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TABLE OF CONTENTS

DIGITALIZATION AND CONSTITUTIONAL LAW – SOME SELECTED ASPECTS **Rainer ARNOLD**	**9**
RUSSIA, THE EUROPEAN UNION AND NATO. FLEXIBILITY AND FIRMNESS **Heribert Franz KOECK**	**22**
CONSIDERATIONS ON THE CONTRACT OF INTERNATIONAL CARRIAGE OF PASSENGERS BY RAIL AS PROVIDED BY THE CONVENTION CONCERNING INTERNATIONAL CARRIAGE BY RAIL, BERN, 1980 **Sevastian CERCEL, Stefan SCURTU**	**44**
ON THE SALE OF LAND LOCATED OUTSIDE THE BUILT-UP AREA **Eugen CHELARU**	**75**
ANTICOVID LABOUR LAW IN POLAND **Jakub STELINA**	**94**
CONTRACTUAL LIMITATIONS IN THE LEGAL SUCCESSION MORTIS CAUSA ON THE EXAMPLE OF THE FACEBOOK CONTRACT **Mariusz ZAŁUCKI**	**106**
THE SPORTS ACTIVITY CONTRACT **Miruna TUDORASCU**	**124**
INTERNATIONAL LEGAL INSTRUMENTS FOR RESOLVING REGIONAL CRISES IN THE EAST (LEBANON, ISRAEL/PALESTINE, IRAQ, SYRIA, YEMEN **Alexandr CAUIA, Naif Jassim ALABDULJABBAR**	**131**
CITIZEN PARTICIPATION IN THE EUROPEAN UNION PUBLIC ADMINISTRATION: FROM HISTORY TO ACHIEVEMENTS **Dorina TICU**	**162**
RULE OF LAW AND EXCEPTIONAL SITUATIONS **Marius ANDREESCU, Andra PURAN**	**172**
SEVERAL ASPECTS CONCERNING THE FUNCTIONS OF JURIDICAL RESPONSIBILITY OF THE STATE **Elena MORARU**	**203**

REGIONAL DEVELOPMENT IN THE CONTEXT OF THE AGREEMENT OF EU-RM **Natalia SAITARLI, Maria ORLOV**	**215**
ROMANIA'S STEPS IN ORDER TO AVOID THE ACTION FOR DAMAGES BY THE EUROPEAN COMMISSION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AS A RESULT OF THE NON-TRANSPOSITION OF THE UNION LEGISLATION **Elise VALCU**	**222**
THE EFFECTS AND THE ROLE OF THE DECISIONS PRONOUNCED BY THE CONSTITUTIONAL COURT OF ROMANIA IN THE PROCESS OF SOLVING LEGAL CONFLICTS OF A CONSTITUTIONAL NATURE **Elena Cristina (MANDA) MURGU**	**231**
ANALYSIS OF NORWEGIAN EDUCATION SYSTEM- ADVANTAGES AND OPPORTUNITIES **Tatiana TUTUNARU**	**243**
ASSESSMENTS REGARDING THE IMPACT OF TAXATION ON ECONOMIC AND SOCIAL DEVELOPMENT IN ROMANIA **Catalin Emanuel CIOBOTA**	**262**
TAXATION IS A DETERMINING FACTOR OF SOCIAL PROGRESS ? **Catalin Emanuel CIOBOTA**	**268**
PECULIARITIES OF FOREST PROTECTION IN AUSTRIA **Stefania-Diana IONITA-BURDA**	**273**
THE HISTORICAL FUNDAMENTS OF THE ENVIRONMENTAL LAW. FROM THE OLD ROMANIAN LAW TO MODERN AGES **Ramona DUMINICA**, **Daniela IANCU**	**285**
THE ROL OF PUBLIC AUTHORITES IN EXERCISE BY THE PUBLIC OF THE RIGHT OF ACCES TO ENVIRONMENTAL INFORMATION **Viorica POPESCU, Ancuta-Elena POPESCU**	**292**
ASPECTS OF COMPARATIVE LAW REGARDING THE REGULATION OF RELAPSE AND ATTEMPT **Catalin BUCUR**	**305**
TOTALITARIAN TENDENCIES IN ROMANIAN LAW **Ana Maria CRÎNGUŞ – ECHERT**	**313**
GUARANTEE OF THE RIGHT TO PROPERTY BY THE JUDICIAL AUTHORITY FROM THE PERSPECTIVE OF EUROPEAN STANDARDS **Mariana OJOGA**	**333**

ABOUT SOME EFFECTS OF THE DECISION OF THE CONSTITUTIONAL COURT OF ROMANIA NO. 189/2021 **Andrei SOARE**	**353**
THE PRINCIPLE OF AVAILABILITY OF THE PARTY IN THE CIVIL LITIGATION AND THE REVISION OF THE BANK CREDIT AGREEMENT **Andreea TABACU**	**363**
CONDITIONS REQUIRED FOR OPENING INSOLVENCY PROCEEDINGS **Dragoș-Mihail DAGHIE**	**381**
THE BENEFIT OF EXCUSSION – SPECIFIC DEFENCE UNDER THE SURETYSHIP RELATION **Nora Andreea DAGHIE**	**387**
GENERAL ASPECTS REGARDING THE MAIN SUBJECTS OF BANKING LAW **Adriana PIRVU**	**397**
THE PRESENCE OF RELIGIOUS SYMBOLS AND CLOTHING IN THE PRE-UNIVERSITY AND ACADEMIC SCHOOL ENVIRONMENT. THE JURISPRUDENTIAL PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS. **Mihaela-Adriana OPRESCU**	**405**
RIGHT TO A NAME IN CONNECTION WITH IMAGE RIGHT AND PRIVACY RIGHT **Oana-Nicoleta RETEA**	**426**
DUTIES OF CIVIL SERVANTS IN THE SYSTEM OF PUBLIC ORDER AND SAFETY IN A PANDEMIC CONTEXT **Maria-Irina GRIGORE-RĂDULESCU, Corina Florența POPESCU**	**435**
INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS IN THE CONTEXT OF THE GLOBAL PANDEMIC **Mircea SELEA**	**445**
CORONAVIRUS VACCINATION AND THE NEW EUROPEAN LEGAL FRAMEWORK **Marius VACARELU**	**462**
CARRIER'S LIABILITY FOR LUGGAGE, SHORT SENDING TO AIR TRANSPORT RESPONSABILITY **Amelia GHEOCULESCU / SINGH**	**470**

PERSONAL NUMERICAL CODE – INDIVIDUAL IDENTIFICATION ATTRIBUTE? **Ramona DUMINICĂ, Andreea DRĂGHICI**	**480**
PARTICULAR ASPECTS OF THE PROVISIONAL PROTECTION ORDER **Raducu Razvan DOBRE**	**487**
THE INSTITUTION OF MARRIAGE AND WOMAN'S STATUS UNDER THE MEDIEVAL LAWS OF THE 17TH CENTURY **Elena GHEORGHE**	**495**
AUDIOVISUAL TRANSLATION AND LEGAL PROVISIONS IN ROMANIA **Bianca DABU**	**518**
THEORETICAL AND PRACTICAL VALENCIES OF THE SANCTION OF LEGAL NULLITY OF THE ADMINISTRATIVE ACT OF ESTABLISHING THE TERMINATION OF WORK RELATIONSHIPS OF THE PUBLIC SERVANT **Carmen NENU**	**529**
CONTRACT ASSIGNMENT, A LEGALLY REGULATED LEGAL OPERATION UNDER THE PRESSURE OF CONTRACTUAL PRACTICE **Dumitru VADUVA**	**537**
SCIENTIFIC RESEARCH AND THE PRESENT EU CRISES CHALLENGES **Sorina IONESCU**	**546**

DIGITALIZATION AND CONSTITUTIONAL LAW

Arnold RAINER[1]

Abstract:

In the following article, fundamental aspects of the development of fundamental rights will be set in relation to digitization, in order to show that the modern phenomena of the digital age are also covered by the fundamental general concepts developed by constitutional court jurisprudence.

Key words: *fundamental rights; Constitutional; digitalization; data protection; jurisprudence.*

INTRODUCTION

The topic of digitization and constitutional law has numerous facets. Democracy and parliamentary process pears future will be characterized more and more by digital actions. The digitization of administration will also play a major role and thus change the relationship of the individual to the start in this practical dimension as well. Digitalization will be given very special weight in the area of fundamental rights. The fundamental right to data protection, developed in Germany at the federal level by the case law of the Federal Constitutional Court (FCC) and defined as the right to informational self-determination as an essential aspect of the right of personality, stands out in particular; likewise, the aspects of social media relevant to fundamental rights are of the utmost importance.

In the following article, fundamental aspects of the development of fundamental rights will be set in relation to digitization, in order to show that the modern phenomena of the digital age are also covered by

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the fundamental general concepts developed by constitutional court jurisprudence.

The following essential questions arise in this context:

(1) Are all the fundamental rights guarantees anchored in the text of the German Basic Law or developed by the case law of the Federal Constitutional Court (FCC) applicable even if the corresponding freedoms are used in digital form? The following may serve as an example: does freedom of expression under Article 5.1 of the Basic Law (BL) also apply if the opinion is expressed by digital means?

(2) Are restrictions on fundamental rights using digital technologies on the part of public authorities, interventions in the classic sense that must be justified, and do special, additional needs for freedom protection arise as a result of the particular intensity of such an application? To take the example of the digital collection, storage and use of personal data: This involves the normative definition of procedural and substantive limitations.

(3) Are private individuals who use digital techniques or distribute digital resources also bound by fundamental rights? In other words, is the blocking of an account by an Internet operator a (possibly justified) encroachment on freedom of expression?

(4) Does the use of digital techniques give rise to an increased vertical and horizontal duty of protection on the part of the state?

(5) How should the influence of international and supranational law on these questions be assessed?

The digital reality is characterized by numerous details, some of which are highly complicated. Basically, however, the constitutional questions that arise can essentially be limited to the basic questions mentioned above.

Answering these questions touches on fundamental constitutional concepts. These concepts have been developed as the result of the idea that the constitution is not a rigid normative document cemented forever, but a "living instrument" representing a basic order that adapts to constant developments without losing its directive function. This is also the case with regard to digitalization. This is linked to novel and far-reaching developments, which, however, are conceptually encompassed by the foundations that have been established so far.

Some of these questions can be considered here; the aim is to show how these questions are conceptually anchored in the basic body of

constitutional law as developed by case law and in line with the basic tenets of the anthropocentric understanding.

FUNDAMENTAL RIGHTS IN THEIR DIGITAL DIMENSION AND SAFEGUARDS AGAINST DIGITAL THREATS

Let us turn to the first and second questions, which are thematically interrelated: The first is whether the Constitution's guarantees adapt readily to new technological developments, or whether this requires a textual amendment or an explicit finding by constitutional jurisprudence. Secondly, the question arises as to how far encroachments on fundamental rights by means of digital technology can be adequately limited.

If we look at the essence of the constitution, we can assume that the finality of a constitution is the regulation of the basic order of state and society, which is which is fundamentally intended to exist for an indefinite period of time. This also means that its regulatory goal has to adapt to changes in the object of regulation. The functional dimension of the regulatory finality is therefore decisive; if the expression of opinions is to be functionally protected, it cannot matter by what means opinions are expressed, whether by traditional means or with the help of digital technologies. The protective concept of the fundamental right is only fulfilled if the protection intervenes independently of the modality of the expression. The principle of human freedom, which springs from the dignity of the individual and is the written or unwritten basis of every constitution, demands efficient protection that fully realizes the functional goal of the fundamental right. In this sense, the written text of a fundamental right must be interpreted or, in the absence of such a written text, the visualization of the unwritten fundamental right must be carried out through judicial interpretation.

The constitutional norm aims at a regulation that fulfills its functional finality during the entire duration of the constitutional validity - and this is usually unlimited. Therefore, the subject matter of the regulation, however far it changes or develops, must be included *a priori* in the regulatory intent of the constitutional norm, insofar as this corresponds to its functional finality. This finality is directed to the goal of protecting the freedom of man through the expression of his opinion. It is clear that it is this functional goal and not the modality of the

expression of opinion that matters. Thus, the fundamental right norm is open, amenable to dynamic and evolutionary interpretation. Should special conditions for the expression of opinions arise from the fact of their digital communication modality, these must be taken into account in terms of fundamental right. The special nature of digital expression, which lies in its speed and worldwide dissemination, i.e., in its functional intensity, can lead to the need to limit it in particular in order to adequately protect the fundamental rights of others and legitimate interests. This limitation is primarily the responsibility of the legislator.

The adaptation of fundamental rights to the digital dimensions may also become relevant in other respects. For example, the digital broadcasting of religious events will fall under the freedom of religion of Article 4 BL; the parental right to education of Article 6 BL will include a right to (albeit probably limited) access to the Internet for children; state supervision of the public school system will have to adequately take into account the digital dimension of teaching, which is relevant in various respects; telecommunications secrecy undoubtedly encompasses the digital domain; the inviolability of the domicile also means a defense against digital intrusion, and the like. However, there may also be cases of doubt where the traditional fields of reference are substantially altered: Is a digital rally via different computers an assembly in the sense of the fundamental right of assembly if this rally is coordinated? Is it an assembly in closed rooms or - in a broader sense - an assembly in the open air?

Further developments in digital technology can lead to intensive encroachments on civil liberties, especially on personal rights, whether through data storage or, for example, through police measures to investigate criminal acts.

It is evident that the right to personal development in its numerous manifestations also includes the protection of personal data. In Germany, where the text of the 1949 Basic Law, the constitution, does not contain a separate fundamental right to data protection (and this was not inserted into the text of the BL at a later date), the FCC has developed this in its case law and also shaped it in its important preventive function via the so-called "protection of fundamental rights through procedure". It should also be emphasized that the "right to free development of one's personality," as the text of Article 2.1 BL literally states, does not mean the right of personality in the narrower sense, but

rather the freedom of the person, the general freedom of the individual as a "subject" to be recognized in his or her dignity. This was also stated by the FCC in the well-known *Elfes* decision of 1957 (vol.6, 32). The rights of personality in the narrower sense, which also include the so-called right to "informational self-determination" and the new "basic computer right", were derived by the FCC with reference to the general freedom of man in connection with his dignity, i.e. from the guarantees of Art. 2.1 and 1.1 BL. The general right of personality is therefore more closely related to the person of the individual, his characteristics and qualities associated with his individuality, than to his or her relations to the state and society. The FCC has developed the two aspects of the personality right that are associated with particular intensity with digitization through its case law. The right of personality includes, as the court states in its famous decision of December 15, 1983 (vol. 65, 1 - 71), the power to decide for oneself whether one's personal data may be collected, stored, used and disclosed; the court speaks of the individual's right to "informational self-determination" and refers in a clear manner to digital technology. It is only this technology that, as a result of its special features, has put the personality of the individual at risk. In its decision of February 27, 2008 (vol. 120, 274-350), the FCC derived the "fundamental right to guarantee the confidentiality and integrity of information technology systems" from the right of personality. In both cases, the FCC does not deny the process, i.e., the storage of personal data by means of digital technology or, in the other case, the clandestine infiltration of an information technology system by trojans for the purpose of surveillance and exploration of a computer's storage media, but ties these processes to specific prerequisites. Such preconditions are established by procedural rules in the case of data storage; in the case of the basic computer right, there must be dangers to a legal interest of paramount importance and, for example, there must be a judicial order for infiltration.

We can thus conclude that the use of digital technology constitutes encroachments on fundamental rights insofar as they functionally endanger or violate the sphere of the individual. The fact that these are digital measures does not prevent the assumption that they are interferences with fundamental rights. The collection of personal data is also an encroachment with fundamental rights relevance, as the case law of the FCC has always established.

According to general rules, such interventions require a formal legal basis, they must be proportionate and must not affect the essence of the fundamental right. These conditions, which apply to all interventions in fundamental rights, are also relevant to digital interventions. In addition, there are the requirements of the rule of law, the definiteness of the legal basis, the observance of procedural rules that protect fundamental rights, in special cases authorization by the judge and also the observance of the innermost sphere of the individual, which is protected by human dignity. The legislature must specify these special conditions. It has some leeway, but this is clearly limited by the constitutional requirements. Since it is often a matter of encroachments on personal rights, i.e. the individual is affected in his or her sphere of personality, the normative limits must be stricter than limits that take place in the more society-related social sphere[1].

In the context of digitalization, there are numerous new developments and technically ever more refined application possibilities, which are, however, constitutionally based on the same basic ideas; they cannot be further examined here for reasons of space[2].

THIRD PARTY EFFECT OF FUNDAMENTAL RIGHTS: FUNDAMENTAL RIGHTS OBLIGATION OF DIGITAL NETWORK OPERATORS?

Central aspects of the fundamental right to communication (in the German BL a complex of freedoms covered under Article 5.1 BL, under the terms of freedom of opinion and freedom of information, as well as the specific terms of press freedom, broadcasting freedom, film freedom) is the freedom to actively express or refrain from expressing one's opinion and to inform oneself from generally accessible sources. It is evident that these freedoms are of essential importance for the personality and thus for the individual as such and also for the democratic process. This is about freedoms from state intervention, but it

[1] On the sphere theory, see Theodor Maunz, Gunter Dürig and Di Fabio, *Grundgesetz - Grundwerk mit Fortsetzungsbezug***,** 93rd suppl. edition (October 2020), GG Art. 2 Par. 1, margin no. 158.

[2] On this, see Ines Härtel, "Digitalisierung im Lichte des Verfassungsrechts - Algorithmen, Predictive Policing, autonomes Fahren", in: *LKV* (Landes- und Kommunalverwaltung, 2019): 49 - 60.

also raises the question of the extent to which fundamental rights obligations apply to private individuals, who today essentially mediate these freedoms. The focus here is on digital social networks. Access to them and the free activity on them has become an essential question of social communication today.

The key question is whether the private operators of these networks are obliged to ensure social communication freely or under certain restrictions. At issue, at least primarily, is the freedom of a private person, not of a state functionary such as former U.S. President Trump[1].

Under German constitutional law, public officials are obliged to respect the fundamental rights of the Basic Law. This follows from Article 1(3) of the BL. Fundamental rights are primarily subjective defensive rights against the intervention of the state, at least according to their classical function. Early on, the FCC recognized that fundamental rights, as the central expression of the principle of human freedom, a principle that is intrinsically linked to human dignity (Article 1.1 BL), are also objective principles of the state order and also of the social order, i.e. they must also be regarded as objective values. This means that the Constitution and especially the fundamental rights must be taken into account in all areas of law; they have so-called radiating effects on all parts of the legal order. In particular, this means that civil law is also significantly influenced by constitutional law and fundamental rights. As expressed by the FCC in the famous *Lüth* decision (vol. 7, 198), this is a so-called indirect third-party effect ("*mittelbare Drittwirkung*") of fundamental rights. This means that the relevant provisions of civil law (and also the relevant provisions of other areas of law) must be interpreted in the light of fundamental rights. This means that the particularly significant fundamental right of Article 5 BL must be taken into account with regard to the contract on the use of the social medium through the interpretation, in the light of the fundamental right, of the law related to the contract. This issue can become more complicated if the user contract is not governed by German law but by, for example, Irish or U.S. law. In this case, the rules of international private law must be observed, so that the fundamental rights of the BL gain influence at least indirectly via the legal concept of *ordre public*. In this case, the EU

[1] See Nicolas Harding and Lennart Laude, "Trump und Twitter - Zur Grundrechtsrelevanz (sic!) der Account-Sperrung eines Hoheitsträgers", *JuWissBlog* Nr. 8 (2021) v. 21.01.2021, https://www.juwiss.de/08-2012/ .

regulations on international private law must also be observed, insofar as they apply.

Let us limit ourselves here to the perspective of German law. The consideration of Art. 5 BL in the interpretation of the norms relevant for the user contract and the general terms and conditions means that the individual's interest in the expression of opinion and in receiving information, which is protected by the fundamental right, must be duly regarded in its core. However, which becomes relevant, for example, in the case of blocking of messages or of accounts, the limits of Art. 5 (2) BL must also be considered. Hate speech and insults justify restrictions on freedom of expression, and also the blocking of messages or account. Of course, the principle of proportionality must be adequately taken into account when interpreting civil law norms.

A particular problem arises insofar as, on the level of the constitution, Art. 5 BL and Art. 2.1 BL, which guarantees freedom of contract, compete with each other. The question is whether private individuals, in the context of their freedom of contract, must observe the principle of equality of Art. 3 (1) BL in the same way as holders of public power must do so. The latest case law of the FCC shows new ways here: in the decision on the stadium ban (vol.148, 267), it is stated on the one hand that the principle of equality also binds private ones; rather, it is basically part of the freedom of each person "to determine according to his own preferences with whom he (wants to) conclude contracts under which conditions." However, it is recognized that there may be "specific constellations" to which the principle of equality in Article 3(1) BL applies in indirect third-party effect. In the specific case, the issue was that persons who give cause for concern that they will cause disturbances in soccer stadiums can be excluded by the owner of the stadium on the basis of his civil law domestic authority. Is the owner of the stadium free, on the basis of freedom of contract, to exclude whomever from attending a soccer match in his stadium? In principle, this is true. However, the principle of equality of Art. 3 (1) BL had to be observed if "the exclusion decides to a considerable extent on the participation in social life for the persons concerned" and if the stadium is "opened to a large public without regard to the person" due to the owner's own decision.

If we draw a parallel between this stadium decision and access to a social medium, the similarities are striking. Participation in social life is

also, it can be argued, mediated through participation in social media. Thus, it can be assumed that the operator's freedom of contract is restricted by the fundamental right to communication, i.e., equal treatment is necessary; this means the operator's obligation to enter into a contract for access to the social medium and to maintain this access. However, this also means that restrictions are permissible, especially in the case of serious violations of the rules of the social medium.

A certain parallel also arises from the fact that freedom of contract has been relativized from a civil law perspective by a contracting obligation, which intervenes when there is a monopoly on the part of the contracting party. This idea can also be applied to the case of social media, which operate with similar market power. However, restrictions are also possible and necessary from this perspective. The principle of proportionality has to be used also here to assess the appropriateness of such restrictions.

In summary, it can be stated that private operators of digital services are indirectly bound by fundamental rights. However, the freedom of contract guaranteed by fundamental rights must also be observed. However, access to social media and the maintenance of this access is so essential for the participation of the individual in social life that one must affirm the binding of the operator of such services to the fundamental rights of communication. It is evident, on the other hand, that limits to these fundamental rights must also be recognized.

HORIZANTAL AND VERTICAL DUTY OF THE STATE TO PROTECT THE FUNDAMENTAL RIGHT`S VALUES IN THE DIGITAL AREA

The recognition of fundamental rights as objective values led one step further: the FCC concludes from the objective character of fundamental rights and their significance for all areas of law also the obligation of the state, in particular the legislature, to actively protect the values enshrined in fundamental rights (FCC vol.39, 1, 41; vol. 46, 160, 164; vol. 49, 89, 141; vol. 53, 30, 57; vol.,56, 54, 73, etc.). This is referred to as the state's objective duty to protect, which is procedurally individualized, since the individual can assert the violation of the duty to protect via a constitutional complaint.

The duty to protect can be realized through laws with substantive, procedural or organizational provisions. This is intended to prevent the violation of fundamental rights. This applies in particular to private individuals who may violate fundamental rights through their actions or omissions. This horizontal dimension of the duty to protect can play a major role, especially in the digital sphere. The legislature is obliged to prevent fundamental rights violations and threats to fundamental rights on the network by adequate means. The German Network Enforcement Act of 2017 (BGBl. I p. 3352), which is currently being tightened, is an example of the realization of the *horizontal duty* to protect.

In addition, there is the *vertical duty* to protect, which exists in the relationship between the state and the individual. Fundamental rights must be realized and implemented by the state, particularly by the legislator. Their elaboration, i.e. the concretization of the generally formulated constitutional norm through detailed legislation, is essential to their realization.

