two evils cannot do anything good." In the matter of juvenile delinquency, the recidivism rate is very high, we are talking about young people who no longer manage to adapt to society or whom society itself rejects and who hardly manage to integrate anymore. insurmountable values that protect minors and facilitate their re-education and reintegration process, but the reality is not gratifying.

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