The state is obliged to protect fundamental rights efficiently, i.e. to shape the areas of freedom through ordinary legislation in such a way that they are as efficient as possible. In doing so, the legislator has a creative leeway, i.e. the legislator can choose between different solution possibilities and solution paths, but must keep in mind the finality of the fundamental rights design, to protect the freedom of the individual as efficiently as possible. The legislator must also find an adequate solution between different conflicting fundamental rights, which corresponds to an optimal realization in the sense of "practical concordance" (Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 18th ed., 1991, paras. 317 et seq.).

Thus, the state has a duty to protect the legal valuesprotected by the fundamental rights to a sufficient extent also in relation to itself, i.e. vertically. If it does not do so, it violates the so-called "Untermaßverbot", a new expression found by the FCC (vol. 88, 203, 254) for the fact that the legislator (or other state organs) has not fulfilled the measure necessary for protection, i.e. falls short of the protection minimum.

Both dimensions of the duty to protect, the one towards other private persons, i.e. the horizontal duty to protect, and also the one towards the state itself, the vertical duty to protect, are of particular importance in the digital area. This is particularly evident in data protection and in the relationship with social networks.

The duty to protect is objective in nature, but can be enforced by constitutional complaint before the FCC. However, such an appeal will only be successful if the legislator has remained completely inactive or has obviously failed to achieve the objective of protection. In the case of the horizontal duty to protect, this restriction leads in most cases to the dismissal of the constitutional complaint. There is a greater chance of success in cases where the vertical duty to protect has been undercut. If a law already exists but offers too little protection, i.e., it violates the prohibition on falling short of the protection minimum, the FCC can determine that the law is unconstitutional and demand that it be amended, often on the basis of a so-called appeal decision. The court thereby pronounces the obligation of the legislator to carry out the rectification of the law in accordance with the requirements indicated by the FCC within a certain period of time. An important recent example is the FCC's decision of March 24, 2021[1], which declared the Federal Climate Protection Act of December 12, 2019 (BGBl. I p.2513) partially unconstitutional.

INTER-AND SUPRANATIONALIZATION OF THE DIGITAL AREA

Today, the protection of fundamental rights in Germany can no longer be understood in purely national terms. Rather, it is embedded in international fundamental rights protection, especially in the framework of the European Convention on Human Rights (ECHR). Moreover, it is overlaid by the supranational fundamental rights protection of the European Union. This complex situation can only be outlined here in a few basic remarks.

a) The ECHR and, in particular, its Article 8, which is relevant to data protection, must be used as a decisive factor in interpreting the relevant German fundamental rights. Especially since the FCC's 2004 Görgülü decision (vol. 111, 307), it has been recognized that the FCC and all courts and authorities in Germany have a duty to interpret German fundamental rights in light of the ECHR and the case law of the Strasbourg Court. Although under German law the ECHR applies in the rank of ordinary federal law due to the doctrine of transformation, it is to be used as an essential tool for interpreting the

[1] http://www.bverfg.de/e/rs20210324_1bvr265618.htm

constitution, especially the fundamental rights. As a result, questions of digitization must also be assessed from the perspective of both the fundamental rights of the Basic Law and the ECHR.

b) The supranationalization of law through EU law has an even greater impact on the area of digitization. EU law has direct application in the member states and takes precedence over national law. A limitation of the process is given in the perspective of the FCC by the fact that the so-called constitutional identity of Germany should not be affected by this (see the Lisbon ruling of the FCC vol. 123, 267). Specifically relevant to the area of fundamental rights is the EU Charter of Fundamental Rights, which applies instead of the German Basic Law when Germany, as a Member State of the European Union, implements EU law. Pursuant to Article 51(1) of this Charter, it applies in such a (quite frequent) case instead of the fundamental rights of the Basic Law. While the Court of Justice of the European Union advocates a broad application of Art. 51(1) of the Charter, the FCC narrows this scope and limits it to cases in which German law is fully harmonized, "determined" by EU law (FCC vol. 133, 277-377).

Of particular importance are the law of data protection, concretized by the General Data Protection Regulation, which is directly applicable in the EU Member States, and also other secondary law, in particular the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 on the European Electronic Communications Code (recast)[1] .

Important decisions of the FCC, such as in particular the two decisions on the right to be forgotten of November 6, 2019 (vol. 152, 152-215 (I) and vol. 152, 216-274 (II)). They are clear evidence of the increased influence of supranational law on the German constitutional order.

Without going into further detail on this subject at this point due to lack of space, it can be stated that the subject of the digitalization and constitutional law can only be grasped more from an integrated perspective of national and inter- or supranational law.

[1] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3A4379983.

CONCLUSIONS

Digitalization is of the utmost importance for the state and society. In constitutional law, the area of fundamental rights is particularly affected by this. The solution to the questions arising from these new technological developments can be found with the help of the constitutional concepts developed so far, which expand the function of fundamental rights. Thus, there is no change in constitutional law, but the principles developed by case law, in particular by the Federal Constitutional Court, have proven to be useful to adequately regulate new developments.

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RUSSIA, THE EUROPEAN UNION AND NATO. FLEXIBILITY AND FIRMNESS

Heribert Franz KOECK [1]

Abstract:

The political system of Russia as it has been built up by Putin and which favors the enrichment of a tiny minority around Putin depends on the latter's ability to keep the standard of living of the average citizen on an acceptable level. This has worked during the first years of Putin's rule at the turn of the millennia, but was then due to Russia's rich income from the export of oil and gas. At that time, the Putin government missed the opportunity to modernize Russia's infrastructure; and when the price of oil and gas on the world market fell to an unexpected low for an unprecedented length of time, Putin was not able to keep the standard of living at its former level. Since this led to protests and was likely to endanger Putin's rule in Russia, he accused "foreign powers" with interfering in Russian affairs and of threatening the "natural Russian interests" in former Soviet republics bordering on Russia.

Ever since the tensions in the Caucasian region originating from Russia's support to separatists who really or allegedly wanted break away from Georgia resulting in the Caucasian War of 2008, Putin has tried to destabilize other successor states of the Soviet Union if their governments were tending to the West and expressed aspirations to becoming integrated into the European Union and members of NATO. Ukraine is an alarming example of what could happen to these countries if they ignore Putin's wishes.

The West is called upon to render, to such countries, all the support necessary to withstand Russia's pressure. This would keep Putin's foreign ambitions at bay because he is not eager to get into a serious conflict with the West, a conflict which would be likely to undermine the domestic political system in Russia and endanger the grip of Putin and his clique on the remaining wealth of Russia. For this reason, Putin's military posturing should not be taken too serious and should not keep the West from standing up against any of Russia's imperialist threats.

Key words: *China; Balance of Powers; Disinformation campaigns; European Union; Fake news; Georgia; Intervention into internal affairs; NATO; Putin; Russia; Separatism; Social media; Soviet Union; Subversive action and agitation; Syria; Turkey; Ukraine; United States.*

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INTRODUCTION

If somebody should wonder why the title of this paper does not run "The European Union, NATO and Russia", and why Russia is named first and not last, I can assure him that of course the European Union is central to our considerations. But at the same time I want to emphasize that the future of both the European Union and NATO, or, from a global view, the United States will be intimately connected with the way by which relations with Russia will be conducted.[1]

May be that some will say "Do not forget China" or even "China is the bigger problem for the future"; but even relations with China will be dominated – or at least, as in the case of the United States, strongly affected – by considerations concerning the situation in Eastern Europe and Western Asia. According to a joke stemming from the time of the "old" Cold War, Europeans are less concerned about China because before the latter could occupy Europe it would have to occupy – then: the Soviet Union, now: – Russia). In contrast, China is no natural strategic barrier against Russian aggression.

That Russia has become aggressive was shown by its occupation (or rather annexation) of the Crimea in 2015 and its continuing military support for the pro-Russian insurgents in the Eastern part of the Ukraine since 2014, as well as by its armed interference in Syria. In all three cases the justification invoked by Russia was nothing more than a pretext. As regards the Crimea, Russia claimed that historically the peninsular has always belonged to Russia and had only unjustly been given to the Ukraine by the then Soviet leader Khrushchev in 1954. Russia's support to the insurgents in the Ukraine, the argument was that the people in the Eastern part the Ukraine were Russian-speaking and therefore, in fact Russians, i.e compatriots subjugated by the Ukrainian regime.

Both justifications are easily refuted by the fact that after the breaking up of the Soviet Union and in turn for Ukraine's renouncing its

[1] For the following cf. the numerous references to pertinent books and articles given in encyclopedias and other currant works of information as well as the numerous contributions and articles published on the issue in Journals and Collection of Papers. Not completely up to date but still informative are the contributions to Daniel S. Hamilton and Stephan Meister (eds.), *The Eastern Question. Russia, the West and Europe's Grey Zone, Center of Transatlantic Relations*, Paul H. Nitze School of Advanced Studies, Johns Hopkins University / German Council on Foreign Relations, Washington, D.C.: Center for Transatlantic Relations, 2016.

status as nuclear state a quadruple agreement of 1994, which besides Russia and the Ukraine also included the United States and the United Kingdom, guaranteed the territorial integrity and the political and economic independence of the Ukraine and thus consciously waived any rights to question the unity of the latter in the future. Russia's actions to the detriment of the Ukraine since (at least) 2014 are in flagrant contradiction to its obligations under that agreement[1] as well as of the Treaty of 1997 by which the partitioning of the former Soviet fleet in the Black Sea and the status of the Russian navy in Crimea were laid down.

In Syria, finally, Russian military intervention was justified by the call for support from the Assad regime and therefore by the allegedly legal government of Syria, notwithstanding the fact that at the time the Assad regime only controlled small parts of Syria and that its opponents had already set up a new government that was supported by the greater part of the international community with legitimate stakes in Syria.

All these Russian activities and the clearly anti-Western stance taken by Russia within and outside the United Nations and its Security Council have caused observers to speak of a "new" Cold War.

In 2021, the concentration of Russian troops along the borders of Ukraine and the demonstration of Russian warships in those parts of the Black See which are adjacent to the Ukrainian coast as well as the statement by a speaker of the Russian government that it was Russia's right to interfere in other states if Russian citizens there suffered from suppression or civil war where interpreted by the US administration and by governments in the European Union as an act of intimidation of Ukraine, if not a threat to Ukraine's territorial integrity.

European public regards this development with apprehension. In contrast, people in the United States – with the exception of academic experts in World politics and politicians with comparative expertise – still widely regard Eastern Europe and Western Asia as an area

> Whe[re] folk in Turkey, up in arms,
> Far off, are 'gainst each other fighting[2],

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[1] Also referred to as the "Budapest Memorandum" of 5 December 1994, because it was part of the transactions of the OSCE Conference then held in the Hungarian capital.

[2] Quotation from Goethe's Faust, Part I, Easter Promenade. The quotation is wrapped up in the statement of a complacent European burgher:

> "On holidays and Sundays naught know I more inviting
> Than chatting about war and war's alarms […]
> Then joyful we at eve come home again,

and, for this reason believe that such a distant crisis would be of no direct concern to them, forgetting to recall the famous words by John Donne (1572-1631):

No man is an island,
Entire of itself.
Each is a piece of the continent,
A part of the main.[1]

However, European public apprehension is not so much based on information about the present situation and its background than on the recollections of the "old" Cold War and the threat the Soviet Union and the Eastern bloc had posed to the West in general, and to the "free countries of Europe" in particular, a threat that could only be fended off by the balance of terror, i.e. by the mutual conviction that a nuclear war would be disastrous for all sides. This recollection and the rearmament of Russia after the nineteen nineties followed by her use of force against various states the independence of which was due to the collapse of the Soviet Union (Moldova, Georgia and Ukraine) nursed the fear that Russia was but the former Soviet Union risen from the dead.

A serious examination of the basis of Russia's present national and international policy reveals, however, notable differences between the "old" and the "new" Cold War. Though the Soviet Union was, and Russia is, intent on the position of a world power with a big nuclear arsenal at its disposal, the ideological background for this quest is quite different.

The Soviet Union originated from the Soviet Revolution in 1917; and – after its consolidation in Russia – from the export of Bolshevik ideas to the non-Russian part of the Tsarist Empire where governments were forcefully established by Soviet agents. These Soviet governments were easily caused to resign independence of their particular state in favor of a Soviet Union run centrally from Moscow under Lenin and Stalin. Thus the old "Greater Russia" was re-established.[2]

And peaceful times we bless, peace long-abiding."

[1] John Donne, *Devotions upon Emergent Occasions, Meditation XVII, Medidations* (London, 1661).

[2] How much the Soviet Union was identified with Russia is shown by the fact that until the late eighties of last century there did not exist a separate Communist Party in Russia but only the Communist Party of the Soviet Union, which took care also of Russian agendas. This position corresponded to the fact that the name of Russia was not

How much the Soviet Union was identified with Russia is shown by the fact that until the late eighties of last century there did not exist a separate Communist Party in Russia but only the Communist Party of the Soviet Union, which took care also of Russia agendas. This position corresponded to the fact that the name of Russia was not contained in the official name of the Soviet Union. In the years immediately following the Russian revolution, many Communists were euphoric about the chance of a "World Revolution" and about thereby expanding the Soviet Union to all countries which should choose the Bolshevik way, and with such a vision the idea of a "Russian Soviet Union" was incompatible.

Only after this vision fainted, it was necessary for Stalin to switch to the idea of "Socialism in one country", an idea which permitted him again to label the war with Hitler's German (1941-1945) as the "Great Patriotic War". After the Second World War, all that the Soviet Union could do, was to set up Communist Regimes in countries occupied by the Red Army. Although it was possible to make these countries of the Eastern bloc join the Warsaw Pact as its military basis, the latter and the Eastern bloc as such collapsed with the political turn in Europe in 1989 and all Satellite States became part of the liberal and democratic states acceding at least to the Council of Europe and – most often – also NATO and the European Union. When the Soviet Union disintegrated in 1991 and its former republics became independent, most of them, including Russia, joined the Council of Europe, with the exception only of Belarus, where the authoritarian regime since then refuses to adapt to the pattern of liberal democracy. The Baltic countries, which had once been part of the Russian Empire and had become independent after the First World War, and which had been forcefully integrated into the Soviet Union after the Hitler-Stalin Pact of the 1939, declared their independence even before the formal dissolution of the Soviet Union and considered themselves to be in continuity with the pre-Soviet states; they joined both NATO and the European Union.

Unfortunately, development of Russia into a full-fledged liberal democracy was hampered right from the beginning by the chaotic

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transition period of her economy in the nineteen-nineties which did not result in a free market system but only in the enrichment of those members of the old system who were shrewd enough to acquire huge former state enterprises. Their number was rather small but their economic power and political influence so great that they became to be called oligarchs. They were not interested in a free market in which any enterprising person or group of persons could participate; rather, they shared their gains and kept all others from competing with them in the market. Since they had been part of the old system, they naturally took over what had already before proven useful and what characterized the old system to a high degree, namely corruption. Corruption is inherent in all authoritarian regimes; and for this reason the oligarchs were not interested in a free society and a democratic system, because that would have meant a check on their economic and political power. Then Russian President Boris Yeltsin (1991-1999), while a key factor in the overthrow of Communism and in the dissolution of the Soviet Union and originally a guarantor for keeping Communists at bay became little more than an executor of the will of the leading oligarch circles.

Towards the end of the nineteen nineties, the standard of life in Russia had reached a low point, and so had public sentiment. It became imperative to find a political figure that would be strong enough to stop the economic decline without endangering oligarch interests. The man considered able to do so was Vladimir Putin (*1952). The transfer of power from Yeltsin to Putin in 1999 went smoothly, Yeltsin and his family having been guaranteed legal immunity and freedom from any molestation in the enjoyment of their by then accumulated wealth. But Putin differed from Yeltsin in one decisive point. While Yeltsin had administrated Russia by the principle of laissez-faire in favor of the oligarchs and their clientele, Putin believed that some reforms where necessary in order to raise the general standard of living and thus to pacify the people and prevent them from becoming restive. Moreover, Putin was convinced that such reforms could only be introduced by a state strong enough to carry them through against any political opposition, even that of one or the other oligarch who might believe that he knew better. Putin was able to convince most of the members of the oligarchy (of which he and his family unobtrusively became to be a part) that their interests were best served by him; and those who chose to oppose him politically were easily quieted by bringing criminal charges

against them, often because of an alleged infringement of tax laws, and having them sentenced to long imprisonments.

In his early years of presidency, Putin thus brought about a twofold social contract. The contract with society at large was based on the promise of a better life for everybody through reforms to be brought about by the President. In return, society at large had to give continuous support to Putin's politics. The contract with the oligarchic stratum was based on maintaining its members in the enjoyment of their economic privileges, again in return for their support of Putin's politics and their recognition of Putin's power as the sole guarantee of their privileges.

Success of this twofold social contract was of course dependent on Putin's ability to deliver on his promises. As regards its second part, this was not difficult as long as the first part worked satisfactorily. However, this was greatly dependent on Russia's income from oil and gas exports and this again on the stability of the world-wide oil price (and the related price of gas). During the greater part of the first decade of two-thousands all went well. Average standard of life in Russia increased and with it grew Putin's popularity. But in the wake of the world's financial crisis caused the busting of the bubble of real estate speculations and the down break of affected banks in 2008, and the resulting world-wide economic crisis, oil suffered an unexpected deep drop in price for an unexpected long period. This made it impossible for Putin to live up to his promise of a better life for all. In consequence, public support for Putin dwindled away and he was confronted with public mass protests. This was a danger to his ability to fulfil the second part of the social contract which concerned the upper class of the oligarchs and therefore also a danger to his political survival.

For this reason, Putin resorted to the classical means of authoritarian leaders for diverting the public interest from their domestic political failures, namely by engaging in international adventures where they can easily have some success and appeal to the national pride of the people. This caused him to alter Russia's stance towards the West. As late as 2005, at the World' summit meeting held in the framework of the United Nations General Assembly, Russia (and – by the way – China) supported the right of the international community to interfere in the internal affairs of one of its members if war or civil strife threatened the life of its people. This Responsibility to Protect (also abbreviated "R2P") was reaffirmed by the Security Council in 2006. Since the Security

Council would have to mandate such measures of protection, Putin probably believed that thereby unilateral actions of Member States, such as taken in 2000 by the NATO in the Kosovo, would be ruled out for all future. What he did not take into account was that the fact that the R2P-regime – as the regime of the United Nations Organization as a whole – presupposes that all Members of the Security Council act in good faith and do not obstruct the Council's functioning.

Support of Putin's Russia (as well as of China) for R2P stopped as soon as the results brought about by this tool seemed not to be in Russia's (and China's) interest. When the NATO nations intervening – with a mandate of the Security Council (!) – in the civil war in Libya considered it necessary for the protection of the Libyan people to support the downfall of the Ghaddafi regime, Russia and China considered this to constitute an illegal intervention in the domestic affairs of Libya, afraid that this could constitute precedence for future cases were people suffered from suppression by their government. As a consequence, Russia and China blocked Security Council mandates for R2P in the Syrian civil war, in order to save Syria's President Baschar Hafiz al-Assad from being ousted from his office by a coalition of oppositional groups. Putin even invoked "invitation by the legitimate (i.e. Assad's) government of Syria" in order to militarily intervene on Assad's side, thereby securing Russia's military basis in Syria. The West (and especially the USA under President Trump) was not prepared for a military show down in Syria and abandoned its and its allies' positions in Syria in favor of a triumphant Putin.

Yet, Syria was only a windfall for Putin that was caused by the conflict arising between Assad and his opposition which was encouraged by the so-called Arabic Spring, a series of protests against the governments then in power in the Arab countries, which were mostly oppressive regimes and considered responsible for the low standard of living. In its course, the leaders of Tunisia, Libya, Egypt, Yemen and Bahrain were ousted. When in Syria Assad refused to step down, the opposition sought his removal by force, and in the ensuing civil war was so successful that Assad almost completely lost control over Syria; and the government set up by the opposing factions received growing recognition.

At this point, Russia militarily intervened justifying doing so by claiming that Assad was the lawful ruler of Syria and the only guarantor

for a defeat of the terrorists who had set up the "Islamic State in Syria and the Iraq" and controlled great parts of these countries. Since the anti-Assad coalition was also fighting the Islamic State, the Russian argument for supporting Assad was a mere pretext. Since the West, however, refrained from direct military intervention, and Russian forces did not, in fact, fight the Islamic State but the coalition of the opposition the tide began to turn in favor of Assad and, in the end, his rule over Syria was restored.

Putin's plans for Syria might not have worked out so smoothly had the anti-Assad coalition not come under attack from another side. Turkey has never been able – not even during its long democratic period after World War II – to come to an arrangement with the Kurdish part of its population in the East of the country, due to the fact that Kemal Atatürk's Turkey had as one of her pillars Turkish nationalism. This was a consequence of the break-up of the former Ottoman Empire which had always been a multinational state bound together by the Islamic religion and the strength of the Turkish military, since the Turkish Sultan was also – at least in theory – the Calif of the *ummat al-Islām*, the All-Islamic Community. Atatürk led the Turkish resistance against the Treaty of Sèvre of 1920 which gave to Greece the Western part of the Anatolian peninsula. He set up a government in Ankara, deposed the Sultan and transferred the Caliphate's powers to the Turkish parliament. He was able to drive out Greek troops from Anatolia and succeeded in having the Treaty of Sèvre substituted by the Treaty of Lausanne of 1922 which recognized Turkey in its present frontiers.

Already in the early phase of the World War, the Ottoman Empire had decided to eliminate all non-Turkish ethnicities on Turkish territory as potential supporters of the Allied Powers. This led to the Armenian genocide as well as the persecution of other, mainly Christian, ethnicities, including, of course the Greek who constituted a noteworthy minority in the costal territories of Western Anatolia. Following the Treaty of Sèvre, Greece tried to expand its newly gained territory there into central Anatolia but was defeated by armies of the new Turkish nation state led by Kemal Atatürk, and finally was ousted from all her possessions in Anatolia which were officially lost in the Treaty of Lausanne. The Kurdish people who remained distributed among various successor states of the Ottoman Empire, namely notably Turkey herself, Syria and the

Iraq, and of which a substantial part also lived in the Iran, thus were disappointed in their hope for a national state of their own.

Since, however Kurdish politicians never renounced their goal of a united Kurdistan ("Greater Kurdistan") and who called, for the time being, for autonomous regions in each of the just mentioned states, Kurds were always regarded an internal threat to the unity and territorial integrity of the respective country and, for this reason, were denied even that autonomy which they rightly would have deserved. In Turkey, especially, all kind of arguments were made to justify refusal of their national aspirations. This went so far that some denied them their character as an ethnic entity by referring to them as mere "Mountain Turks". In consequence, they were denied the use of their native language, their own schools and their own media. Finally, the Kurdistan Workers' Party or PKK was set up as a militant political organization and an armed guerilla movement which presently is active primarily in the mountainous mountain regions of South-Eastern Turkey and Northern Iraq. Although both various Turkish governments and the PKK have twice reached agreements on a cease-fire, they never have come to a satisfactory solution of the problem which would have had to grant the Kurds, as a minimum, autonomy and respect for their human rights.

Towards the end of the democratic rule by parties, which were all more or less in the tradition of "Kemalism" as they accepted secularity of the state as another pillar of a modern Turkey, and with the ascendency of the Justice and Development Party (AKP) under Recep Tayyip Erdoğan, the latter succeeded in turning the clock back and step by step transform Turkey in an Islamic state. Erdoğan's AKP strongly relies on conservative segments of the Turkish society, especially in the rural area of Anatolia.

Internally, the economic situation deteriorated because Turkey came to suffer from increasing corruption. After strong anti-government protests following a gigantic corruption scandal in 2013, Erdoğan's government turned to censorship of the radio, television and (what had remained of) the free press and to the restriction of the social media. As regards the world-wide net, access to sites that contained Erdoğan critical texts was restricted. Disassociation from his old ally Fethullah Gülen, earlier Turkish President, led to a purge of the latter's supporters in the administration, the military and the judiciary. Following an abortive attempt to overthrow Erdoğan by a military coup d'état in 2016, Erdoğan

proclaimed a state of emergency and continued with additional purges of civil servants and members of the armed forces. The following year, Erdoğan formed an alliance with the far-right Nationalist Movement Party (MHP) in order to accomplish his goal of transforming Turkey from a parliamentarian to a presidential system. Having obtained approval of this constitutional change in a referendum, Erdoğan united both the function of the head of state and the head of government.

While at the beginning of his rule (then as prime minister) Erdoğan brought about economic recovery by promoting investments in infrastructure project, appeared to respect democracy, pursued Turkey's aspirations to a membership in the European Union, and even seemed ready to come to terms with the Kurds who were permitted to form a party of their own which was successful at the ballots and thus secured Kurdish representation in Turkey's parliament, all these acts of liberalization turned out to be only maneuvers designed to throw dust in the eyes of international observers and Western governments.

The peace negotiations with the PKK, opened in 2012, as well as the accompanying ceasefire broke down in 2015, and the conflict escalated further. Main objective of Turkey's involvement of in the Syrian conflict was to hit down on the Kurds who formed part of the Syrian Democratic Front in the aria south of the Turkish-Syrian border. These activities and the fact that Erdoğan celebrated the fall of Constantinople and the end of the Eastern Roman Empire as most important steps in world's history and referred to the unsuccessful siege of Vienna by the Ottoman in 1683 as a deplorable setback in European history have caused observers to qualify Erdoğan's international policy as Neo-Ottoman. Though Turkey is a member of NATO, she has procured defense missiles from Russia over strong opposition from the alliance. Unfortunately, Turkey is an important factor in regulating refugee flows from Africa and Asia to the European Union for which the latter pays to Turkey high financial indemnification and support, while Turkey uses her advantageous position for political and economic blackmailing of the Union and its mostly vulnerable Member States. Most recently, this and the fact that Turkey's foreign policy is increasingly characterized by expansionism and its internal policy by Erdoğan's authoritarianism and the violation of human rights connected with it are a continuous strain on Turkey's relations with the European Union and the United States of America. Probably as a reaction to the

present Turkish stance on human rights questions the United States have just recently (2021) recognized the measures taken by the Ottoman Empire against its Armenian minority during World War I which resulted in the extinction of substantial parts of it as genocide.

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If Erdoğan's foreign policy has been called Neo-Ottoman, Putin's foreign policy may be labelled Russian Neo-imperialistic. Putin has openly declared the dissolution of the Soviet Union to be the gravest error and the greatest tragedy of the twentieth century. For this reason, he has decided to regard all states that formerly have been republics of the Soviet Union as pertaining to the Russian sphere of influence. For him, support rendered to the Ukraine for the retrieval of the Crimean peninsula would constitute aggression against Russia, and any assistance given by the West to Western-oriented governments in this area would be considered a provocation of Russia.

Putin's policy is mainly based on ethnic differences which are fueled by Russia and result in a conflict between the major part of the population and the ethnic minority/ies. In these cases, Russia always supports the minorities and encourages them to break away from the country in question. If the central government takes measures to ensure the unity of the country and these measures result in armed clashes with the rebels, Moscow threatens to, or actually does, interfere militarily on their side. The first example was the war against Georgia in 2008 for which the aspirations for independence of Abkhazia and South-Ossetia offered the welcome basis.

It is not possible in this context to lay out in detail the actions taken by both sides. According to analysts, military intervention in Georgia had been prepared by Moscow for a long time. The way by which the war was started followed the Russian strategy laid down over the past years, including the provocations which caused the Georgian army to march into South Ossetia, which in turn was followed by Russian military intervention in Georgia. Russia then recognized the declarations of independence by both Abkhazia and South Ossetia. This recognition was followed only by a very few members of the international community.

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A similar situation exists in Moldova. There, declaration of independence from the Soviet Union in 1991 was even preceded by the de facto breakaway of the East bank of the Dniester under the name of Transnistria in 1990. Towards the end of 1991 clashes started between Moldovan police and Transnistrian forces which were supported by the Russian army. This escalated into a war between both parts of the country in March 1992, and again Russia intervened militarily on the Transnistrian side. At the end of July, a ceasefire was accepted and a security zone was set up, to be controlled by a tripartite peacekeeping of the parties to the conflict and Russia, although the latter could not really be considered an impartial third party.

Russia also supported the separatist movement in Gagauzia. In the 1994 parliamentary election, the nationalist Popular Front which had favored a union with Romania, lost its majority and was replaced by Democratic Agrarian Party which tried to moderate ethnic tensions by a new constitution giving autonomy to both Transnistria and Gagauzia. In December 1994 the Moldovan parliament adopted a Law on the Special Legal Status of Gagauzia.

Yet, Moldova did not regain control of its separatists regions. Since then, the (not reformed) Communist/Socialist Party of Moldova and pro-European alliances have alternatively tried to gain the upper hand. So far, none of them have been able to either ensure or block for good the aspirations of Moldova for a closer relationship with European Union. It is Russia's interest to keep Moldova in a status of instability.

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Presently, the Ukraine constitutes for Russia the most important neighboring country. After her independence in 1991, she was the third nuclear power of the world. She declared her readiness to become a nuclear free country in exchange for guarantees of her territorial integrity by Russia, the United States and the United Kingdom. Relying on these guarantees was, however, a grave error, because Russia's political interference, in particular through Ukraine's dependence on Russia for gas supply, steadily increased, especially with Putin.

The outcome of presidential elections in 2004 which was regarded as pointing the future way either towards Russia or towards the West was clearly manipulated by electoral fraud in favor of the candidate Viktor Yanukovych supported by Russia, the so-called orange revolution succeeded in having the election repeated in an orderly way. In this new round, pro-Western candidate Viktor Yushchenko – who had only narrowly survived an attempt to poison him – was elected. Putin regarded this a personal and political set-back. Yushchenko appointed his ally in the orange revolution, Yulia Tymoshenko, prime minister, but later dismissed her on allegations of corruption. However, Yushchenko lost much of his support by the public. He was replaced in the 2010 presidential elections by Viktor Yanukovych.

Against the will of the majority in the Ukrainian Parliament, but upon pressure from Russia, Yanukovych at the last moment refused to sign an association agreement that had been worked out with the European Union and instead chose to establish closer ties with the Russian Federation. The agreement was expected to be signed during the EU summit in Vilnius on 28–29 November 2013, which was also attended by Viktor Yanukovych, but at the last minute he refused to sign it, following pressure by Putin to abandon the European perspective and to join the Russia-led Eurasian Economic Union. However, this sparked off the Euromaidan ("Eurosquare") protests in November 2013 which the government was not able to put down even by force. President Yanukovych tried to come to a Russian supported compromise with the opposition, on 21 February 2014 agreeing to constitutional changes and early elections to be held by December. Nevertheless, only the day after, 22 February 2014, Parliament voted to remove him and set a presidential election for 25 May 2014. Following this, Yanukovych believed that he was not safe anymore in Kiev, and fled the country, seeking exile in Russia. The election called for by Parliament was won by pro-European Petro Poroshenko by an absolute majority of votes.

In the meantime, however, Putin had decided to take military action against the Ukraine. First, he brought in armed forces into the Crimean Peninsula through the Russian naval basis in Sevastopol and advised Russian troops and intelligence agents to disarm Ukrainian forces and take control of Crimea. After a controversial referendum on 16 March 2014, Crimea was officially annexed by Russia two days later.

Separately, self-declared local militia supported by pro-Russian protestors and led by Russian agents seized government buildings, police and special police stations in several cities in the Russian-speaking Eastern parts of Ukraine and, after holding illegal status referenda, set up the Donetsk People's Republic and the Luhansk People's Republic with the military support of Russia. Since then, the situation in these areas has constantly deteriorated because of Russia's tactic to enter into negotiations with the West for a peaceful solution of the conflict, but neither Russia nor the separatists ever lived up to agreements reached, and profited by the practically unilateral withdrawal of Ukrainian troops which only weakened the Ukrainian military and political position.

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These difficulties notwithstanding, Ukraine has established closer ties with the European Union. The political part of the Association Agreement was signed on 21 March 2014 by the Prime Minister of the newly installed government. The economic part of the Agreement was signed on 27 June 2014 by then newly elected President, Petro Poroshenko. Finally, on 1 January 2016, Ukraine joined the Deep and Comprehensive Free Trade Areas *(*DCFTA*)* with the EU. On 11 June 2017, visa-free travel for Ukrainian citizens to the Schengen area was also agreed upon, and the Association Agreement formally came into effect on 1 September 2017. The political goal to seek integration with, and accession to, the EU was enshrined in the new Constitution of 21 February 2019. In the Eastern Partnership and the European Neighborhood Policy of the European Union, Ukraine is a priority partner.

Notwithstanding Poroshenko's merits in promoting closer ties with the European Union, he did not succeed in sufficiently suppressing corruption and securing a completely independent judiciary. He was not able to maintain his originally high degrees of trust and sympathy. As a consequence, in the 2019 presidential election he was defeated by Volodymyr Zelenskyy by 73 per cent to 25 per cent for Poroshenko. In the 21 July 2019 parliamentary election, Zelenskyy's political party, Servant of the People, won the first single-party majority in modern Ukrainian history.

Zelenskyy was intent on reaching a settlement with Russia on the East-Ukrainian conflict. This was not honored by Putin who continued to exercise pressure on Zelenskyy and his government. The situation deteriorated at the turn of the years 2020/2021, Putin ordered maneuvers of the Russian army and navy in the vicinity of Ukraine and had more than 50.000 soldiers deployed at the Ukrainian border. A Russian spokesman declared that his country was ready to intervene in any country where its citizens were in danger. This was an additional threat because Russia had liberally granted her nationality to all Russian speaking persons who had applied for it. By this political tactic Russia sought to be able to claim that Russian citizens were maltreated, no matter where they lived. It had already been used in the conflict with Georgia, where Russian citizenship had been granted to people in Abkhazia and South-Ossetia.

Zelenskyy appealed for help from EU and NATO, stating that he had come to the conclusion that membership in NATO would be Ukraine's only choice for keeping Russia at bay. Moreover, he expressed his opinion that under the present circumstances Ukraine would be forced to seek nuclear re-armament. In this crisis, Ukraine received political support both from the United States and the European Union. Finally, in April 2021, Putin announced that Russian troops would withdraw from the Ukrainian border following the "successful conclusion of the maneuvers".

* * *

That membership in NATO and the European Union can reduce the probability of Russia's intervention even in countries which have a substantial Russian-speaking minority is demonstrated by the Baltic States. So far, Russia has not attempted to refer to them as her citizens and to threaten to interfere in the affairs of one or the other Baltic State on the allegation that she has to protect them. The Baltic States benefitted from the fact that they sought membership in NATO at a time when Russian state of affairs limited her to protesting on the ground that the West would once (at the time of the reunification of Germany) have promised not to extend NATO membership to territories that originally belonged to the Soviet Union's sphere of interest. Clearly, former Soviet republics that had gained independence with the dissolution of the Soviet

Union did not consider themselves bound by such an understanding; and the changes that had taken place with regard to the Warsaw Pact and the liquidation of the Soviet Empire would in any case have offered sufficient grounds for applying the recognized principle of *rebus sic stantibus*. Moreover, Russia could not have seriously claimed that the enlargement of NATO constituted a threat to herself. Rather, it could be seen as a guarantee against a revival of imperialist aspirations by Russia that might have constituted, and in fact have turned out to constitute, a constant threat to the military, political and economic independence of former Soviet republics.

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From this point of view, the question may be raised why other countries like Georgia or Ukraine, have missed the window of opportunity for acceding to NATO at a time when Russia would have had to limit herself to protests. However, the question has to be put not to these countries but to the European Member States of the alliance which – when at the NATO summit of 2008 the aspirations to membership of these countries were not only discussed but also strongly supported by the United States and Eastern European members of the Alliance – opposed this idea mainly because they did not want "to anger" Russia and shied away from the economic burdens that would have been connected with the need for bringing these countries to adopt the necessary reforms in order to reach Western standards. This shortsightedness could be found even with members of the European Commission of the time who seemed never to have reflected the fact that generous economic support to, in particular, Ukraine would cost much less than only one day of pan-European war and its aftermath.

Another indication for the shortsightedness of important Western countries is their hanging on to projects which at the time of their development were an indication of their readiness to co-operate with an internally free and democratic and in the international field peaceful and reliable Russia. Unfortunately, however, Putin's Russia has turned out, in the meantime, to neither be internally free and democratic nor in the international field peaceful and reliable. The presently most contended project is Nord Stream 2 which is an offshore gas pipeline directly connecting Russia and Germany. The original Nord Stream (1) is owned

and operated by a company owned by the Russian state company Gazprom, and Nord Stream 2 is owned and will be operated by a company, which is also a wholly owned subsidiary of Gazprom. Since Nord Stream 2 will increase the energy dependence of Germany and other central European states on Russia, completion of Nord Stream 2 presently still under construction is opposed by other important European countries like France and will come under sanctions by the United States. Still, Germany clings to the project by arguing that economic and political questions must not be mixed. This, of course, is an untenable position. But long-term German Chancellor Angela Merkel (since 2005) hesitates to stop the project at its last stage because she does not wish to break the (still acceptable?) relations with Russia and to give Putin an excuse for retaliations. But by this she makes Germany and other European countries vulnerable for "energy blackmailing". The idea that Russia would not severe the energy ties with Europe even in an international crisis because she relies heavily on the payments for her energy export is not more than wishful thinking. To expect that in times of an imminent military confrontation exports of energy and payments in return will continue as usual, is naïve, to say the least.

* * *

Of course, it may be fairly assumed that Putin is not bent on a European (or even global) war, because this would be incompatible with his first goal, namely to keep the leading economic clique of Russia in the enjoyment of their profits. Notwithstanding his martial rhetoric, this will limit his external adventures to cases where he does not have to count with military confrontation with NATO. This means that he will go only as far as he believes to be able to do without creating serious consequences for Russia and therefore for him.

The question might be asked whether it would not be more prudent for him to come to terms with the West instead of constantly confronting it. In particular, why is it that Putin cannot accept the integration of the Ukraine (or of Georgia) into the European Union and the Western defense alliance? The answer lies in the internal affairs of Russia; and by understanding this we return to the beginning of this paper.

Putin has set up an authoritarian regime with the goal to remain in power at least until 2036. Already, changes in the Russian constitution have permitted this; and there cannot be any doubt that he will be able to adapt the constitution again to his wishes to stay in power even beyond. But as stated above, Putin can secure his power either by guaranteeing the Russian people lasting prosperity or by shifting the blame to others, in his case to the West which is allegedly threatening Russia from all sides. But even if he would be able to keep domestic standards of life sufficiently high, people would put in question Putin's authoritarian regime with its constant suppression of freedom (especially) of the media and its continuous violation of human rights of political dissenters, if there existed in Russia's neighborhood societies which were able to enjoy not only economic prosperity but also those freedoms which characterize liberal democracies. Therefore, in order to prevent especially Ukraine from giving an undesirable example of peace, liberty and welfare not conflicting with, but promoting, each other Putin will do everything to undermine Ukraine's stability.

In addition, Putin has begun to assert that the idea of a peaceful international Community based on free and democratic societies is only a chimera and that the countries of the West, especially those of the European Union, follow ideas which are not workable and for this reason are doomed to fail. Putin argues that democracy – unless it is "steered" (*"gesteuerte Demokratie"*) – is not able to secure law and order and guaranteeing "good life" for everyone. What Putin is dreaming of is the international community as it had been in the nineteenth century, with little emphasis on freedom and democracy but with a balance of world powers all with recognized spheres of influence. What Putin does not take into account is that this system of imperialism could flourish only in the heydays of colonialism and that, in the end, it led to the real catastrophes of the twentieth century, namely to the two world wars.

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What is alarming, however, is the fact that even in the West some political leaders incline to an "illiberal democracy" in order to stay in power. Within the European Union, examples have been given so far by Hungary and Poland; and in America – equally disturbing but even more alarming – by the United States under the presidency of Donald Trump.

Putin gives all kind of support to centrifugal movements in- and outside the European Union. This has been demonstrated by the support given by his secret services to the presidential campaigns of Trump in the United States in 2016 and 2020 with the purpose of dividing the country and foster hatred between people of different races. Most probably, the success of the Brexiteers in the United Kingdom was also due to Russian anti-EU propaganda through various social media channels. It is deplorable that conservative politicians like Boris Johnson were, and still might be, susceptible to these destructive advances because they indulge in reminiscences of their country's imperialist greatness although these times have long since passed. Given the fact that this Russian interference is not conceded by the Putin administration, there are still gullible people who are ready to believe information thus spread and to act (vote, demonstrate) accordingly.

Moreover, Putin can rely on some politicians in the West who are attracted by his autocratic leadership and are ready to openly show their sympathy with Russia and its system, such as Czech President Miloš Zeman who already earlier has been labelled "one of the European Union's most Kremlin-friendly leaders" and who is presently accused of having affronted the Czech government by casting doubt in the Czech TV on the "irrefutable evidence" provided by Czech counterintelligence service that Russian agents were involved in causing an explosion at an arms depot in 2041. Pavel Fischer, chairman of the Czech senate committee on foreign affairs, defense and security, said that Zeman's doubts had damaged the country's reputation and that "with his manipulative statements, Zeman directly undermines the defense of his own state."[1]

The most recent example for Russia's subversive agitation on a large scale was and is the spreading of farfetched conspiracy theories in the context of pandemics and the fact that there are enough credulous people who lend credence to them. According to a report published by the European Commission, Russia (as well as China) is actively spreading fake news regarding vaccination against the Corona virus alleging that the vaccines produced in Western countries are less effective than those produced in Russia or China, and therefore less

[1] The case has been summed up by *Euronews*, 27 April 2021, https://www.euronews.com/2021/04/26/czech-president-casts-doubt-over-russian-involvement-in-deadly-blast.

suited for (in particular) developing countries. Their stronghold in Europe is the region of the West Balkan, and here especially Serbia.

Again, the only purpose of disseminating these theories is to destroy the trust of the people in their democratically elected governments, a goal that unfortunately can be attained even among social segments in free and democratic countries if some people there are ready to turn a deaf ear to reasonable arguments. It is most deplorable that there even exist populist parties who jump on this band-wagon under the pretext that all measures taken against the pandemic have only one purpose, namely to take away human rights and fundamental freedoms from the man in the street. But it is even more disturbing that renowned jurists support these attempts to curtail measures of health security taken by the government and that even constitutional courts are vulnerable to these ideas whenever their case law is based on rigid constructions of positive law instead on reasonable considerations.

CONCLUSIONS

As long as reason can control emotions, it is unlikely that Putin will attend his goal of disassociating the Western States presently members of the European Union and/or NATO if the latter stay – as stated in the title of the present paper – both *flexible* and *firm* toward Russia. However, if today polls in Germany give a chance, in the forthcoming general elections to the *Bundestag*, to the parties left of the Christian Democratic/Social Union (*CDU/CSU*), and if a future German government might be formed by the Green Party *("Die Grünen"*), the Social Democrats (*SPD*) and the Left-wing Party (*"Die Linke"),* nothing can be excluded, not even an attempt to have Germany leave the NATO. This would only pave the way to a Russia-dominated Europe.

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CONSIDERATIONS ON THE CONTRACT OF INTERNATIONAL CARRIAGE OF PASSENGERS BY RAIL AS PROVIDED BY THE CONVENTION CONCERNING INTERNATIONAL CARRIAGE BY RAIL, BERN, 1980

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Ștefan SCURTU[2]

Abstract:

The most important international convention on the international rail carriage contract is the Convention concerning International Carriage by Rail, concluded in Bern in 1980 (designated as C.O.T.I.F.). Romania ratified C.O.T.I.F. in 1983. The European Union joined C.O.T.I.F. in 2011. One of the most important changes to C.O.T.I.F. 1980 was the one made by the Vilnius Protocol of 3 June 1999, which entered into force in 2006; due to the importance of these amendments, at present the usual name of this Convention is "C.O.T.I.F. 1999". C.O.T.I.F. 1999 includes the following documents: a) the Convention as such, which governs the functioning of the Intergovernmental Organization for International Carriage by Rail (designated as O.T.I.F.); b) the Protocol on the Privileges and Immunities of O.T.I.F., annexed to the Convention; c) the seven annexes to the Convention, which establish a uniform railway law; one of these annexes is entitled "Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)" and constitutes Appendix A to the Convention. The Uniform Rules concerning the Contract of International Carriage of Passengers by Rail regulate the following matters: the scope of these rules, the conclusion and performance of the contract of carriage, the carriage of hand luggage, animals, checked baggage and vehicles, liability of the carrier, liability of the passenger, the exercise of rights, relations between carriers. In accordance with art. 5,

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the CIV rules are imperative, the contracting parties not being able, in principle, to derogate from them.[1]

Keywords: *international carriage by rail; Bern Convention; Vilnius Protocol; uniform rules; binding nature of uniform rules.*

PRELIMINARY ISSUES

An international convention which plays a major part in the international rail carriage is the Convention concerning International Carriage by Rail, concluded in Bern in 1980[2]. It is usually referred to by the acronym C.O.T.I.F. 1980, consisting of the initials of its French name (Convention sur l'Organisation des Transports Internationaux Ferroviaires)[3].

C.O.T.I.F. entered into force on 1 May 1985. Romania ratified the Bern Convention concerning International Carriage by Rail in 1983[4], and the European Union joined C.O.T.I.F. in 2011[5]. So far, C.O.T.I.F. 1980

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[2] On the history of this convention, see O. Manolache, *Dreptul transporturilor* (Bucharest: All Beck, 2001), 97.

[3] The Parties to this Convention have established the Intergovernmental Organization for International Carriage by Rail (referred to as O.T.I.F.); established on 1 May 1985, the date of entry into force of C.O.T.I.F. 1980, O.T.I.F. is based in Bern and has its own legal personality (art. 1, C.O.T.I.F. 1980). Pursuant to art. 2, the purpose of O.T.I.F. is to promote, improve and facilitate, in all respects, international rail traffic. It should be mentioned that, in 1922, at the initiative of Romania, at the intergovernmental economic conference in Genoa, there was established the International Union of Railways (U.I.C.); the U.I.C. abbreviation is made up of the initials of its French name: Union internationale des chemins de fer. U.I.C. is a professional non-governmental international rail transport organization based in Paris. It currently has about 200 members (active, associated or affiliated) from five continents. It aims to promote rail transport worldwide (for details on this organization, see Gh. Caraiani and Stancu Ion, *Transporturile feroviare* (Bucharest: Lumina Lex, 1998), 269.

[4] Decree 100/28.03.1983 for the ratification of C.O.T.I.F. was published in the Official Gazette no. 23 of 1 April 1983.

[5]http://publications.europa.eu/resource/cellar/23a31dbb-189a-47e5-bb22-67b0646c0cb2.0007.03/DOC_1 , accessed 16.05.2021.

has been amended three times[1]: a) by the Bern Protocol of 1990 (commonly referred to as the "1990 Protocol")[2]; b) by the Vilnius Protocol of 3 June 1999, which entered into force in 2006[3]; c) by the Amendments of 29-30 September 2015, adopted at the 12th session of the General Assembly of O.T.I.F., held in Bern on 29-30 September 2015[4]. Due to the importance of the amendments that were made to C.O.T.I.F. 1980 by the Vilnius Protocol of 3 June 1999, at present the usual name of this Convention is "C.O.T.I.F. 1999".

C.O.T.I.F. 1999 includes the following documents: a) the Convention as such, which governs the functioning of O.T.I.F.; b) the Protocol on the Privileges and Immunities of O.T.I.F., annexed to the Convention; c) the seven annexes to the Convention, which establish a uniform railway law; these annexes contain: i) model contracts for the carriage of passengers and goods, and ii) technical requirements for railway equipment used in international carriage. Thus, pursuant to art. 6, entitled "Uniform rules", international rail traffic and the admission of railway material for use in international traffic, are governed by the following "rules": a) "Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)", which constitute Appendix A to the Convention; b) "Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)", which constitute Appendix B to the Convention; c) "Regulation concerning the International Carriage of Dangerous Goods by Rail (RID)", which constitutes Appendix C to the Convention; d) "Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV)", which constitute Appendix D to the Convention; e) "Uniform Rules concerning

[1] Regarding the most important amendments to the Bern Convention,1980, see D.A. Sitaru and C.P. Buglea and Ș.A. Stănescu, *Dreptul comerțului internațional. Partea specială. Tratat* (Bucharest: Universul Juridic, 2008), 359.

[2] Romania ratified "Protocol 1990" relating to the amendment to the Convention concerning International Carriage by Rail (C.O.T.I.F.) of 9 May 1980 by Law no. 27 of 24/03/92, published in the Official Gazette no. 55/01.04.1992 (http://legislatie.just.ro/Public/DetaliiDocument/2195 , accessed 16.05.2021).

[3] Romania ratified the Vilnius Protocol of 1999, by G.O. no. 69 of 30.08.2001, published in the Official Gazette no. 538 of 01.09.2001 (http://legislatie.just.ro/Public/DetaliiDocumentAfis/30383 , accessed 16.05.2021), .

[4] Romania accepted the Amendments of 29-30 September 2015 to the Convention concerning International Carriage by Rail of 9 May 1980 by Law no. 98 of 29.06.2020, published in the Official Gazette, Part I, no. 593 of 7 July 2020 (http://legislatie.just.ro/Public/DetaliiDocumentAfis/227644 , accessed 16.05.2021).

the Contract of Use of Infrastructure in International Rail Traffic (CUI)", which constitute Appendix E to the Convention; f) "Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU)", which constitute Appendix F to the Convention; g) "Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (ATMF)", which constitute Appendix G to the Convention.

In the case of states that have ratified C.O.T.I.F. or acceded to it, the uniform rules of the Convention apply as a matter of priority, and national law applies in subsidiary, within the limits permitted by the Convention; in this sense, the provisions of art. 27 and art. 30 of the CIV Rules and art. 48 of the CIM Rules are relevant.

The subject-matter of our study is the contract of international carriage of passengers by rail, as governed by Appendix A to the Convention [entitled: "Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)"].

1. UNIFORM RULES CONCERNING THE CONTRACT OF INTERNATIONAL CARRIAGE OF PASSENGERS BY RAIL (CIV). CONTENT OF THE CIV RULES AND SCOPE.

The CIV Rules are regulated by the following aspects: scope of these rules (Title I), conclusion and performance of the contract of carriage (Title II), carriage of hand luggage, animals, registered luggage and vehicles (Title III), liability of the carrier in case of death of or personal injury to passengers and in case of failure to keep to timetables, liability of the carrier in the case of hand luggage, animals, registered luggage and vehicles (Title IV), liability of the passenger (Title V), assertion of rights (Title VI), relations between carriers (Title VII).

Pursuant to art. 1(1), the CIV Rules apply to any contract of carriage of passengers by rail when the place of departure and destination are located in two different Member States[1]; by this provision, the CIV Rules enshrined the objective criterion for determining the international character of this contract; furthermore, it is provided that the domicile or

1 The articles indicated in this paper, without mentioning the regulation, refer to the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (hereinafter referred to as the CIV Rules).

place of business and nationality of the parties to the contract of carriage are deemed irrelevant; nor do they count as secondary elements of foreignness in determining the international character of the contract.

One should also note the consequence deriving from the fact that the CIV Rules apply when the place of departure and destination are located in two different Member States; per a contrario, if the place of departure and destination are not located on the territory of two Member States, but only on the territory of either of them, the CIV Rules are no longer applicable ex officio, but only if there is a contractual provision to that effect; a situation identical to that in which none of the States on whose territory the place of departure and destination is situated is a member of the Convention.

The following exceptions from the rule under art. 1(1) are provided: a) the CIV Rules do not apply to carriage performed between stations located on the territory of neighbouring states, when the infrastructure of these stations is managed by one or more infrastructure managers belonging to one and the same state between the respective neighbouring states (art. 1 par. 5). However, Member States' derogations from the provisions of art. 1 are permitted; thus: the CIV Rules apply when Member States conclude agreements providing for derogations from the CIV Rules for carriage performed exclusively between two stations located on both sides of the border, when there is no other station between them; also, for carriage between two Member States, transiting a non-member State, the States concerned may conclude agreements derogating from the CIV Rules (art. 4); b) the CIV Rules do not apply when a Member State applying for accession to the Convention, declares that it will apply the CIV Rules only to carriage on a part of the railway infrastructure situated on its territory; this part of the railway infrastructure must be precisely defined and must be connected to the railway infrastructure of a Member State (art. 1 par. 6).

The CIV rules apply, when there is an element of foreignness required by art. 1(1), both for carriage that is paid for and for free carriage[1].

The CIV Rules also apply both when the carriage is performed entirely by rail and in the following situations: i) when such carriage is the subject of a single contract which includes, in addition to transfrontier

[1] In this respect, the CIV Rules are different from the CIM Rules, the latter being applicable only to onerous contracts (see, in this respect, the CIM Rules, art. 1).

carriage by rail, carriage by road, or by an inland waterway in the internal traffic of a Member State; ii) when a carriage which is the subject of a single contract includes, in addition to carriage by rail, carriage by sea or transfrontier carriage by inland waterway, if the maritime or inland waterway carriage is performed on lines included in the list provided by art. 24 of C.O.T.I.F.[1]

2. THE IMPERATIVE CHARACTER OF THE CIV RULES.

The CIV rules are binding, and the contracting parties cannot, as a matter of principle, derogate from them. In this sense, art. 5 provides that, in the absence of a contrary clause in the CIV Rules, any stipulation that would directly or indirectly derogate from these uniform rules is null and void (therefore, only derogations based on the provisions of the CIV Rules are allowed). In the same sense, art. 7(2)(b), regulating the form and content of the tickets, stipulates that the carrier must enter on the ticket the statement according to which the carriage is subject, despite any contrary clause, to the CIV Rules; this statement can be made by putting the acronym CIV on the ticket.

However, the Convention did not enshrine the principle of total nullity of the contract, but that of partial nullity, since art. 5, second thesis provides that the nullity of such derogating clauses does not imply the nullity of other clauses in the carriage contract.

An exception to this rule can be made only when a carrier assumes a greater responsibility and stricter obligations than those provided for in the CIV Rules, therefore, in accordance with art. 5, third thesis, the clauses of aggravation of the carrier's liability are valid[2].

Art. 64 also stipulates that the carriers are free to conclude conventions that derogate from some of the provisions of the CIV Rules, more precisely from the provisions of art. 61 (which regulates the apportionment of the carriage charge) and from those of art. 62 (which regulates the exercise of the right of recourse by the carrier who has paid compensation under the CIV Rules).

[1] With regard to this provision, the CIV Rules and the CIM Rules are identical.
2 To note that the provisions of art. 5 of the CIM Rules are identical to those of art. 5 of the CIV Rules.

Romanian law. The C.F.R. Transport Regulation (art. 27)[1], whose rules were inspired by those contained in the CIV Rules, do not stipulate expresis verbis the imperative nature of its rules, but prohibits the limitation of the carrier's liability by its tariff provisions or special agreements between the carrier and the passenger, if they seek to relieve the carrier in advance in whole or in part of its liability or have the effect of overturning the burden of proof that is incumbent on the carrier or set lower limits than those provided for in this Regulation; such tariff provisions or conventions are automatically declared null (thus, indirectly, establishing the binding nature of these regulatory provisions). This nullity (of the tariff provisions or of the contractual clauses) does not attract that of the carriage contract (it should be noted that, like the CIV Rules, the C.F.R. Transport Regulation did not enshrine the principle of the total nullity of the contract, but that of its partial nullity).

3. CONCLUSION AND PERFORMANCE OF THE CONTRACT OF INTERNATIONAL CARRIAGE OF PASSENGERS BY RAIL. NOTION, FORM AND CONTENT OF THE CONTRACT.

Pursuant to art. 6(1), by the contract of carriage, the carrier undertakes to transport the passenger and, where appropriate, luggage and vehicles to the place of destination and to deliver the luggage and vehicles at the place of destination[2].

The contract of carriage must be established by one or more tickets issued to the passenger; however, the absence, irregularity or loss of the ticket does not affect the existence or validity of the contract,

[1] Under Romanian law, carriage by rail is regulated by the Romanian Railway Transport Regulation, which was approved by G.O. no. 7 of January 20, 2005, published in the Official Gazette. no. 101 of 31 January 2005. It was republished pursuant to art. II of Law 110/2006 on the approval of G.O. no. 7/2005 for the approval of the Romanian Railway Transport Regulation, published in the Official Gazette of Romania, Part I, no. 408 of 11 May 2006, giving the texts a new numbering. The Romanian Civil Code regulates the contract of carriage through the provisions of art. 1955-2008 - for details on this aspect, see C. Stanciu, *Dreptul transporturilor. Contracte de transport de bunuri* (Bucharest: Universul Juridic, 2015), 42.

[2] Comparing the CIV Rules (art. 6) with the CIM Rules (art. 6), we notice that, regarding the notion of the carriage contract, mutatis mutandis, the two regulations have the same content.

which is still subject to the CIV Rules (art. 6 par. 2). It follows from these provisions that the carriage document is not required ad validitatem, but is merely an instrument of the contract, which can be proved by any means of proof. Moreover, pursuant to art. 6(3), the ticket proves, only until otherwise proven, the conclusion and content of the carriage contract.

The carrier establishes, by the general conditions of carriage, the form and content of the tickets, as well as the language and characters in which they are to be printed and written by the carrier (art. 7 par.1). As a consequence, the carrier will be liable, towards the one entitled, for any damage resulting from the irregularity of the ticket.

The following mandatory particulars must be entered on the ticket: i) identification data of the carrier or carriers; ii) the statement according to which the carriage is subject, despite any contrary clause, to the CIV Rules (this can be done by indicating the acronym CIV on the ticket); iii) any other indication necessary to prove the conclusion and content of the contract of carriage and which allows the passenger to assert his rights arising from this contract (art. 7 par. 2).

The ticket is transferable if it is not nominal and if the journey has not started (art. 7 par. 4).

Romanian law. Pursuant to art. 11 of the Romanian Railway Transport Regulation, the resale of travel documents by unauthorized persons is not allowed; on the contrary, their resale by authorized persons is permitted; therefore, in Romanian law, the rule has been established that the tickets are transferable; instead, the transmission of nominal or reduced-fare tickets to other persons who are not entitled to them is prohibited (constitutes a contravention)[1].

4. CARRIER'S LIABILITY. FORMS OF LIABILITY.

The CIV rules regulate three forms of the carrier's liability: a) liability in case of death of or personal injury to passengers; b) liability in case of failure to keep to timetables, and c) liability in case of hand luggage, animals, registered luggage and vehicles.

[1] With regard to the particularities of international rail passenger transport, with regard to travel documents, see Gh. Stancu, *Dreptul Transporturilor. Curs universitar* (Bucharest: Lumina Lex, 2005), 259.

Romanian law. Pursuant to art. 22 of the C.F.R. Transport Regulation, the railway transport operator is liable for the damage resulting from: a) death of, injury or any other injury to the passenger's health; b) total or partial loss of or damage to the objects that the passenger, victim of such an accident, had on him; c) pursuant to art. 25 of this regulation, he will pay other damages, in accordance with the legal provisions on civil liability.

In Romanian law the liability of the carrier for failure to keep to timetables is not expressly provided; therefore, an improvement of the legislation, in this sense, should be considered by the legislature.

5. LIABILITY IN CASE OF DEATH OF OR PERSONAL INJURY TO PASSENGERS. DAMAGES IN CASE OF DEATH.

Pursuant to art. 26(1), the carrier is liable for damage resulting from the death of, personal injury or any other injury to the physical or mental integrity of the passenger, caused by an accident in connection with the railway operation, caused while the passenger is in railway vehicles, entering or alighting from these, regardless of the railway infrastructure used[1].

In the event of the death of the passenger, a distinction is made between damages due when the death occurred immediately after the accident and those due when the death occurred later; thus, in the first case, the damages include the necessary costs as a result of death, in particular those for the transport of the body and for the funerals; if the death did not occur immediately, the damages are those provided by the CIV Rules for bodily harm (art. 27 par 1). Therefore, the person entitled

[1] Pursuant to art. 31, the provisions on the liability of the carrier in case of death of or personal injury to the passengers are not applicable to the damage occurred during the carriage which, according to the carriage contract, was not a railway carriage. However, when the vehicles are transported by ferry, the provisions on liability in case of death of or personal injury to passengers apply to the damage referred to in art. 26 par. 1 and art. 33 par. 1, caused by an accident in connection with the railway operation which occurred while the passenger was in the said vehicles or while entering or leaving them. Also, when, as a result of exceptional circumstances, the railway operation is temporarily interrupted and the passengers are transported by another means of transport, the carrier is liable in accordance with the CIV Rules.

to claim damages in the event of death of the passenger is the one who covered the necessary costs caused by the death.

In the case of persons to whom the deceased passenger had or would have had a maintenance obligation in the future, the uniform rules distinguish between obligations based on the law and those having another basis (contractual, moral, etc.): i) whether the maintenance was due under the law, the injured person has the right to be compensated for this loss, in accordance with the CIV Rules; ii) the action for damages of the person to whom the passenger ensures the maintenance, without being legally bound, is regulated by national law (art. 27 par. 2).

Romanian law. The relevant rules of the C.F.R. Transport Regulation are identical; thus, pursuant to art. 23, in case of the passenger's death, the damages include: a) expenses resulting from the death, especially those for the transport of the body, for the funeral service or for the cremation; b) if the death did not occur immediately, the damages are those provided for in art. 24, on damages due in case of injury to the passenger.

Just like the CIV Rules, in the case of persons to whom the deceased passenger had or would have had a maintenance obligation in the future, the C.F.R. Transport Regulation (art. 23 par. 2 and 3) distinguishes between obligations which have a legal basis and those which have another basis; in the former case, those persons are entitled to receive an indemnity or an annuity, as the case may be, for this loss, and in the latter case, the action for damages of the persons whom the passenger was maintaining (without being legally bound) is exercised in compliance with the law.

6. DAMAGES IN CASE OF PERSONAL INJURY.

In case of bodily harm or any other damage to the physical or mental integrity of the passenger, pursuant to art. 28, damages have two components: i) first of all, the necessary costs; for example, those for treatment and transport are included in this category; ii) secondly, damages represent the amount necessary to repair the damage caused either by total or partial incapacity to work, or by increased needs.

The enumeration made for the damages due to the passenger in case of bodily harm is not exhaustive; this results from the provisions of

art. 29, which stipulates that the compensation for bodily harm other than that provided by the CIV Rules is established by national law.

Romanian law. In the matter of damages due by the carrier in case of injury to the passenger, the rules established by the C.F.R. Transport Regulation (art. 24) are somewhat different from those of the CIV Rules; thus, the Romanian law stipulates that the damages include: i) the necessary costs for treatment and transport, the enumeration having an exhaustive, not illustrative character, as in the CIV Rules; ii) the remedy for the damage caused by the total or partial incapacity to work (the Romanian legislature excludes the remedy for the damage caused by increased needs). These provisions of the C.F.R. Transport Regulation are likely to create confusion among practitioners, because they are not in accordance with the principle of full repair of damage, established by art. 1385 of the Romanian Civil Code, or with the CIV Rules. We propose to amend the provisions mentioned above in the sense of those contained in the CIV Rules.

7. FORM AND AMOUNT OF DAMAGES IN CASE OF DEATH AND PERSONAL INJURY.

Regarding the form of awarding the damages due to the persons to whom the deceased passenger had or would have had a maintenance obligation in the future, under the law, as well as the damages representing the repair of the damage suffered by the passenger, in case of bodily harm, either through incapacity to work or through increased needs, the CIV Rules give priority to national law; this results from the provisions of art. 30(1), which stipulates that, if national law allows the allocation of an annuity, damages are awarded in this form, when the injured passenger or persons entitled so request (so the two conditions must be met cumulatively); otherwise, such damages are awarded in the form of a lump sum.

As regards the amount of damages to be awarded in the cases mentioned above, it is determined in accordance with national law. However, in application of the CIV Rules, a maximum limit of 175,000 units of account[1] in capital or annual rent corresponding to this capital is

[1] In order to make the payment system efficient, which is of particular interest to the discount of transport tariffs and compensation between the national railway networks of the member countries of C.O.T.I.F., art. 9 enshrined as a common currency of

set, for each passenger, if the national legislation provides for a lower limit of value (art. 30 par. 2).

Romanian law. Regarding the form in which damages are awarded in case of death of or injury to the passenger, the C.F.R. Transport Regulation (art. 26) establishes the rule (identical to that of the CIV Rules) that they are awarded in the form of a lump sum; as an exception, it is possible to allocate an annuity, upon request, in compliance with the law.

The maximum limit of the total damages to be awarded in case of death of or injury to the passenger, according to the C.F.R. Transport Regulation (art. 26) is established in accordance with the legal provisions, but the compensation in lei cannot exceed, for each passenger, the equivalent of 190,000 euros in a lump sum or in the form of an annuity corresponding to this lump sum[1].

8. LIABILITY IN CASE OF SUCCESSIVE CARRIERS.

Pursuant to art. 26(5), when a carriage, which is the subject of a single contract of carriage, is performed by successive carriers, the one who is liable, in the event of death of and personal injury to passengers, is the carrier in charge, under the contract of carriage, with providing the carriage service during which the accident occurred. When this service

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calculation and payment, as a unit of account, the Special Drawing Right (S.D.R.), as defined by the International Monetary Fund (IMF). The conversion of national currencies in relation to the S.D.R. aims at establishing the monetary relationship between the debtor and the creditor railways, having no effects in the relations between each national railway network and its customers; the pecuniary relationship between the carrier and the passenger or consignor, respectively the consignee is established in the national currency of the beneficiaries of the transport - in connection with the introduction of the S.D.R., in the case of C.O.T.I.F., see O. Căpățână and Gh. Stancu, *Dreptul Transporturilor. Partea specială* (Bucharest: Lumina Lex, 2002), 43. S.D.R. is the virtual currency of the International Monetary Fund designed as a replacement for the gold standard. Its value is calculated according to the US dollar (41.73%), the euro (30.93%), the Japanese yen (8.33%), the British pound (8.09%) and, since 2016, the Chinese yuan (renminbi) (10.92 %), according to the exchange rate from the London Stock Exchange (https://ro.wikipedia.org/wiki/Drepturi_speciale_de_tragere , accessed 17.03.2021).

[1] With regard to the particularities of international rail passenger transport, as regards compensation, see Stancu, *Dreptul Transporturilor. Curs universitar*, 260.

was not provided by the carrier, but by a substitute carrier, the two carriers are jointly and severally liable in accordance with the CIV Rules.

9. CAUSES OF LIMITATION OF LIABILITY OF THE CARRIER.

In case of death of or personal injury to passengers, the carrier is relieved of liability in the following situations (art. 26 par. 2): i) if the accident has been caused under circumstances not connected with the railway operation and which the carrier, despite all due diligence required under those circumstances, could not avoid and the consequences of which he could not prevent; ii) to the extent that the accident occurred due to the fault of the passenger; iii) if the accident is caused by the behaviour of a third party which the carrier, despite all due diligence required under the circumstances, could not avoid and the consequences of which he could not prevent (another undertaking using the same railway infrastructure is not considered a third party and, therefore, the carrier will be liable for the damage, but has the right of recourse against that undertaking).

In order to protect the interests of passengers, the CIV Rules provide that the carrier is liable to the injured party for all the damage when the accident is caused by the conduct of a third party, but the carrier is not entirely relieved of liability; logically, the carrier has the right of recourse against the third party (art. 26 par. 3).

Romanian law. The C.F.R. Transport Regulation (art. 22) provides, identically to the provisions of the CIV Rules, that the carrier is relieved of liability for damage resulting from the death of, injury or any other injury to the health of the passenger in the following situations: i) if the accident has been caused under circumstances not connected with the railway operation, which the carrier, despite all due diligence required by the particularities of the case, could not avoid and the consequences of which he could not prevent; ii) to the extent that the accident is attributable to the passenger; iii) if the accident is due to the behavior of a third party that the railway operator, despite all due diligence required by the particularities of the case, could not avoid and the consequences of which he could not prevent.

10. LIABILITY IN CASE OF FAILURE TO KEEP TO THE TIMETABLE.

Art. 32(1) establishes the carrier's liability toward the passenger for damage resulting from the fact that, due to cancellation, delay or missed connections, the journey cannot be continued on the same day or the continuation cannot reasonably be requested on the same day. As regards the amount of damages, they include reasonable accommodation costs as well as reasonable costs occasioned by having to inform persons expecting the passenger.

The carrier is relieved of this liability when the cancellation, delay or missed connections are attributable to one of the following causes (art. 32 par. 2): i) circumstances not connected with the railway operation which the carrier could not avoid and the consequences of which he could not prevent; this cause of limitation may be considered only if the carrier proves that he has taken the care required in the particular circumstances of the case in order to avoid those circumstances or to prevent their consequences; ii) a fault of the passenger; iii) the conduct of a third party which the carrier, despite all due care required in the particular circumstances of the case, could not avoid and the consequences of which he could not prevent; another undertaking using the same railway infrastructure is not considered a third party, so the carrier will be liable for the damage caused by the fault of that operator, but has a right of recourse against it.

In addition to the compensation provided by the CIV Rules, the carrier may be bound to pay other damages requested by those entitled, if they are provided by national law (art. 32 par. 3).

Romanian law. The C.F.R. Transport Regulation does not govern the compensation due to the passenger in case of delay of the train in internal traffic, due to the fault of the carrier.

Instead, for the international carriage of passengers, at the URL address of CFR, "International traffic" menu, "Journey information" submenu, one can download the Regulation (EC) no. 1371/2007 of the European Parliament and of the Council, of 23 October 2007, on rail passengers' rights and obligations, which, in art. 17, regulates the

compensation in case of train delay in international traffic, due to the carrier[1].

11. LIABILITY OF THE CARRIER IN THE CASE OF HAND LUGGAGE, ANIMALS, REGISTERED LUGGAGE AND VEHICLES.

a. Liability for hand luggage and animals. The CIV Rules also regulate the liability of the carrier in the case of hand luggage, animals, registered luggage and vehicles. Pursuant to art. 33(1), in case of death of or personal injury to the passengers, the carrier is also liable for the damage resulting from the total or partial loss of, or damage to the objects that the passenger either had on him or as hand luggage; he is also liable for the animals that the passenger had with him.

The compensation to which the carrier may be obliged is limited to a maximum of 1,400 units of account for each passenger (art. 34).

Article 26, on the basis of liability and limitation of liability of the carrier, also applies by analogy in the case of liability for hand luggage and animals.

In other cases, i.e. when the death of or personal injury to the passengers did not occur, the carrier is not liable for damage resulting from the total or partial loss of, or damage to objects, hand luggage or animals which were supervised by the passenger in accordance with the CIV Rules; the exception to this rule is the case when the damage is caused by a fault of the carrier (art. 33 par. 1).

For the damage resulting from the fact that the passenger does not comply with the prescriptions of the customs authorities or other administrative authorities, the carrier is relieved of liability (art. 35).

b. Liability for registered luggage. Pursuant to art. 36(1), the carrier is liable for the damage resulting from the following causes: i) total or partial loss; ii) damage to registered luggage (loss or damage must have occurred between the time of taking over by the carrier and the time of delivery); iii) delay in luggage delivery.

The carrier is relieved of liability to the extent that the loss, damage or delay in delivery was due to a fault of the passenger, an order

[1] https://www.cfrcalatori.ro/wp-content/uploads/2018/02/Regulamentul-2007.1371.EC_.pdf , accessed 16.05.2021.

given by him not resulting from a fault of the carrier, a defect in registered luggage or circumstances that the carrier could not avoid and the consequences of which he could not prevent (art. 36 par. 2); the burden of proving that the loss, damage or delay in delivery was due to one of the causes mentioned above is the responsibility of the carrier (art. 37 par. 1).

The carrier is also relieved of liability to the extent that the loss or damage is the result of specific risks inherent in one or more of the following circumstances: i) the lack of packing or improper packing; ii) the special nature of the luggage; iii) the consignment as luggage of objects excluded from transport (art. 36 par. 3); when the carrier establishes that, taking into account the factual circumstances, the loss or damage could have resulted from one or more specific risks mentioned above, there is a presumption that it results from these risks. The person entitled has the possibility of proving that the damage was not caused, in whole or in part, by one of these risks (art. 37 par. 2).

c. Successive carriers. In the case of successive carriers, the rule enshrined in art. 38 is that each carrier is responsible for performing the carriage over the entire route up to delivery; the condition is that the carriage be the subject of a single contract of carriage, performed by several successive carriers; in this case, each carrier, upon taking over the luggage with the luggage registration voucher or the vehicle with the carriage voucher, becomes a party to the contract of carriage, as regards the consignment of luggage or carriage of vehicles, in accordance with the specifications on the luggage registration voucher or the carriage voucher and assumes the obligations arising therefrom.

d. Substitute carrier. Regarding the substitute carrier, art. 39(1) provides that, when the carrier has entrusted, in whole or in part, the performance of the carriage to a substitute carrier, the carrier remains liable for the entire carriage, whether or not the substitute carrier is performing a function recognized in the contract of carriage.

All the provisions of the CIV Rules, which regulate the liability of the carrier, also apply to the liability of the substitute carrier in respect of the carriage performed by his care. The provisions of art. 48 on the forfeiture of the carrier's right to invoke the limits of liability and those of art. 52, on legal actions regarding the liability of the carrier, also apply when a legal action is brought against the agents or any other persons

whose service the substitute carrier uses in order to perform the carriage (art. 39 par. 2).

The convention whereby the carrier assumes obligations which are not imposed by the CIV Rules or whereby the carrier waives the rights conferred by those rules are of no effect in respect of the substitute carrier who has not expressly accepted it in writing. The carrier who has concluded such an agreement remains bound by the obligations or waivers resulting therefrom, regardless of whether the substitute carrier has accepted it or not (art. 39 par. 3). When the carrier and the substitute carrier are liable for damage, their liability is joint and several (art. 39 par. 4). The total amount of compensation due by the carrier, the substitute carrier, as well as their agents and the other persons whose services they have used in order to perform the carriage, may not exceed the limits provided by the CIV Rules (art. 39 par. 5). The provisions concerning the substitute carrier are without prejudice to the right of recourse which may exist between the carrier and the substitute carrier (art. 39 par. 6).

e. Presumption of loss. Art. 40(1) establishes the presumption of loss of the luggage in case it has not been delivered to the one entitled or placed at his disposal within fourteen days from the request for delivery, made in accordance with the provisions of the CIV Rules. If an item of luggage considered lost is found within one year from the request for delivery, the carrier must notify the person entitled if his address is known or can be found. In this case, the CIV Rules govern two hypotheses (art. 40 par. 3 and 4): i) if the person entitled requests that the item of luggage be delivered to him within thirty days from the receipt of the notification, he must pay the charges related to the transport of the item of luggage from the place of consignment to the place where the delivery will take place and refund the compensation received, from which, if applicable, the costs included therein are deducted; he retains the right to claim compensation for delay in delivery provided for in the CIV Rules; ii) if the person entitled does not claim the item of luggage found within the period provided by the rules or if the item of luggage is recovered more than one year after the delivery request, the carrier disposes of it in accordance with the laws and prescriptions in force in the place where the item of luggage was found.

f. Compensation for loss. In accordance with art. 41, in case of total or partial loss of registered luggage, the carrier must pay

compensation and refund the charge for luggage carriage and the other amounts paid in connection with the carriage of the lost luggage, as well as customs duties and excise duties already paid. The amount of compensation differs depending on whether or not the amount of the damage is proved; thus: i) if the amount of the damage is proved, a compensation equal to this amount will be paid, but not exceeding 80 units of account per kilogram of gross mass short or 1200 units of account per item of luggage; ii) if the amount of the damage is not proved, liquidated damages of 20 units of account per kilogram of gross mass short or 300 units of account per item of luggage will be paid (the method of compensation, by kilogram missing or by item of luggage is determined by each carrier in the General Conditions of Carriage).

g. Compensation for damage. In the event of damage to registered luggage, the carrier must pay compensation equivalent to the loss in value of the luggage. The compensation does not exceed: i) the amount that would have been reached in case of total loss, if all the luggage has lost value due to the damage; ii) the amount that would have been reached in case part of the luggage has lost value due to the damage (art. 42).

h. Compensation for delay in delivery. In case of delay in delivery of registered luggage, pursuant to art. 43(1), the carrier must pay, for each full period of twenty-four hours from the request for delivery, a compensation the amount of which differs depending on whether or not the person entitled provides proof that the damage has resulted from the delay; thus: i) if the person entitled proves that damage has resulted from it, the compensation will be equal to the amount of the damage, up to a maximum of 0.80 units of account per kilogram of gross mass of the luggage or 14 units of account per item of luggage, delivered late;; ii) if the person entitled does not prove that damage has resulted from it, the compensation will be equal to liquidated damages of 0.14 units of account per kilogram of gross mass of the luggage or 2.80 units of account per item of luggage, delivered late; the method of compensation, by kilogram missing or per item of luggage, is determined by each carrier in the General Conditions of Carriage (pursuant to art. 40, if the delay in delivery exceeds fourteen days the person entitled may, without needing to provide other evidence, consider the luggage lost).

Regarding the cumulation of compensations, art. 43 provides the following rules: i) in case of total loss of the luggage, the compensation

provided for the delay in delivery is not cumulated with the one provided for the loss; ii) in case of partial loss of the luggage, the compensation provided for the delay in delivery is paid for the part which was not lost; iii) in case of damage to the luggage that did not occur as a result of the delay in delivery, the compensation provided for the delay in delivery is cumulated, if applicable, with the one provided for the damage; iv) in no case does the cumulation of the compensation provided for the delay in delivery together with that provided for loss and damage allow the payment of a compensation that exceeds the one that would be due in case of total loss of the luggage.

12. LIABILITY FOR VEHICLES.

a. Compensation for delay. Two hypotheses are governed by the CIV Rules on compensation due by the carrier for delay in the case of a vehicle, namely: i) in case of delay in loading due to a cause attributable to the carrier or delay in delivery of a vehicle (for the latter delay the fault of the carrier is presumed), the carrier must pay compensation, but the damage must be proved by the person entitled; however, the compensation may not exceed the value of the carriage charge; ii) in case of delay in loading due to a cause attributable to the carrier, the person entitled has the possibility of cancelling the carriage contract, in which case the carriage charge is refunded; in addition, if he proves that he has suffered damage as a result of the delay, he may claim compensation not exceeding the carriage charge (art. 44).

b. Compensation for loss. In the event of total or partial loss of a vehicle, the compensation to be paid to the person entitled is calculated on the basis of the usual value of the vehicle (to note that a trailer with or without load is considered a separate vehicle). This compensation may not exceed 8000 units of account (art. 45).

13. LIABILITY IN RESPECT OF OTHER ARTICLES.

With regard to the carrier's liability for other articles, a distinction is made between those inside the vehicle and those on the outside of the vehicle. Thus: i) for articles left in the vehicle or in boxes (e.g. luggage or ski boxes), fixed to the vehicle, the carrier is liable only for the damage caused by his fault; in this case, the compensation may not exceed 1400

units of account; ii) for articles fixed on the outside of the vehicle, including luggage or ski boxes, the carrier is liable only if it is proved that the damage results from an act or omission committed by the carrier with the intention of causing such damage, or recklessly and with knowledge that such damage is likely to result; in this case, the compensation is not limited by the CIV Rules (art. 46).

In order to avoid a redundant regulation, art. 47 provides that the rules on liability for vehicles are supplemented by those laid down on liability for luggage.

Romanian law. The C.F.R. Transport Regulation does not contain, like the CIV Rules, specific provisions governing the liability of the carrier in the case of hand luggage, animals, registered luggage and vehicles; art. 25 of the C.F.R. Transport Regulation refers to the general regulatory framework, providing that the carrier may be obliged to pay compensation for damage other than that provided by the regulation for the death of or injury to the passenger, in accordance with the legal provisions on civil liability.

14. LOSS OF RIGHT TO INVOKE THE LIMITS OF LIABILITY.

The limits of liability provided for in the CIV Rules, as well as the provisions of national law limiting compensation to a certain amount, do not apply if it is proved that the damage has resulted from an act or omission committed by the carrier either with intent to cause such damage, or recklessly and with knowledge that such damage could probably result (art. 48).

Romanian law. The C.F.R. Transport Regulation does not contain provisions equivalent to those in art. 48 of the CIV Rules.

15. CONVERSION AND INTEREST RATE REGIME.

With regard to conversion, the rule is enshrined that when the calculation of compensation involves the conversion of amounts expressed in foreign currency, it is made at the exchange rate applicable on the date and in the place where the compensation is paid (art. 49 par. 1).

With regard to interest, the following rules are established (art. 49 par. 2-5): i) the person entitled may claim interest on compensation,

calculated as a percentage of five percent per year, from the day of the claim regarding the liability of the carrier or, if no complaint has been made, from the day of commencing legal proceedings; ii) in case of compensation due in the event of death or personal injury, interest accrues only from the day on which the relevant events took place which serve to assess the amount of compensation, if that day is later than the day of the claim or the day of commencing legal proceedings; iii) in respect of luggage, interest is due only if the compensation exceeds 16 units of account per luggage registration voucher; iv) in respect of luggage, if the person entitled does not submit to the carrier, within a reasonably determined period, the supporting documents required for the final settlement of the claim, interest does accrue between the expiry of the time allotted and the actual submission of those documents.

16. PERSONS FOR WHOM THE CARRIER IS LIABLE.

The carrier is liable for his servants and other persons whose services he uses, or for the performance of the carriage, when those servants and other persons are acting within the scope of their functions. The managers of the railway infrastructure on which the carriage is performed are considered persons whose services the carrier uses in order to perform the carriage (art. 51).

17. ASSERTION OF RIGHTS.

a. Ascertainment of partial loss or damage. In order to ascertain the partial loss or damage, art. 54 establishes the following procedure: i) when partial loss of or damage to a transported article, in the charge of the carrier (luggage, vehicles), is discovered or assumed by the carrier or claimed by the person entitled, the carrier must draw up without delay and, if possible, in the presence of the person entitled, a report stating the nature of the damage, the condition of the article, and, as far as possible, the extent of the damage, its cause and the time when it occurred; ii) the carrier must send free of charge to the person entitled a copy of the report ascertaining the partial loss or damage; iii) if the person entitled does not accept the findings in the report, he may request that the condition of the luggage or vehicle and the cause and amount of the damage be ascertained by an expert appointed by the parties to the

carriage contract or by a court (the procedure for appointing the expert by the court is subject to the laws of the state where the ascertainment takes place).

b. Carrier's liability claims. Pursuant to art. 55, the claims regarding the liability of the carrier have different rules, as it is about the liability for death of or personal injury to the passengers or the liability for the other cases generating damage. Thus: i) claims regarding the liability of the carrier in case of death of or personal injury to passengers must be addressed in writing to the carrier against whom a legal action may be brought. In the case of a carriage which is the subject of a single contract and performed by successive carriers, claims may be addressed equally to either the first or last carrier and the carrier having his principal place of business or the branch or agency where the contract of carriage was concluded in the state in which the passenger has his domicile or habitual residence; ii) the other claims relating to the contract of carriage must be made in writing to the first or last carrier or carrier who performed the part of the carriage during which the event giving rise to the damage occurred; in the case of carriage by successive carriers, claims must be made in writing to the carrier who was to deliver the luggage or vehicle, if he is entered with his consent on the luggage registration voucher or the carriage voucher, even if he has not received the luggage or vehicle.

The documents that the person entitled deems useful to submit with the claim must be presented either in the original or as copies, if applicable, the copies being duly authenticated, if the carrier so requests. In order to settle the claim, the carrier may request the surrender of the ticket, the luggage registration voucher and the carriage voucher.

Romanian law. The C.F.R. Transport Regulation (art. 29) provides that for damages provided for by the Regulation, the action on the liability of the carrier, in any capacity whatsoever, may be based either on the provisions of the Regulation or on the provisions of the general regulatory framework. Where the action for liability is based on the provisions of the Regulation, the person having the right to sue the carrier must first submit a written administrative complaint within 3 months of the time limits laid down in the Regulation. So, the obligation of the administrative complaint is also established in Romanian law.

c. Carriers against whom an action may be brought. In this matter, art. 56 lays down the following rules: a) the legal action based on

the liability of the carrier in the event of death of or personal injury to passengers may be brought only against the carrier who was responsible, under the contract of carriage, for the provision of the carriage service during which the accident occurred (when this service was not performed by the carrier, but by a substitute carrier, the two carriers are jointly and severally liable); b) the legal action for the recovery of an amount paid under the contract of carriage may be brought against the carrier who received that amount or against the one for whose benefit that amount was collected; c) other legal actions brought by passengers on the basis of the contract of carriage may be brought only against the first or last carrier or against the carrier who performed that part of the carriage during which the event giving rise to the legal action occurred; this rule also applies where, in the case of carriage by successive carriers, the carrier who must deliver the luggage or vehicle is entered, with his consent, on the luggage registration voucher or the carriage voucher; he can be sued even if he did not receive the luggage or the vehicle; d) the action may be brought against a carrier other than those referred to in points b and c above, when such action is brought as a counterclaim or as an exception in court, relating to a principal claim based on the same contract of carriage; e) in so far as the CIV Rules apply to the substitute carrier, he may also be sued; f) if the claimant has a choice between several carriers, his right of option is extinguished as soon as the legal action is brought against one of them; this also applies if the claimant can choose between one or more carriers and a substitute carrier.

Romanian law. With regard to carriers that can be sued, the C.F.R. Transport Regulation. (art. 31) has simplified provisions, due to the specifics of internal transport; in that regard, it provides that an action for the refund of an amount paid under the contract of carriage may be brought against the railway passenger operator who collected that amount or against the person for whose benefit it was collected.

d. The competent court. Legal actions based on the CIV Rules may be brought before the competent courts of the Member States designated by mutual agreement of the parties, or before the competent court of a Member State on whose territory the defendant has his domicile or habitual residence, principal place of business or the branch or agency where the carriage contract was concluded. No action can be brought before other courts (art. 57 par. 1). When a legal action based on the CIV Rules is brought before a competent court under the conditions

set out above, or when in such a dispute a judgment has been delivered by such a court, a new legal action can only be brought for the same case, between the same parties, if the judgment of the court before which the first legal action was brought is not enforceable in the State where the new legal action is brought (art. 57 par. 2).

e. Extinction of the right of action in case of death or personal injury. Art. 58(1) provides that any legal action of the person entitled based on the liability of the carrier, in case of death of or personal injury to passengers, is extinguished if the accident suffered by the passenger is not reported by the person entitled within twelve months of the date of finding the damage, to one of the carriers to which a claim may be addressed, in accordance with art. 55(1). Where the person entitled has verbally notified the carrier of the accident, he must provide proof of such verbal notification. As an exception, the legal action is not extinguished in the following situations (art. 58 par. 2): i) if within the period provided for above, the person entitled has submitted a complaint to one of the carriers designated in art. 55(1); ii) if within the period provided for above, the responsible carrier has become aware, in another way, of the accident suffered by the passenger; iii) if the accident was not reported or was reported late, as a result of circumstances not attributable to the person entitled; iv) if the person entitled proves that the accident was caused by the fault of the carrier.

Romanian law. The C.F.R. Transport Regulation (art. 32) has identical provisions, in principle, to those contained in the CIV Rules on the extinction of the action arising from the liability of the carrier in case of death of and injury to passengers, but the time limit is longer (any action based on the liability of the carrier in case of death of or injury to the passenger is extinguished if the person entitled does not report in writing the claims within 3 years from the moment of becoming aware of the occurrence of the accident). In Romanian law as well, as an exception to the rule, the right of action is not extinguished if: i) the accident was not reported or was reported late by the railway transport operator, as a result of circumstances that are not attributable to the person entitled ; ii) the person entitled proves that the accident was caused by a fault of the railway transport operator; it should be noted that the number of exceptions is lower in Romanian law.

f. Extinction of the right of action arising from carriage of luggage (art. 59). The rule established by art. 59 is that the acceptance of

the luggage by the person entitled extinguishes any legal action against the carrier, arising from the contract of carriage in case of partial loss, damage or delay in delivery. The exceptions to this rule are numerous; thus: a) in case of partial loss or damage, the legal action is not extinguished in the following situations: i) if the loss or damage was ascertained in accordance with art. 54, before the person entitled accepts the luggage; ii) if the ascertainment that should have been carried out in accordance with art. 54, was omitted exclusively by the fault of the carrier; b) in case of non-apparent damage, the existence of which is ascertained after the acceptance of the luggage by the person entitled, the legal action is not extinguished in the following situations: i) if he requests the ascertainment in accordance with art. 54 immediately after the discovery of the damage and at the latest within three days of accepting the luggage; ii) if he proves, in addition, that the damage is caused between receipt by the carrier and delivery; c) in case of delay in delivery, the legal action is not extinguished if the person entitled has asserted, within twenty-one days, his rights against one of the carriers mentioned in art. 56(3); d) the legal action is not extinguished if the person entitled proves that the damage is due to a fault of the carrier.

g. Limitation of actions. The periods of limitations of actions, provided in art. 60, are the following: a) for legal actions regarding damages based on the liability of the carrier in the event of the death of or personal injury to passengers, the period of limitation is: i) in the case of a passenger, three years from the day after the accident; ii) in the case of other persons entitled, three years from the day after the death of the passenger, subject to a maximum of five years from the day after the accident; b) for other legal actions arising from the carriage contract, the period of limitation is one year. By way of exception, the limitation period is two years in the case of a legal action for damage resulting from an act or omission committed either with intent to cause such damage or recklessly and with knowledge that such damage could probably result.

The limitation period for these legal actions begins to run as follows: i) for the compensation of the total loss, from the fourteenth day following the expiry of the term provided in art. 22(3); ii) for the compensation of the partial loss, damage or delay in delivery, from the day when the delivery took place; iii) in all other cases related to the carriage of passengers, from the day of expiry of the validity of the ticket.

The day indicated for the commencement of the limitation period is not included in the period (art. 60 par. 3).

The limitation period is suspended, in the case of a written claim addressed to the carrier (in accordance with art. 55, together with the necessary supporting documents), until the date on which the carrier rejects the claim in writing and returns the attached documents. In the event of partial acceptance of the claim the limitation period resumes for that part of the claim which remains in dispute. The burden of proving receipt of the claim or reply and that of returning the documents lies with the party invoking these facts. The limitation period is not suspended for subsequent claims having the same object (art. 60 par. 4).

The prescribed legal action cannot be exercised, not even in the form of a counterclaim or an exception (art. 60 par. 5).

Romanian law. The C.F.R. Transport Regulation (art. 33) has the same provisions, in the matter of passenger transport, as those of the CIV Rules, both regarding the moment when the limitation period of the right of action begins to run, and regarding the suspension of the limitation period.

Thus: a) actions for damages, based on the liability of the carrier in case of death of and injury to passengers, are prescribed: a) in the case of a passenger, three years from the day after the accident; ii) in the case of other persons entitled, three years from the day after the death of the passenger; c) the other actions arising from the contract of carriage are time-barred after one year. The one-year limitation period begins to run as follows: i) for the action on payment or refund of the carriage charges, ancillary charges or additional charges or on rectification in case of incorrect application of a charge or error of calculation or collection, from the payment day or, if no payment has been made, from the day on which the payment should be made; ii) for the action regarding the payment of a tariff supplement claimed by the customs bodies or other bodies authorized by law, from the day of their request; iii) in all other cases regarding the transport of passengers, from the day of expiry of the validity of the ticket. The day indicated as the starting point of the limitation period is never included in the period.

In the event of a claim to the railway transport operator, in accordance with the Regulation, the limitation period is suspended until the claim has been decided or until the expiry of the 30-day period within which he was obliged to settle it; in the event of partial acceptance of the

claim, the limitation period begins to run again for the part of the claim which remains in dispute; after the termination of the suspension, the limitation period resumes its course, counting the time before the suspension, but the limitation period is not fulfilled before the expiry of a term of 6 months, counted from the termination of the cause of suspension. Subsequent claims having the same object do not suspend the limitation period.

If the limitation period expires on a Saturday or Sunday or on a public holiday, its expiry is extended until the first following working day.

18. RELATIONS BETWEEN CARRIERS.

a. Apportionment of the carriage charge. Any carrier who has collected or should have collected a carriage charge must pay to the carriers concerned their respective shares of such a charge. The methods of payment are fixed by agreement between the carriers (art. 61).

Romanian law. The C.F.R. Transport Regulation (art. 70), referring to the "statement between successive railway transport operators", provides just like the CIV Rules, that any successive carrier that has collected either in the place of delivery or at destination the charges or other receivables resulting from the carriage contract or who should have collected these charges or other receivables must pay the railway transport operators concerned their share. The methods of payment are determined by agreements concluded between successive railway transport operators.

b. Right of recourse. The carrier who has paid compensation under the CIV Rules, has a right of recourse against the carriers that participated in the transport in accordance with the following rules: i) the carrier that has caused the damage is the only one liable; ii) when the damage has been caused by several carriers, each of them is liable for the damage he has caused; iii) if it cannot be proved which of the carriers has caused the damage, the compensation is distributed among all the carriers who participated in the carriage, except for those who prove that the damage has not been caused by them; the apportionment is made in proportion to the part of the carriage charge that belongs to each carrier; iv) in case of insolvency of one of the carriers, the part due from him and not paid by him is distributed among all the other carriers that

participated in the carriage, in proportion to the part of the carriage charge that belongs to each of them (art. 62).

Romanian law. The C.F.R. Transport Regulation (art. 71) provides, identically to the CIV Rules, that the carrier who has paid compensation under this Regulation has the right of recourse against successive rail transport operators who have participated in the transport, in accordance with the following rules: i) the carrier who has caused the damage is solely liable; ii) when the damage has been caused by several successive carriers, each of them is liable for the damage he has caused; iii) if it cannot be proved which of the rail transport operators has caused the damage, the compensation is distributed among all the rail transport operators who participated in the transport, except for those who prove that the damage was not caused by them. The apportionment is made in proportion to their share of the price of the transport service; iv) in case of insolvency of a successive rail transport operator, the part due by him and not paid by him is distributed among all the other successive carriers which participated in the transport, in proportion to the part of the price of the transport service due by each of them. The carriers may agree among themselves provisions which derogate from these rules.

c. Procedure for recourse. The recourse procedure is subject to the following rules (art. 63): i) The validity of the payment made by the carrier exercising the right of recourse in accordance with the CIV Rules, cannot be challenged by the carrier against whom the recourse is exercised, when the compensation was fixed by a court, and the latter, correctly designated carrier, was allowed to intervene in the proceedings. The court before which the principal action was brought, sets the time limits for signing the claim and for intervening; ii) the carrier exercising his right of recourse must file a claim in one and the same court for all carriers with which he has not reached a settlement, under the penalty of losing his right of recourse against those he has not sued; iii) the court must rule by a single judgment on all recourse actions brought before it; iv) the carrier wishing to exercise his right of recourse may bring the case before the court of the state on whose territory one of the carriers participating in the carriage has its principal place of business or the branch or agency which concluded the contract of carriage. When legal proceedings are to be commenced against several carriers, the claimant carrier may choose between the competent courts the one before which he will bring his recourse action; v) recourse actions may not be joined

with actions for compensation taken by the person entitled under the contract of carriage; vi) the carriers are free to conclude conventions, regarding recourse actions, which derogate from the rules shown above (art. 64).

Romanian law. The C.F.R. Transport Regulation (art. 72) has identical rules, in principle, with those provided by the CIV Rules; thus: i) the validity of the payment made by the carrier exercising one of the recourse actions provided for in the Regulation cannot be challenged by the rail transport operator against whom the recourse action is exercised, when the compensation has been established by a judicial authority and when the latter rail transport operator was given the opportunity to intervene in the process. The judge having to decide on the principal action sets the time limits for notification and intervention; ii) the carrier exercising his right of recourse against all railway transport operators with which he has disagreed must file a single claim in the same court, under the penalty of losing his right of recourse against those which he did not include in this claim. The judge must rule by one and the same judgment on all the requests; iii) the claim may be filed in the court at the head office of any of the railway transport operators or at the office of their agencies or branches.

CONCLUSIONS

The aim of this study has been to highlight the applicable rules in this matter, to compare, where appropriate, the CIV Rules with the CIM Rules and, in particular, to capture the essential similarities and differences between the CIV Rules and the rules established in Romanian law by the Romanian Railway Transport Regulation, in order to be able to suggest the legislative changes that we consider necessary. In most cases, the solutions in the C.F.R. Transport Regulation are identical to those in the CIV Rules (for example: the imperative character of the norms included in the Romanian law; the establishment of the partial nullity of the carriage contract, in case of inclusion of some clauses derogating from the transport regulation). In other cases, the C.F.R. Transport Regulation has different rules from those of the CIV Rules (for example, in Romanian law the ticket is not transferable). Finally, in some cases, the C.F.R. Transport Regulation does not provide solutions to problems frequently encountered in rail transport (for example, it does

not regulate the compensation due to the passenger in case of delay of the train in internal traffic, due to the carrier; it does not contain specific provisions on the carrier's liability for hand luggage, animals, registered luggage and vehicles, but refers to the general regulatory framework).

The positive influence of this international convention in the standardization of national regulations is remarkable, especially in the case of states that have ratified or acceded to the convention.

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ON THE SALE OF LAND LOCATED OUTSIDE THE BUILT-UP AREA

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Abstract:

The disorder that characterized the land ownership records and the legislation dedicated to the transfer of the land ownership rights had dramatic consequences on agriculture, Romania turning from a net exporter of food products to a net importer.
Adoption of Law no. 17/2014 is a rather late attempt to stop especially speculative transactions with land that are thus stolen from agricultural production. It regulates only the alienation by sale of agricultural land located outside the towns. The provisions of this law apply to Romanian citizens, respectively to the citizens of a European Union Member State, of the states that are party to the Agreement on the European Economic Area (ESAA) or of the Swiss Confederation, as well as to stateless persons domiciled in Romania, in a European Union Member State, in a state that is a party to the ASEE or in the Swiss Confederation, as well as to legal persons of Romanian nationality, respectively of a nationality of a Member State of the European Union, of the states that are party to the ASEE or in the Swiss Confederation.

The most important provisions of the law are devoted to the establishment of preemption rights when buying agricultural land located outside the built-up area. Preemptors are divided into seven ranks and, in principle, can be given priority when buying agricultural land in the order in which they belong. In order to exercise the right of preemption of tenants, young farmers and subjects of law coming from the above-mentioned states, some additional conditions have been established. The verification of the fulfilment of these conditions is done by the administrative authorities provided by law.

The alienation by sale of agricultural lands outside the built-up area, which are located at a distance of 30 km from the state border and the Black Sea coast, towards the interior, as well as of those located at a distance of up to 2,400 m from the special objectives, but also of the agricultural lands on which archaeological sites are located, on which there have been established areas with spotted archaeological patrimony or areas with archaeological potential incidentally discovered, is subject to additional administrative control.

Failure to comply with the provisions of Law no. 17/2014 is sanctioned with the absolute nullity of the agricultural land sales contract.

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Key words: *Agricultural land; sale; right of pre-emption; administrative control; good faith; absolute nullity.*

PRELIMINARY REMARKS

Unfriendly with private property, the communist state adopted measures that progressively restricted the possibility of individuals to acquire ownership of land. These restrictions culminated in 1974 with the adoption of Law no. 58/1974 on the systematization of the territory and of urban and rural localities, as well as of Law no. 59/1974 concerning the land fund, which removed lands from the general civil circuit. The alienation of land by juridical documents was forbidden, and the only way to acquire ownership of these assets remained lawful inheritance.

In the context created by the events of December 1989, Decree Law no. 1/1989 repealed Law no. 58/1974 and Decree Law no. 9/1989 repealed the provisions of Articles 44-50 of Law no. 59/1974, which led to the full re-entry of the lands owned by individuals in the general civil circuit.[1]

This abrupt way of proceeding led to more disturbances on the real estate market, which remained practically unregulated, and determined the inclusion of a section dedicated to the matter in Law no. 18/1991 concerning the Land Fund, which entered into force on February 20, 1991. This law, as well as the subsequent normative acts, including the new Civil Code (Civil Code), which entered into force on October 1, 2011, did not, however, contain provisions to effectively combat disturbances caused by speculative agricultural land operations. These operations were carried out mainly by foreign individuals and legal entities, who, taking advantage of a superior financial power and of a constant increase in agricultural land prices, bought more land which they did not cultivate and then resold with consistent profits.

[1] For the presentation of the restrictive legislation adopted by the communist state and the evolution of the regulations on the legal movement of land between January 1, 1990 and October 1, 2011, please see Eugen Chelaru, *Drept civil. Drepturile reale principale*, 5th edition (Bucharest: C.H. Beck, 2019), 190-206.

This was also one of the causes that led to the dramatic decrease in agricultural production and the establishment of Romania's dependence on food imports and which determined the adoption of Law no. 17/2014 regarding certain measures for regulating the sale and purchase of agricultural land situated outside outside the city limits and to amend Law no. 268/2001 on the privatization of companies managing the State's publicly- and privately-owned agricultural lands and for the setting-up of the State Domains Agency.[1]

1. THE REGULATORY SCOPE OF LAW NO. 17/2014.

Law no. 17/2014 regulates only the alienation by sale of agricultural lands located outside the built-up area, respectively outside the buildable perimeter of the localities (*extra muros*). The sale of agricultural lands located within the built-up area (*intra muros*) does not fall under the scope of this normative act.

According to Article (Article) 20 (2) and (3), the provisions of this normative act do not apply to alienations between co-owners, spouses, relatives and relatives up to the third degree, including in foreclosure proceedings and sales contracts concluded as a result of fulfilment of some public tender formalities, as is the case of those carried out within the insolvency (prevention) procedure or as a result of the building belonging to the private domain of local or county interest of the administrative-territorial units.

Only alienation by sale, and not that performed by means of other juridical documents, is subject to regulation. In this respect, the observations made in the doctrine in the case of other preemption rights remain valid. Thus, it has been showed that the right of preemption cannot be recognized if the alienation is performed either free of charge (for example, by donation), or at random (for example, by maintenance or annuity contract) or by contract of exchange, even with an allowance, because in such situations there is no price, and the right of preemption is exercised only at an equal price[2].

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[1] Published in the Official Gazette of Romania, part I, no. 178 of March 12, 2014. Law no. 17/2014 was substantially amended and supplemented by Law no. 175 of August 14, 2020.

[2] Francisc Deak,, *Tratat de drept civil. Contracte speciale* (Bucharest: Universul Juridic, 2001), 29.

With the exceptions mentioned, the provisions of this law apply to Romanian citizens, respectively to the citizens of a European Union Member State, of the states that are party to the Agreement on the European Economic Area (ESAA) or of the Swiss Confederation, as well as to stateless persons domiciled in Romania, in a European Union Member State, in a state that is a party to the ASEE or in the Swiss Confederation, as well as to legal persons of Romanian nationality, respectively of a nationality of a Member State of the European Union, of the states that are party to the ASEE or of the Swiss Confederation.

With regard to third-country nationals, stateless persons domiciled in a third country and legal persons having the nationality of a third country, the law provides that they may acquire ownership of agricultural land located outside the built-up area under conditions governed by international treaties, based on reciprocity. This legal provision is in line with the provisions of Article 44 paragraph (2), sentence II of the Constitution, according to which "Foreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the European Union and other international treaties Romania is a party to, on a mutual basis, under the terms stipulated by an organic law, as well as a result of lawful inheritance." The organic law the constitutional provisions refer to is Law no. 312/2005 concerning acquisition of private property rights over land by foreign citizens, stateless persons and foreign legal entities.[1]

Law no. 17/2014 contains two categories of regulations dedicated to the subject of interest to us: those that regulate a prior administrative control of the sale of agricultural land and those that establish preemption rights in favour of certain categories of persons.

2. ADMINISTRATIVE CONTROL.

For the alienation of agricultural lands located outside the built-up area, located at a depth of 30 km from the state border and the Black Sea coast, inland as well as those located at a distance of up to 2,400 m from

[1] For the conditions under which foreign citizens and stateless persons can acquire the right of ownership over the lands in Romania, please see Eugen Chelaru," Foreign citizens' right over land in Romania", in *Transformation of law sistems in central, eastern and southeastern Europe. Liber amicorum in honorem prof. dr. dres. H.C. Rainer Arnold* (Gdansk : University Press, 2016): 343-359.

the special objectives, it is necessary to obtain a prior approval of the Ministry of National Defence, which is issued after consultation with state bodies with competences in the field of national security, through specialized internal structures [Article 3 paragraph (1) of the law]. It follows from the wording of the law text cited that the requirement to issue a specific opinion is based on the protection of national defence and security interests.

The specific opinion of the Ministry of National Defence is not required if the land is acquired by one of the preemptors. As we shall see, some foreign natural or legal persons may also have the status of preemptors, which means that the verification according to which the transfer of ownership of the land is not liable to generate potential dangers for the defence of the country or national security is not conditional on the new owner's citizenship, respectively nationality.

These opinions are granted according to a procedure regulated by the methodological norms for the application of the law. Notices must be given to the seller within 20 working days of the registration of the request made by him. In the event of non-compliance with this obligation, a favourable opinion shall be deemed to have been issued.

According to Article 3 paragraph (3) of the law, for agricultural lands located outside the built-up area, on which there are archaeological sites, on which areas with spotted archaeological heritage or areas with accidentally highlighted archaeological potential have been established, the alienation can be carried out only with the prior obtaining of a specific approval of the Ministry of Culture, respectively of its deconcentrated public services. At the request of the seller, the Town Hall must issue, within 3 days, an address stating whether or not the approval of the Ministry of Culture is necessary. If such an opinion is required, the Town Hall shall provide an original copy of the address of the competent Real Estate Cadastre and Registration office, in order to record this situation in the Land Register. At the request of the seller, the Ministry of Culture shall issue the approval within 20 working days from the registration of the request. If the opinion is not communicated within 20 days, it shall be deemed to be favourable.

In the situation where one intends to alienate by sale an agricultural land situated outside the built-up area on which classified archaeological sites are located, the provisions of Law no. 422/2001 on

the protection of historical monuments, republished, as subsequently amended, shall also apply.

Law no. 17/2014 also contains provisions establishing preemption rights in favour of certain categories of persons, the control of their observance being ensured by the obligation to obtain a final approval from the Ministry of Agriculture or its territorial structures. The Ministry issues the opinion in the case of lands with an area of more than 30 ha, and its territorial units for lands that have a smaller area than the one mentioned above [Article 9 paragraph (1)]. In the absence of this opinion, the notary public is forbidden to authenticate the deed of sale, and the court, if notified by means of a request regarding the capitalization of a promise of sale, shall not be able to issue a decision to replace the genuine sale contract.

Sales contracts that have been concluded in breach of the legal provisions establishing the obligation to obtain prior administrative approvals shall be sanctioned with absolute nullity (Article 16).

3. THE RIGHT OF PREEMPTION.

Reappeared in the Romanian juridical landscape in 1991, when the Law no. 18/1991 concerning the Land Fund entered into force, the right of preemption is the capacity that a person is acknowledged to have, by law or by juridical document, of acquiring ownership over a good, in case of its alienation, in priority to any other buyer.

The common law in the matter is represented by the provisions of Articles 1730-1740 Civil Code. According to Article 1730 paragraph (1) of the Civil Code, the right of preemption may be established by law or by contract. The exercise of the right of preemption regulated by the Civil Code is post-contractual. Thus, after the conclusion of the sale contract, the seller shall communicate to the preemptor the content of the contract, and the latter, within the period provided for in the same article, must communicate whether he exercises his right of preemption. If so, the sales contract is considered to be concluded between the seller and the preemptor, under the conditions contained in the contract concluded with the third party, and the latter contract is terminated retroactively (Article 1733 Civ. C.).

The juridical nature of the right of preemption is controversial. Thus, starting from the finding that the right of preemption is opposable

erga omnes and is exercised without the assistance of another person, some doctrinaires have stated that the right of preemption is part of the category of real rights.[1]

It has also been stated that the right of preemption would be a right of claim,[2] "an accessible dismemberment of the ownership right with priority over other persons"[3] or as a potestative right[4], which gives the holder the option to choose whether or not to exercise the preemption.[5]

As far as we are concerned, we agreed with the opinion that a distinction must be made between legal preemption rights exercised *ante rem venditam* and those exercised *post rem venditam*. In the first case, "the right of preemption has the characteristics of a right of claim" and in the second "it can be qualified as a potestative right."[6]

Being imposed by law and exercised before the conclusion of the sales contract, the preemption rights regulated by Law no. 17/2014 have the legal nature of debt rights.

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[1] In this sense, please see Gheorghe Beleiu, "Dreptul de preempțiune reglementat de Legea nr.18/1991 a fondului funciar, in *Dreptul* no. 12 (December 1992): 5*;* Ioan Adam, *Regimul juridic al dobândirii și înstrăinării imobilelor – terenuri și construcții*, (Bucharest : Europa Nova, 1996), 76. For a critique of this opinion, please see Eugen Chelaru, "Dreptul de preempțiune reglementat de Codul silvic", in *Dreptul* no. 6 (June 1997): 18-19, Liviu Pop, *Dreptul de proprietate și dezmembrămintele sale* (Bucharest: Lumina Lex, 2001): 129-130.

[2] Răzvan Dincă, *Contractele civile speciale, in the new Civil Code* (Bucharest: Universul Juridic, 2013), 71.

[3]Manuela Tăbăraș, "Dreptul de preempțiune în legislația română contemporană, între restricționare și liberalizare", in *Curierul Judiciar* no 6 (June 2014): 115.

[4] Please see Ion Negru, Dumitru Corneanu (I), Alexandru George Ilie and Marian Nicolae "Discuții în legătură cu natura juridică a dreptului de preempțiune", in *Dreptul* no 1 (January 2004): 22-64; Valeriu Stoica, *Drept civil. Drepturile reale principale*, vol.I, (Bucharest: Humanitas, 2004), 335-338; Dan Chirică, *Tratat de drept civil. Contracte speciale. Volumul I. Vânzarea și schimbul*, 2nd revised edition (Bucharest: Hamangiu, 2017), 202.

[5] In this respect, please see Dan Chirică, "Dreptul de preempțiune în noul Cod civil", *Revista Română de Drept Privat* no 4 (April 2015): 34-35; Mirela Moise," Dreptul de preempțiune reglementat de Codul civil, din perspectiva practicii notariale", *in Buletinul Notarilor Publici no 2* (2012): 10-19.

[6] Marian Nicolae, *Drept civil. Teoria generală. Vol. II. Teoria drepturilor subiective civile* (Bucharest: Solomon, 2018), 99-100.

For the seller, the existence of a right of preemption is also a limitation of the right of disposal, more specifically, a limitation of the right to choose his buyer.[1].

4. THE RIGHT OF PREEMPTION AS REGULATED BY LAW NO. 17/2014.

According to Article 4 paragraph (1), the alienation by sale of agricultural lands located outside the built-up area shall be done in compliance with the preemptive right of the categories of persons that the same law provision enumerates.

The law divides preemptors into seven ranks, who have the opportunity to exercise their right of preemption in the order of the category they belong to.

First-degree preemptors are co-owners, first-degree relatives, spouses, relatives and relatives up to and including the third degree. Their mention among the preemptors listed by Article 4 may seem surprising if we take into account the fact that Article 20 paragraph (1) expressly provides that the provisions of Law no. 17/2014 do not apply to alienations made between these categories of people. However, this way of regulation is useful because it contributes to the shaping of the rule according to which the higher-rank preemptors remove the lower-rank preemptors from benefitting of the preemptive right.

Another consequence of the legal provision cited is that the first-degree preemptors will be able to exercise their right of preemption under the conditions provided by Articles 1730-1740 of the Civil Code, and not following the much more complicated procedure regulated by Law no. 17/2014.

The category of second-class preemptors includes "owners of agricultural investments for tree crops, vines, hops, exclusively private irrigation and tenants." [Article 4 (1) (b)].

The provision contained in the legal provision cited, according to which if on the lands subject to sale there are agricultural investments for tree crops, vines, hops and for irrigation, the owners of these investments have priority when buying these lands with the effect of the removal of

[1] Paul-Henri Antonmattei and Jacques Raynard, *Droit civil. Contrats spéciaux*, 5e éd., (Paris: Litec, 2007), 83.

tenants, who would enter in competition with them, although the latter are also second-degree preemptors.

The owners and tenants of the agricultural lands neighbouring with the land subject to sale are third-rank preemptors.

The case with several owners of land adjacent to the land on sale that are willing to buy is also regulated: the division between them will be made by means of several criteria.

Thus, the owner of neighbouring agricultural land, which has a common border with the largest side of the land that is the object of the sale offer, will have priority when buying agricultural lands located outside the built-up area.

If the land that is the subject of the sale offer has two large sides or all sides equal, priority to the purchase of land is given to the owner of the neighbouring agricultural land, a young farmer, who has had his domicile or residence on the national territory for at least one year before the registration of the sale offer.

If the sides of the land subject to the sale offer are uneven, the owners of the neighbouring lands will be preferred in descending order of the length of the common border with the land in question.

Finally, if the large side or one of the equal sides of the land that is the subject of the sale offer has a common border with a land located within the radius of another administrative-territorial unit, priority to the land purchase belongs to that owner of the neighbouring agricultural land who has his domicile or residence within the administrative-territorial unit the land is located in.

The tenant wishing to purchase the leased agricultural land located outside the built-up area must have this quality under a valid lease contract concluded and registered at the Town Hall where the land is located, at least one year before the date of publication of the sale offer. The following conditions must also be met:

a) the tenants that are natural persons must prove their domicile or residence located on the national territory for a period of 5 years prior to the registration of the sale offer;

b) the tenants that are legal entities and their associates, natural persons, must prove their domicile or residence located on the national territory for a period of 5 years prior to the registration of the sale offer;

c) the tenants that are legal entities, with shareholders that constitute another legal entity, and the shareholders holding the control of the

company must prove that the registered office or the secondary headquarters located on the national territory was established 5 years before the registration of the sale offer.

Through Article 1849, the Civil Code also establishes a preemptive right of the tenant, which has leased agricultural goods as object, so there arises the problem of establishing the relationship between the two regulations.[1] The problem is solved by applying the *specialia generalibus derogant* rule so that the provisions of Law no. 17/2014, which is a special law, shall be applied with priority whenever the object of the lease contract is an agricultural land located outside the built-up area. As a result, the tenant's right of preemption remains subject to the provisions of the Civil Code only in cases where the lease has other agricultural goods as object.

The third-rank preemptors are the owners and tenants of the agricultural lands adjacent to the land subject to sale. In this case, the tenants must also meet the conditions set out above.

The fourth-rank preemptors are young farmers.

According to the law, "young farmers" are persons up to 40 years of age, as defined by Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, as subsequently amended, who intend to carry out or do carry out agricultural activities.

Young farmers have priority when buying land subject to sale if they carry out animal husbandry activities, in compliance with the condition of establishment of domicile or residence on the national territory for a period of at least one year prior to registration of the sale of agricultural land located outside the built-up area.

The fifth-rank preemptors are the "Gheorghe Ionescu-Şişeşti" Academy of Agricultural and Forestry Sciences and the research-development units in the fields of agriculture, forestry and food industry, organized and regulated by Law no. 45/2009.

[1] For the correlations that exist between the right of preemption regulated by the Civil Code and the one provided by Law no. 17/2014, please see Eugen Chelaru and Adriana Pîrvu, "Despre dreptul de preempțiune reglementat de Legea nr. 17/2014", in *Revista de Studii Juridice* no. 1 (January 2017): 60-61.

The category of sixth-rank preemptors includes natural persons with their domicile or residence located in the administrative-territorial units the land is located in or in the neighbouring administrative-territorial units. Of course, within this category of preemptors, priority will be given to the natural person with their domicile or residence located in the administrative-territorial unit the land is located in.

Finally, the Romanian state, through the State Domains Agency, is a seventh-rank preemptor.

If a classified archaeological site is located on the agricultural land that is the object of the sale offer, the preemptors shall not be established by reference to the 7 ranks provided by Article 4 paragraph (1) of Law no. 17/2014, but by means of the provisions of Law no. 422/2001 on the protection of historical monuments, which establishes a right of preemption of the state, exercisable through the Ministry of Culture or through its decentralized units. If the state does not exercise its right of preemption within 25 days of receiving notification of the intention to sell, it shall be transferred to the local public authorities. The local public administration authorities the legislator refers to are the local councils, the county councils or the General Council of the Municipality of Bucharest, which must exercise the right of preemption, on behalf of the respective administrative-territorial unit, within 15 days.

If the holders of the preemption right regulated by Law no. 17/2014 do not manifest their intention to buy the land, the alienation by sale of the agricultural lands located outside the built-up area can be performed to the natural persons who fulfil a series of cumulative conditions provided by Article 4^1. Thus, they must have their domicile or residence located on the national territory at least 5 years before the registration of the offer to sell; they must have carried out agricultural activities on the national territory for 5 years and be registered by the Romanian tax authorities at least 5 years prior to the registration of the sale offer.

The land may be alienated to legal entities that meet the following cumulative conditions: they have had their registered office or secondary office located on the national territory for at least 5 years prior to the registration of the sale offer; they have carried out agricultural activities on the national territory for a period of at least 5 years prior to the registration of the offer to sell agricultural lands located outside the built-up area; they prove in writing that, of the total income of the last 5 fiscal

years, at least 75% represents income from agricultural activities; they prove that the partner or shareholder in control of the company has been domiciled on the national territory for at least 5 years prior to the registration of the sale offer. If in the structure of legal entities, the partners or shareholders that control the company represent other legal entities, they must prove the domicile located on the national territory for a period of at least 5 years prior to registration of the sale offer.

5. EXERCISING THE RIGHT OF PREEMPTION.

The way in which the right of preemption is exercised is regulated by Articles 5-7[1] of Law no. 17/2014. We are mainly dealing with a pre-contractual execution, which derogates from the provisions of Article 1730 ff. Civil Code[1]. In fact, considering the multitude of preemptors established by Law no. 17/2014 and their division into 7 ranks, it would have been impossible to exercise a post-contractual right of preemption.

In essence, the exercise of the right of preemption involves the seller's registration of the sale offer at the Town Hall of the administrative-territorial unit the land is located in, the publication on the notice board of the Town Hall and on its website, the notification of the preemptors that can be contacted, the transmission of the sale offer and related documentation to the Ministry of Agriculture or its territorial structures, as the case may be, as well as to the State Domains Agency, the acceptance of the sale offer by the preemptor, the selection of the preemptor entitled to conclude the contract in case of competition between several preemptors and the conclusion of an authentic sales contract with the selected preemptor.

The role of the Ministry of Agriculture or of its territorial structures is to verify the observance of the legal provisions establishing the preemption rights and the issuance of a mandatory administrative approval for concluding the sale contract. The control that these

[1] The provisions of the Civil Code are in the sense that the sale of the good in respect of which there is a legal or conventional right of preemption can be made to a third party only under the condition precedent of the non-exercise of the right of preemption by the preemptor. The exercise of the right of preemption will have the effect of retroactively terminating the original contract and considering it as being concluded directly between the preemptor and the seller.

administrative authorities exercise is regulated by Articles 9-12 of Law no. 17/2014.

Preemptors who want to buy the land must express their intention in writing, within 45 working days from the date of posting the sale offer. The law also regulates the possibility of modifying the sale offer, as well as its withdrawal by the seller. Both operations must be carried out within the 45-day period provided for the exercise of the right of preemption.

The sale of the land while not complying with the preemption right, as well as the sale concluded at a price that is lower than the price required in the sale offer or in more advantageous conditions than those indicated in it is sanctioned with absolute nullity. The legislator opted for this sanction because it is not only the interests of the preemptors that are at stake, but also the public interests.

Failure to comply with the conditions provided in Article 4^1, which we presented above, also results in the sanction of absolute nullity of the sales contract.

6. THE EFFECTS OF USING THE LAND BOOK EXTRACT.

According to Article 4 paragraph (7) of Law no. 17/2014, "The request for and use of the land book extract or, in accordance with the law, the encumbrance certificate and the cadastral documentation valid at the conclusion of property transfer contracts on real estate and other real rights fully demonstrate the good faith of both parties to the contract, and before the notary public regarding the quality of owner of the seller on the real estate subject to sale as described in the land book." It is a confusing legal provision whose meaning can only be deciphered by reference to provisions in other regulations.

First of all, it should be mentioned that good faith enjoys a general regulation in Article 14, paragraph (1) of the Civil Code, the law text cited provides that "Any natural or legal person must exercise his rights and perform his obligations in good faith, in accordance with public policy and morals." In the second, it is added that "good faith is presumed until proven otherwise", so it does not have to be proven.

Maintaining the relative presumption of good faith, some law texts which regulate specific matters circumstantiate it. Thus, according to Article 901 paragraph (1) of the Civil Code, anyone who has acquired in good faith any real right registered in the land book, by virtue of an

onerous juridical document, will be considered the holder of the property right registered in his favour, even if, at the request of the true owner, the right of its author is deleted from the land book. The law text cited thus establishes a presumption of ownership in favour of the holder registered in the land register.

However, this law text must be read together with the one contained in Article 901 paragraph (2) of the Civil Code according to which the acquirer of a real estate is in good faith only if, at the date of registration of the application for registration of the right in his favour, three conditions are met: no action has been registered challenging the contents of the land book; there is no reason in the land register to justify its rectification in favour of another person; the acquirer was not otherwise aware of the inaccuracy of the contents of the land book.

It follows from this legal provision that good faith consists in convincing the acquirer, which is based on the fulfilment of the three conditions provided by law, that he acquired the property from the true owner. Failure to meet a single condition has the effect of overturning the relative presumption established by Article 14 paragraph (2) of the Civil Code. We draw attention to the fact that the legislator accepts the idea that the contents of the land book may be inaccurate and that the acquirer has found out about this circumstance, in any case. In this situation the buyer will be considered in bad faith, which has the effect of finding that neither his author nor he will be considered owners of the property.

Also, the third parties interested will be able to prove the contrary and thus overturn the presumption of ownership established by Article 901 paragraph (1) of the Civil Code, in cases when the holder of the registration in the land book acquired the real estate by means of an onerous juridical document or by one of the acquisition methods that do not require the registration in the land book, provided by Article 887 of the Civil Code (inheritance, natural accession, forced sale, expropriation for reasons of public utility or other cases provided by law).

Therefore, "the request for or use of the land book extract", referred to in Article 4 paragraph (7) of Law no. 17/2014, cannot prove the "full", therefore unassailable, good faith of the parties to the contract.

On the other hand, the establishment of the location and extent of the real estate registered in the land book is mandatory through valid land book documentation, which is why the reference to it as a way of determining the parties' good faith is not necessary.

It is also useless to refer to the proof of the parties' good faith before the notary public because the latter has to verify only the fulfilment of the conditions provided by law for the authentication of the deed of sale. Good faith is only relevant in the relationship between the buyer and the third parties who would claim rights to the property that was the subject of the sale while the subjective attitude of the seller is indifferent in this respect.

Likewise, the third party will be able to contest the quality of owner of the person who has fulfilled the real estate advertising formalities under the conditions of Law no. 7/1996 because their effect is not that of establishment or transfer of rights, as provided by the Civil Code, but of opposability to third parties. All the more it will be possible to contest the quality of owner of the person who did not register the right acquired by juridical document in the land book.

Under these circumstances, the sole utility of the provision contained in Article 4 paragraph (7) of Law no. 17/2014 would be to substantiate the relative presumption of good faith of the acquirer of a building not registered in the land register or which was registered in an open land register under the conditions provided by Law no. 17/2014.

However, we cannot omit the provisions of Article 563 paragraph (3) of the Civil Code, according to which "The property right acquired in good faith in accordance with the law shall be fully acknowledged." This provision establishes an exception to paragraphs (1) and (2) of the same article, prohibiting the claim over the good from the person who, in good faith and in accordance with the law, acquired the right of ownership over the claimed property.

Considering the way in which the issue is regulated by the Civil Code, we appreciate that the text of Article 4 paragraph (7) of Law no. 17/2014 confuses more than it helps.

7. SPECIAL OBLIGATIONS OF THE BUYERS.

Article 4^2 imposes a number of obligations on buyers in order to maintain the agricultural use of the land and to limit speculative sales.

Thus, the buyers of agricultural lands located outside the built-up area have the obligation to use them exclusively in order to carry out the agricultural activities from the purchase date. Likewise, in the situation where on the respective piece of land there are agricultural investments

for the cultivation of trees, vines, hops and exclusively private irrigations, their agricultural destination shall be kept.

Agricultural lands alienated under the conditions of Law no. 17/2014 remain in the civil circuit but, in case of their alienation before the fulfilment of an 8-year term, calculated from the date of purchase, a tax of 80% shall be paid on the amount representing the difference between the sale price and the purchase price, based on the grid of notaries from that period.

The same tax will be paid by the seller in case of direct or indirect alienation, before the 8th anniversary of the purchase, of the control package of the companies that own agricultural lands located outside the built-up area and which represent more than 25% of their assets. In this case, the income tax on the difference in value of the shares or social shares sold will be applied on a basis reduced in proportion to the percentage of the share of the respective agricultural lands in fixed assets, any double taxation being prohibited.

Non-compliance with the provisions on the alienation of the land or of the control package of the company, as the case may be, before the fulfilment of the 8-year term shall be sanctioned with the absolute nullity of the alienation act.

The latter provisions do not apply to the reorganization or reallocation of assets within the same group of companies.

CONCLUSIONS

It is positive that Law no. 17/2014 establishes a series of conditions that tenants must meet in order to be entitled to the right of preemption. Also, the administrative control over the fulfilment of these conditions will have as effect the considerable restriction of the cases in which the legal provisions regulating the matter of the juridical circulation of the lands are defrauded. These measures, in conjunction with the imposition of legal obligations on buyers, will be an obstacle to purely speculative purchases, which have the effect of not using the land for agricultural production.

Likewise, it is salutary to establish preemption rights when purchasing these lands. In this respect, however, we consider that the system imagined by the law in question is far too complicated and will

have the effect of limiting the right of legal disposition of agricultural land owners, disproportionately to the purposes pursued.

First of all, it relates to the establishment of an excessive number of preemptors. In its initial form, the law was much more rational, establishing only four categories of preemptors: co-owners, tenants, neighbouring owners and the Romanian state. Given the ageing of the population engaged in agriculture, we consider it justified only to include young farmers in the category of holders of the right of preemption, an operation carried out in 2020, when the law was amended.

Secondly, the mechanism for exercising the right of preemption, in particular the method of selecting the buyer in case of a competition between several preemptors, is also complicated. We believe that it would have been preferable to take over the legislative solution contained in Article 1734 of the Civil Code, according to which if several holders have exercised their right of preemption over the same good, the sales contract is concluded with the holder of the legal right of preemption chosen by the seller.

We consider that the application of the sanction of absolute nullity of the sales contract concluded while non-complying with any legal provisions governing the right of preemption to purchase agricultural land located outside the built-up area is excessive and does not contribute to achieving the purpose stated in Article 1 paragraph (3) of Law no. 17/2014, which is the merging of agricultural lands in order to increase the size of agricultural farms and the establishment of economically viable farms. We consider that the legislator should have made a distinction between situations in which the land was sold without following the procedure of exercising the preemption right or to persons who, though they belonged to the category of preemptors, did not meet the conditions required by law to purchase agricultural land located outside the built-up area, on the one hand, and the cases where the sale was made to a lower-rank preemptor, even though a higher-rank preemptor had indicated his intention to buy, or where the contract was concluded at a price that was lower than the price requested in the sale offer or in more advantageous conditions than those shown in it, on the other hand.

If in the first case the application of the sanction of absolute nullity is justified by the violation of legal norms that protect public interests, in the second the interests injured belong to certain preemptors,

therefore they are private and the sanction should have been relative nullity.

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ANTI-COVID LABOUR LAW IN POLAND

Jacub STELINA[1]

Abstract:

A comprehensive assessment of the anti-Covid policy in Poland will be possible after the epidemic has ceased, its social and economic consequences being fully known. However, certain reflections in that respect arise even now. The state's response speed should be assessed positively. Actions to prevent the negative economic effects of the epidemic were taken before the first case of the coronavirus occurred in this country. Attention should also be paid to the flexible reaction of the state to the emerging problems, as evidenced by subsequent amendments to the Anti-Crisis Shield. It seems that targeting the support instruments towards maintaining employment and protection of the existing jobs has brought about good results.

Key words: *Labour; epidemic; economic effects; Anti-crisis Shield; quarantine.*

INTRODUCTION

In January 2020, news about the appearance, in China, of an extremely dangerous and contagious virus from the coronavirus group resounded throughout the world. Within a few months, the virus spread, in practical terms, onto most countries of the globe, paralyzing social and economic life in many of them. In Poland, the first case of a confirmed coronavirus infection (the so-called patient 0) occurred on March 5, 2020. In the days that followed, the number of infections was gradually increasing, but compared to the situation in autumn 2020 (the so-called second wave) or spring 2021 (the third wave of the epidemic), the scale of the phenomenon was very small. Based on the experience of the countries in which the epidemic had already appeared (mainly Italy, France and Spain), quite radical measures were quickly taken in Poland to prevent transmission of the virus. It was primarily the limiting of

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social mobility that was aimed at. Therefore, schools were closed on March 12, catering and tourist businesses and cultural establishments - on March 14, universities - on March 16[1], while on March 20, 2020, one of the states of emergency was introduced in Poland - the so-called state of the epidemic, involving numerous restrictions imposed on citizens (these concerned, among others, mobility limitation, social distancing, reduction of the size of public meetings, closing borders to foreigners.etc.). Strict quarantine rules were also established (regarding the event of contact with an infected person or with those returning home from abroad). The idea was not only to reduce the number of infections, but also to maintain the healthcare system's capacity of providing medical assistance to all who needed it. In the ensuing months the restrictions would be eased or made more severe, depending on the current situation and the number of daily infections.

Unfortunately, despite the measures taken, limiting the transmission of infections did not prove possible. After a short-term improvement during the holiday season, two more waves of infections passed through Poland in the autumn of 2020 and the spring of 2021. In the peak period (March 2021), the daily number of infections reached approx. 35,000, and the mortality rate was also very high. As of the end of April 2021, the number of people infected since the beginning of the epidemic amounted to over 2,700,000 and the death toll exceeded 62,000. Fortunately, the symptoms of an epidemic regression were noted in mid-April 2021, which was probably a result of both the introduced restrictions and the dynamically launched vaccination campaign.

Besides its strictly medical dimension, the coronavirus epidemic and the COVID-19 disease it causes have had a number of negative social and economic effects. The limitation of social mobility was particularly acute for employers and entrepreneurs. As in most other countries, certain types of activities were banned (e.g. catering, cultural, sports, service, and to some extent also commercial), while strict quarantine rules combined with the closure of schools, kindergartens and nurseries, resulted in a need for personal childcare.

Consequently, many of those employed could not, in fact, work, and the situation was only partially alleviated by a transition to remote work. Some employees lost their jobs or were at risk of losing them. And

[1] School teaching (save for September and October, 2020) and university tuition was provided remotely.

although the so-called lockdown was not as severe in Poland as in many other countries[1], its consequences for the country's economy were, nevertheless, serious. This means that the social costs of the epidemic include not only the increased costs of fighting it off, but also the expenditures made by public authorities to support both businesses and citizens. In order for the effects of treatment not to become worse than the disease itself, the government decided to launch a number of protective measures aimed at subsidising endangered industries and maintaining jobs.

The package of the measures was referred to as an "Anti-Crisis Shield". The original Anti-Crisis Shield was established as early as on March 2, 2020[2], but later on, as the number of infections increased, it was supplemented with new support instruments. Obviously, a comprehensive evaluation of the measures taken by the government can only be taken after the epidemic is over, but the first signals coming from the labour market seem to indicate that, at least partially, the Anti-Crisis Shield has had a positive effect. As of the end of March 2021, the level of registered unemployment was 6.4%, which, compared to the period before the epidemic (5.4% in January 2020), meant an increase by mere 1% (according to the conservative estimates from spring 2020 the unemployment rate at the end of the year was predicted to be around 9-10%, and possibly even more).

The Anti-Crisis Shield provides for detailed conditions of the functioning of the state in the period of an epidemic threat, and establishes mechanisms of support, from public funds, to businesses which, due to the "economic freeze", fell into trouble. It also establishes a number of rights and facilities for citizens under the conditions of sanitary restrictions and rigours. An important portion of the adopted solutions are regulations concerning the operation of employers and the situation of employees. For the purpose of this study, this part of the Anti-Crisis Shield shall be referred to as the "anti-Covid labour law" in it.

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[1] For example, shops, with the exception of large shopping malls, operated observing strict sanitary requirements throughout the epidemic, while the operation of hotels, service and catering establishments was periodically suspended due to successive waves of the epidemic, and no ban on leaving home or moving inside the country was ever imposed in Poland.

[2] The Act of 2 March, 2020 on Special Measures Related to the Prevention, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (repeatedly amended).

1. MAJOR REGULATIONS FROM THE FIELD OF ANTI-COVID LABOUR LAW

1.1. General assumptions

The "anti-Covid labour law" is a set of specific legal solutions that modify - for the duration of the coronavirus epidemic - selected regulations in the field of labour law. The purpose of the schemes is to adjust the legal situation of employers to the changed conditions in which their business is carried out, as caused by numerous and long-lasting administrative restrictions. Due to its extraordinary nature and the context in which it was enacted, the anti-Covid labour law has temporary nature. As a rule, the Anti-Crisis Shield shall remain in force throughout the period of the epidemic (although some solutions may also be applied during a year after the latter ends), which means that specific legal solutions described below will cease to apply after the epidemiological threat is over. It should not be ruled out, though, that some of them, if positively assessed by the government and social partners, would stay in force permanently. This is likely to happen with the provisions on remote work and will entail a need to amend the Labour Code.

The Anti-Crisis Shield provides, in principle, for two types of instruments of support to employers – organisational and financial[1]. The former allow the employers to increase the scope of employees' availability by introducing more flexible forms of work organisation, the latter concern a reduction in labour costs or offer a possibility to apply for state subsidies (e.g. in order to cover the costs of employee salaries). Modifying the rights and obligations of the parties to the employment relationship during the epidemic is primarily aimed at safeguarding jobs, as it is better to temporarily change or even deteriorate employment conditions if the crisis caused by the COVID-19 disease can be survived as a result. Therefore, employers are given the option to apply specific legal solutions or are granted the right to obtain financial aid from the state, provided that jobs are maintained. Consequently, a dismissal of employees for reasons attributable to the employer results in the latter's obligation to return the obtained public funds.

[1] J. Stelina, *Anti-Covid labour law regulations in Poland a year after the start of coronavirus epidemic*, http://www.cielolaboral.com/wp-content/uploads/2021/04/stelina_noticias_cielo_n3_2021.pdf.

It should also be emphasized that some of the solutions provided for in the Anti-Crisis Shield, which particularly deteriorate the legal situation of employees (e.g. changes in the working time or deterioration of employment conditions) must be previously consulted on by the employer with trade unions or - in their absence - with a representative of the staff.

1.2. Remote work (telework)

The first of the applied solutions was to increase the possibility of using the so-called remote work. Mandatory quarantine ordered by the sanitary authorities, as well as the need for self-isolation, reduced the mobility of workers. For many employers, the only way to keep their businesses running was to instruct the employees to do the work not at the employment establishment - most often at home, using the Internet. The Anti-Crisis Shield empowered the employer to entrust the employee to do, for a specified period, the work specified in the contract of employment outside the place of its permanent performance. Although telework was, of course, allowed under Polish labour law even earlier, it was, nevertheless, possible only upon winning the employee's consent, expressed in the employment agreement. Currently, the employer may instruct the employee to do distant work even without the employee's consent. Similar regulations have been also enacted as regards officers of the so- uniformed services who do not have the status of employees within the meaning of labour law (e.g. officers of the Police, secret services, Border Guard, State Fire Service, Prison Service, etc.).

1.3. Economic downtime

Another important instrument aimed at protecting employees against job losses is referring them to the so-called economic downtime. Economic downtime can be full or partial. Full economic downtime consists in a complete release of the employee from the obligation to perform work, his/her right to (partial) remuneration being retained. Thus, the employer does not formally terminate the employment contract, but - due to economic difficulties - simply does not make use of the employee's work. The solution allows the employer to survive the hard times faced by him, its greatest advantage being the fact that, after the

problems are over, a full operational efficiency of the employing unit can be easily achieved again. Instead of re-hiring employees, the employer calls on those being on standby to resume work. A milder measure, yet similar in nature, is partial economic downtime. This consists in the employee's working time being reduced due to the restrictions imposed on the business run by the employer. The employee is thus only partially released from the obligation to perform work. In both cases, i.e. when the employee is subject to an economic downtime or when his/her working time has been reduced, the employer may apply for a state subsidy to cover part of the employee's remuneration. The condition for receiving it is the employer not being in arrears with payment of tax liabilities and social security contributions and a fall in turnover by not less than 15% in comparison to the corresponding month of the previous year or by 25% compared to the selected month after January 1, 2020 (the Anti-Crisis Shield provides for possible reimbursement of remuneration also in the event of those doing work under civil law contracts).

The employer pays to the employee being subject to economic downtime a remuneration reduced by no more than 50%, but not lower than the minimum wage. The state subsidy is then 50% of the minimum wage. Such co-financing is not available in the event of highly-paid employees, whose earnings exceed 300% of the national average monthly salary. Co-financing concerning the above mentioned reduction in the working time applies only to the situations where the working time is reduced by the employer by no more than 20% (and no more than down to 50% of the working time required at the respective person's position).

The terms and procedure for performing work during the period of economic downtime or reduced working time are determined in an agreement concluded by the employer and trade unions (or, the latter lacking in the company, a representative elected by the staff).

State benefits concerning economic downtime or working time reduction may be granted for a total period of 3 months. In order to soothe the economic effects of COVID-19, the government may further extend the period (should this be reasonable in the light of the country 's epidemic conditions). It is also vital to mention that during the period when the co-financing is being provided, the employee's contract of employment must not be terminated by the employer for reasons not attributable to the employee.

1.4. Working time regulations

The Anti-Crisis Shield also provides for particular solutions regarding changes in work organisation, aimed at assisting the employers to adjust to the new conditions of doing business under the epidemic circumstances. The employer suffering a fall in turnover due to the occurrence of COVID-19, may (provided that the he is not in arrears with payment of taxes and other levies):

a) limit the uninterrupted time of daily rest from 13 to 8 hours and the uninterrupted weekly rest from 35 to 32 hours,

b) extend the daily working time, but no more than to 12 hours, an average working day of 8 hours in an accounting period not exceeding 12 months being retained.

The above mentioned extension of the daily working time is introduced by means of an agreement concluded by the employer with the trade union(s), or in the absence of the latter - with the employee representative. As regards the shortening of the rest period, this has to be compensated for by a time-off granted in a period not exceeding 8 weeks.

The employers whose staff works in enterprises of particular importance (e.g. in the power sector, entities/facilities of importance for defence, economic interest of the state, public safety or other essential public interests, banks, enterprises of the agricultural/food sector producing or supplying foodstuffs) are authorised to introduce even more flexible work organisation schemes. During the period of epidemic emergency, such employers are allowed, for a specified period not longer than that ending upon recall of the epidemic emergency state, to:

a) change the employees' working time system or schedule in a way needed to secure continuous operation of the undertaking;

b) instruct the employees to do overtime work in the scope and to the extent needed for continuous operation of the undertaking;

c) oblige the employee to stay on stand-by duty outside his/her working hours at the work establishment or at another place designated by the employer;

d) instruct the employee to exercise his/her right to rest at a place indicated by the employer.

In such cases, the employer is obliged to provide the employee with accommodation and board needed by the employee to meet his/her work duties.

1.5. Remuneration refund

An important employee entitlement is the right to a partial refund of remuneration lost in connection with the need to take personal care of an ill child or in connection with the closure of a kindergarten or school. Such a refund is due from the social insurance institution for a standard period of up to 60 days a year. During the epidemic and the closure of all care facilities for young children, it became urgent to extend the refund period. Many parents caring for young children were forced to stay at home with them for a long time, which resulted in their inability to perform work. Thus, the Anti-Crisis Shield extended the right to the refund of the lost remuneration due to caring for young children until the time of reopening of care facilities (kindergartens, schools, etc.).

As part of the Anti-Crisis Shield, the possibility of compensating employers for the costs of remuneration of certain employee groups, which are in a special life situation, was also introduced. This concern, in particular, people with disabilities, employed in institutions where occupational and social rehabilitation of the people is provided.

1.6. Optional deterioration of terms and conditions of employment by the employer

With the consent of the trade union (and in the absence of a trade union - with the consent of an elected employee representative), the employer may apply to the staff terms of employment less favourable than those provided for by respective employment contracts. Among others, the employer may reduce employee remuneration, even if the volume of turnover has not decreased (demonstrating a decrease in sales is sufficient in that respect). The said solution will stay valid for a period of up to one year after the end of the epidemic. The Anti-Covid Shield also provides for limiting the amount of various types of severance payments the employees dismissed from work are entitled to.

In addition, the employer may require an employee to take the unused holiday leave at the date indicated by the employer, i.e. without the employee's consent and regardless of the earlier adopted leave schedule. Also running of the welfare activity, consisting in operation of the company welfare fund, can be unilaterally suspended by the employer.

1.7. Facilitations in the field of employing foreigners

The Anti-Crisis Shield has brought about major changes in the rules on employing foreigners. The good situation on the labour market before the coronavirus epidemic enticed the employers to use the work of foreign workers on a large scale. As regards the citizens of EU Member States, the right to take up employment in Poland is not - as a rule - subject to restrictions, as it results from the provisions of Art. 39 of the Treaty Establishing the European Community (currently Article 45 (4) of the Treaty on the Functioning of the European Union). The regulations in question are, however, not applicable to citizens of countries outside the European Union, and it is just them that constitute an increasingly large group of economic immigrants, as a result of which in some industries (e.g. in construction or trade) the percentage of foreign workers is already significant. The unstable situation in Eastern Europe has contributed to a steady increase in the number of economic immigrants from Ukraine, but also from other countries being formerly part of the Soviet Union. In order to be employed they need, of course, an entry visa and a permit from the relevant authority. Such a permit is issued for a period not longer than 3 years, but may be extended (renewed). In the case of seasonal work, simplified permit issuing procedures apply, the permit being then valid up to 9 months. Conservatively estimated, economic immigration before the epidemic ran at roughly 1-1.5 million people. It was about 10% of the total number of people employed in Poland.

Given the sanitary restrictions imposed from mid-March 2020, some of the foreigners working in Poland returned to their countries of origin, and the closure of borders for people without Polish citizenship made it impossible for them to return to Poland. Obviously, not all of them left. Difficulties in the functioning of state institutions could have caused some of those who remained in Poland to have problems with the renewal of administrative permits for residence and work. For that very reason, provisions of the Anti-Crisis Shield have brought about a number of facilitations allowing them to legalise their stay. It was decided that a change in the conditions of work performed by a foreigner during the epidemic does not affect the validity of the granted work permit. And the validity of work permits having expired during the epidemic has been renewed *ex lege*.

2. PROTECTION OF PERSONS DOING WORK UNDER CIVIL LAW CONTRACTS

The specificity of Poland's labour market is an extensive use of civil law contracts as the basis for hiring people to do work, the so-called civil law employment being spoken about in such situations. Definitely, the use of civil law contracts instead of contracts of employment generally entails deterioration of the conditions of work performance. This is mainly due to the fact that people employed under such schemes are deprived of the protection provided by labour law - they often perform their duties in conditions similar to the employment governed by labour law, but do not enjoy a number of rights provided for in the labour legislation. No wonder that in Poland, the term "junk contracts" is sometimes applied to describe civil law contracts used as the basis for employment. Persons employed under the contracts are not, as a rule, subject to labour law, although there has been a recent phenomenon of extending certain employee rights onto them (such as the introducing of minimum wage rates or authorising the persons to create trade unions). A manifestation of this phenomenon is also protection of people working on the basis of civil law contracts and the so-called self-employed persons (running an independent business and doing their work under the scheme) by the Anti-Crisis Shield.

First of all, a so-called standby pay should be mentioned in that respect. This is granted where the business of a self-employed person or person with whom a civil law contract was concluded has been affected by downtime due to the occurrence of COVID-19. The standby pay amounts, as a rule, to 80% of the minimum wage. In the event of confluence of rights to more than one standby pay, the person is entitled to only a single benefit of the kind. The benefit is due no more than three times. The government may, however, grant another standby pay, should the state of epidemic emergency continue.

The Anti-Crisis Shield has also authorised the state to subsidise the remuneration of persons employed under civil law contracts, and business deductible expenses of self-employed persons, up to 90% of the minimum wage. The entrepreneur, in return, is expected to maintain the employment of persons covered by such subsidies. In order to mitigate the adverse effects of COVID-19, low-interest loans can also be extended

to small entrepreneurs, to fund the current costs of running their businesses.

CONCLUSIONS

A comprehensive assessment of the anti-Covid policy in Poland will be possible after the epidemic has ceased, its social and economic consequences being fully known. However, certain reflections in that respect arise even now. The state's response speed should be assessed positively. Actions to prevent the negative economic effects of the epidemic were taken before the first case of the coronavirus occurred in this country. Attention should also be paid to the flexible reaction of the state to the emerging problems, as evidenced by subsequent amendments to the Anti-Crisis Shield. It seems that targeting the support instruments towards maintaining employment and protection of the existing jobs has brought about good results.

An important part of the policy of mitigating the social and economic effects of the epidemic was regulations aimed at supporting employers and employees, referred to in this paper as the "anti-Covid labour law". Thanks to them, employers were empowered to adapt their enterprises to the new conditions of business. On the one hand, it became easier to them to direct employees to do remote work, flexible forms of work organisation or the option to refer employees to the so-called economic downtime having become possible. On the other hand, the state supported the economy with significant subsidies, being prompted to do so by the need to maintain jobs. Obviously, the solutions that weaken the protection of employees, charging them with the costs of fighting the crisis, cause certain concern. Fortunately, these are only interim regulations that will be lifted once the epidemic is over.

Finally, it is worth noting that, paradoxically, the epidemic has also brought some positive effects. These include, first of all, the accelerated development of digital technologies, i.e. various types of electronic services. The remote work having become so popular also falls within that trend. According to estimated data, over 52% of micro, small and medium-sized enterprises use telework, the most popular being a hybrid system which combines remote work with that stationary. Thanks to that, employers and employees can reap the benefits of remote work while negative consequences of it are reduced.

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CONTRACTUAL LIMITATIONS IN THE *MORTIS CAUSA* LEGAL SUCCESSION ON THE EXAMPLE OF THE FACEBOOK CONTRACT. THE GERMAN FACEBOOK CASE

Mariusz ZAŁUCKI [1]

Abstract:

Contracts with internet service providers often contain restrictions on the use of an internet account by other persons. These provisions are particularly interesting in the context of being able to access digital content on these accounts, especially after the death of the current user. One of the most popular in this context are social networking sites, among them Facebook. Against this background there arises, among others, an interesting problem of inheritance of the content contained in the Facebook and the relationship of the provisions contained in the contract concluded between the service provider and the user with the regulations of inheritance law for the succession case after the deceased user of Facebook services. The author presents the key issues in this area, together with a selection of some dilemmas and discusses some possible solutions, and the source of his comments is the Facebook account inheritance case recently decided in Germany.

Key words: *digital world; digital content; Internet; succession law; inheritance law.*

INTRODUCTION

Digital assets are a controversial type of asset, especially when it comes to rights and obligations related to the use of various online information systems.[2] Such digital assets can include both financial

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

assets (e.g. PayPal balance, e-books) and intangible assets (e.g. profile on a social networking site).[1] Although we all have to deal with inheritance issues in our lives, still not many people realise that digital assets can potentially be part of an estate. At present it is not known, and certainly not uniformly accepted worldwide, whether and under which conditions such digital assets are inherited.[2] Individual contracts with internet service providers contain various provisions to the effect that an account created by the original user cannot be accessed by other persons. In this light, one wonders about the effectiveness of such contractual provisions in the context of the mandatory rules of succession law.[3] Intuitively, it would seem that contractual provisions cannot be in conflict with mandatory rules of law. Whether this is the case in reality, however, and whether rights and obligations related to the use of various online information systems can therefore pass on to heirs, is a problem worth considering. However, as there are many different systems of this kind, the digital content of the most popular social network on the Internet, i.e.

Facebook, will be analysed.[4] This service had an approximately 2.7 billion active users as of the end of 2020, what makes it the biggest social network worldwide.[5] It is estimated that over 8.000 Facebook users die every day. For these reasons alone, it seems that the consideration over this Internet service provider can have a universal dimension. Another reason for this is the fact that a dispute over access to a deceased Facebook user's account by the heirs has recently come to an end in Germany. The resulting conclusions may be a valuable reference for the discussion on the future of the law in this area. Therefore, in this

[1] Romana Matanovac Vučković and Ivana Kanceljak, "Does the Right To Use Digital Content Affect Our Digital Inheritance?," *Eu and Member States – Legal and Economic Issues* 3, no. 3 (2019): 724–46.

[2] Mariusz Załucki, "Digital Content Left On-Line after Death of a User. On the Research That Needs to Be Conducted," *Legal and Administrative Studies* 19, no. 1 (2020): 53–66.

[3] Cf. Sergio Cámara Lapuente, "La sucesión mortis causa en el patrimonio digital. Una aproximación," *El notario del siglo XXI: revista del Colegio Notarial de Madrid* 84 (2019): 377.

[4] Cf. Damien McCallig, "Facebook After Death: An Evolving Policy in a Social Network," *International Journal of Law and Information Technology* 22, no. 2 (2013): 1–34.

[5] S. Westreich, How Many Dead People Are on Facebook?, Medium.com of 21.09.2020, https://medium.com/swlh/how-many-dead-people-are-on-facebook-aa296fea4676 (10.05.2021).

contribution I will deal with the contractual limitations in the mortis causa legal succession on the example of the Facebook contract to the extent that the problems relating thereto have been resolved under German law.

1. FACEBOOK

I need to start with an explanation that Facebook is a social network that creates technologies and services that enable users to connect, build communities and grow their businesses. Facebook does not charge for its use. Instead, companies and organisations pay Facebook to display ads for their products and services. By using Facebook, the user agree to be shown ads that Facebook thinks will be of interest to him. Facebook uses user's personal information to determine which ads to show him. The use of Facebook is unique: from the posts, stories, events, ads and other content that users can see in the News section or on the video platform, to the pages users follow and other features they may use. In order for Facebook to operate its service globally, it is necessary to store and distribute content and data in data centres and systems around the world, including outside the country of user's residence. Such infrastructure is operated or controlled by Facebook, Inc., Facebook Ireland Limited or their affiliates.[1]

Facebook Terms of Service (formerly known as the Statement of Rights and Responsibilities)[2] constitute the entire agreement between the user and Facebook Ireland Limited in relation to the use of Facebook products. This agreement is concluded on the Internet as a result of creating an account on this social networking site and accepting its Terms of Service. According to Facebook's Terms of Service, the Facebook community is safer and more responsible when real people are behind the comments and actions. Therefore, users are required to:

- use the first and last name they use on a daily basis;
- provide accurate information about themselves;

[1] Cf. Lilian Edwards and Edina Harbinja, "'What Happens to My Facebook Profile When I Die?' : Legal Issues Around Transmission of Digital Assets on Death," *CREATe Working Paper* 5, no. 5 (2013): 2.

[2] Facebook Terms of Service, date of last update: 20 December 2020, available at: https://www.facebook.com/legal/terms (10.05.2021).

- to create only one account (their own) and to use the timeline for their own purposes;
- not to share the password, not to allow others to use Facebook account, and not to transfer Facebook account to another person (without Facebook's permission).

Furthermore, the transfer of any of user's rights or obligations under these Terms of Service to another person without Facebook's consent is prohibited. However, the user can designate a person (known as the account custodian) to manage the account when it becomes "*In memoriam*". Only the account custodian, or a person designated by the user in a valid will or other such document in which the user have expressly willed disclosure in the event of death or incapacity, may request disclosure of the contents of the account that has been granted "*In memoriam*" status.[1] The "*In memoriam*" account status is related to the death of its user. As Facebook points out, it wants to respect the wishes of its users regarding what should happen to the account after their death. If a family member or friend uses the appropriate form to send a request for account conversion, the account will receive a special "*In memoriam*" status after verification, unless the owner has requested that the account be deleted in the event of their death.

According to Facebook, giving an account an "*In memoriam*" status protects it from, among other things, other people logging into it. An account with an "*In memoriam*" status is still visible on Facebook, but can only be managed by an account custodian chosen by the account holder. If the account owner has not chosen a custodian for the account, no one will actively look after the account after the account owner has sent the request for "*In memoriam"* status. If the account owner has requested that the account be permanently deleted after their death, Facebook will delete the account once it is notified of the account owner's death.[2]

Such provisions of the Terms of Service can and do raise important questions in practice. It is not clear from them who, or whether, becomes entitled to the digital content associated with a Facebook account after the user's death. Access to an account does not

[1] Facebook Terms of Service, date of last update: 20 December 2020, available at: https://www.facebook.com/legal/terms (10.05.2021).
[2] Facebook Terms of Service, date of last update: 20 December 2020, available at: https://www.facebook.com/legal/terms (10.05.2021).

imply that the content therein is transferred to another person. The option of deleting an account is also highly controversial. What happens then to the data stored on the account after the death of the user? What should happen? Who and on what grounds should be given access to it? The answers to these questions are not obvious and, in seeking them, it is worth looking at what has happened in Germany in this context recently.

2. THE GERMAN FACEBOOK CASE

2.1. Berlin Regional Court (2015)

The recent German case on access to the account of a Facebook user is interesting in that the German courts have taken a clear stance on the question of whether the heirs of a user of a social networking site account have access to all the rights and obligations of that user. The case seemed to have two rounds. The first round was the main round, related to the inheritance of the content of the account. The second round, in turn, concerned the enforcement of the final judgment related to the first round. The whole thing ended with the German Federal Supreme Court ruling of 2020.[1]

The facts of the case are as follows. It all started in 2012, when a 15-year-old girl committed suicide, following which her parents, who were in possession of access data to her Facebook account, sought information on the reasons behind the suicide. As the deceased's account had already been converted into an "*In memoriam*" status following a request from another person, the parents were unable to log in to the account, with the result that they requested access to its content from Facebook, and that access was refused.

In the facts of the case it is worth to mention that the mother explained that her daughter had given her the password and had allowed her to access her data. Because the access was blocked due to the account transformation, she asked Facebook to unblock the user account because she wanted to have access to the account in the same way as her deceased daughter. She claimed, *inter alia*, that the heirs shall be given access to the full user account and the content therein belonging to her deceased daughter.

[1] Angelika Fuchs, "What Happens to Your Social Media Account When You Die? The First German Judgments on Digital Legacy," *ERA Forum*, no. November 2020 (2021): 1–7.

As a consequence of account transformation, the deceased friends had access to the account with "*In memoriam"* status and could post there entries, whereas the heir who was not among the daughter's Facebook friends did not have such access. When the claimant entered the correct password in order to log in to the her deceased daughter's profile, the following sentence appeared: 'this account has "*In memoriam* status"', and when she entered an incorrect password a message appeared: 'the password you entered is incorrect'. Facebook was of the opinion that the heirs could not inherit the Facebook profile, primarily raising arguments related to the application of regulations on protection of personal rights, personal data and secrecy of correspondence, indicating that not only the rights of the deceased, but also her communication partners were protected in this way.[1]

After the proceedings, the court of first instance (*Landgericht Berlin*) ordered on 17.12.2015 that the heirs be given access to the deceased's entire account and the communication content stored there.[2] After determining that German law would apply in the case (which was disputed by the defendant), it pointed out that under §1922 of the German Civil Code, the deceased's Facebook profile passed to her heirs by universal succession.

In giving reasons for this decision, the court cited several arguments. First of all, according to the court, the contract concluded by the deceased with the service provider is a legal obligation relationship having features of a rental, work and service contracts,[3] which according to German law may be inherited. In analysing the existing legal relationship the court emphasized that the fact that no monetary consideration is received from such a "user" does not preclude the hereditary nature of the existing legal relationship, and thus the rights and obligations arising from the contract between the parties, including the right of access to the account, may in principle pass by way of universal succession. In the court's view, the principle of universal succession also applies to personal digital data of the deceased's estate, and such is the nature of the Facebook profile. The court pointed out that the inheritance in this part has a digital character, which only *prima facie* distinguishes it from a traditional inheritance. In the court's opinion it is impossible to treat differently a digital and an "analogue" inheritance. Such an approach would lead to acceptance of a state of affairs

[1] The facts of the case and reasoning of the courts were already presented by me in different place. See: Mariusz Załucki, "Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies" (forthcoming).
[2] *Landgericht Berlin*, 20 O 172/15, judgement of 17.12.2015.
[3] It can also be translated into English as a lease, contract for specific work and a labour contract.

whereby letters and diaries, regardless of their content, would be inherited, while e-mails and private messages on Facebook would not. In the court's view, under the agreement with the respondent, the deceased had the right to access Facebook's servers, and this right, together with the contractual relationship, was transferred to the testator's heirs. According to the court, it is this contractual relationship that is an estate within the meaning of §1922 of the German Civil Code.[1]

Analysing further the content of the legal relationship existing between the deceased and the defendant, the court emphasized that the succession in the present case cannot be excluded because of the special connection of the concluded contract with the person of the deceased. Admittedly, the heredity of a contractual relationship may, in accordance with §399 of the German Civil Code, be excluded if its content is adapted to the person entitled or obliged to such an extent that, in the event of a change in the obliged party, the benefit will be changed in its essence. This is because the nature of the obligation may result in a protectable interest for the debtor to provide performance only to a specific person. The court pointed out that although Facebook's Terms of Service provide that a user's profile is strongly linked to a person, in the court's opinion there is no need to protect the defendant in this case, as an agreement of this kind is concluded *en masse*, without any detailed verification of a specific user, and the user's identity is verified in day-to-day operations only in exceptional cases. Therefore, in the court's opinion, the users do not take advantage of the defendant's personal trust in any way. For this reason, according to the court, the defendant, denying access to the account, cannot invoke the fact that the analogue world knows the regulations aimed at preserving secrecy in relation to heirs (the court cited regulations concerning access to medical records, professional or archival secrecy). In the above-mentioned paragraphs of Facebook's Terms of Service, there is no contractually agreed lack of inheritance of the user's account. The purpose of these regulations is to guarantee the interests of the defendant by the security of each user's account, as well as the security of the social network. The user should not pass on his password or give access to it to third parties in order not to jeopardize the security of the account. Defendant, according to the Facebook Terms of Service, is thus not concerned with regulating the inheritance of an account, but with guaranteeing its security. This, according to the court, is

[1] *Landgericht Berlin*, 20 O 172/15, judgement of 17.12.2015.

not at risk if the account is made available to an heir in order to settle an inheritance.[1]

As an obstacle to succession in this case, the court also considered the regulations concerning protection of testator's posthumous personality arising from article 1(1) of German Basic Law, regulations concerning protection of telecommunication secret, especially §88(3) of *Telekommunikationsgesetz* in connection with article 10(1) of German Basic Law, and regulations concerning protection of personal data. In doing so, it was convinced that these provisions did not preclude succession in the present case. It also wondered whether the defendant's "*In memoriam*" status directive, which was in effect at the time, precluded the heirs' claim. It came to the conclusion in this regard that as a result of inheritance, the heirs accede to the contract on the same terms as had been concluded with the testator, thus taking into account the terms of use stipulated by the defendant, but the directive of "*In memoriam*" status has legal effect. It also pointed out that in the case of contractual relationships with international Internet providers, their general terms and conditions are always subject to content control pursuant to §305 et seq. of the German Civil Code. The provision in the Facebook Terms of Service stipulating that any person on the Facebook friends list can have his or her account transferred to "*In memoriam*" status, with the consequence that the heirs cannot log on with the valid access data, is an unfair disadvantage for the user and his or her heirs pursuant to §307(1) and (2)(1) of the German Civil Code. Under these circumstances, the court upheld the claims of the heirs and ordered that access to the deceased's account be allowed in the state prior to the transformation of its status.[2]

2.2. Berlin Court of Appeal (2017)

However, on appeal by the defendant, the court of appeal (*Kammergericht Berlin*) in its judgement of 31.05.2017 has reversed the first instance judgement and dismissed the action.[3] According to the arguments of the appellant, the regional court wrongly assumed that the disputed Facebook account could be inherited and wrongly justified this with the fact that the "digital estate" should not be treated differently than the "analogue estate". According to this view, the first instance court has

[1] *Landgericht Berlin*, 20 O 172/15, judgement of 17.12.2015.
[2] *Landgericht Berlin*, 20 O 172/15, judgement of 17.12.2015.
[3] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.

misunderstood the fundamental problem of the discussion about the "digital estate". Meanwhile, the special feature is that the data and information that a deceased has left in digital media is not on a physical object (thing) that belongs to the estate (e.g. stored on a computer or USB stick). Rather, the data and information are stored exclusively on the provider's servers. This difference is essential. Because the reason why diaries and letters pass to the heirs in the "analogue world" is that the heir receive ownership of the physical property "diary" or "letter" regardless of the content. In the case of the "digital estate" on e-mail or social media accounts, there is a lack of a physical thing (that is in the estate) as a point of contact.

Also, according to this view, the regional court assumed that the universal succession in accordance with §1922 of the BGB basically also includes claims under the law of obligations and contractual relationships. However, the regional court wrongly followed the view that a distinction was not made between the property law and non-property law part of the (digital) estate. Data and information in letters or diaries only passed to the heir because the heir acquires the letter or diary as a physical object, insofar as it was the property of the deceased. If this is not the case, an express legal regulation is required for inheritance. To the extent that this view is justified by the fact that a distinction between property law and non-property law is impractical, since digital content is usually a mixture of property and highly personal content, this does not do justice to the importance of the legal interests concerned. It is an idea that shapes inheritance law that only property law positions can be inherited. Non-property rights, ie. highly personal legal positions are not inheritable and expire with the death of the deceased. This is an expression of the deceased's general right to personality. This principle is also reflected in the assessment of the inheritance of contractual relationships, which are then not inheritable, one cannot simply pass over with reference to reasons of practicality. Especially with a social media service such as that operated by the defendant as an online platform, which has the purpose of allowing users to exchange ideas with friends and families, the content and data stored in an account are largely more private (highly personal) nature. If one were to follow the opposite view, content and data which, due to their highly personal nature, are not inheritable, would be "infected" by the property-related content and data

and would be withdrawn from the protection aimed at not being inherited.[1]

Also, according to the arguments of the appellant, the regional court wrongly denied the highly personal nature of the contract between the defendant and the deceased. The defendant has presented extensively on the highly personal nature of the contract between Facebook and the deceased, in particular that the contract between the user and the defendant forbids the user to make the Facebook account available to third parties or to transfer it to third parties. Every user is also obliged to indicate their true identity when registering for the Facebook services and not to use any false personal data. If the inheritance of the contract were affirmed, this would mean that the heir, i.e. a person other than the person who set up the Facebook account, would continue to use it under the name and use of the personal data of the deceased, without the other users realizing that they are no longer dealing with the deceased. The heir would appear under the identity of the deceased. Because the Facebook services are mainly intended for use in the private sector, to maintain personal relationships between people who are spread around the world, and because of this provision for predominantly private purposes, Facebook differs from other social networks. Registering on Facebook is therefore comparable to membership that is directly linked to the person of the user and cannot be transferred.[2]

The appeal of Facebook proved to be well founded. According to the second instance court, the content and design of the Facebook contracts themselves leads to the adoption of a view that a user profile is "strongly related to the person of the user", although for different reasons than one might expect. Therefore, the court's argumentation is interesting. The court has noticed that according to the Terms of Service, the user is prohibited from sharing his password with others or granting third parties access to his account. Users are also prohibited from transferring the account without the prior consent of the defendant. However, these regulations only relate to the behaviour of the users during their lifetime, but do not make any statements about whether and to what extent rights from the contract are transferred to the heirs in the event of the user's death. This also applies to the memorial status of the account of the user concerned provided by Facebook in the event of a

[1] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.
[2] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.

death report. The notes on memorial status that can be found on the defendant's help pages also do not contain any regulations on the inheritance of rights from the user contract. Rather, it is a description of services. According to the court, the personalization of the account only serves the "order of the situation", but not a particular interest of the defendant to only have to provide services to certain people, as also the offer directed to all to register on Facebook shows, so that a change in the person of the contract partner does not change the character of the services to be provided by the defendant. According to the court, however, access to digital data cannot be made conditional on whether the data are proprietary in nature or personal. Such a distinction itself is problematic, however, and it is not very clear who should make it and on what basis. So if one thinks of access to data, one should think of all possible data, without such a distinction.[1]

In the facts of the case, however, the court, according to its view, does not have to decide whether or not the testator's Facebook account is inheritable or not. Even if the heirs were entitled to access to the account contents of the deceased despite the mixture of property and highly personal content, its enforceability failed due to §88(3) of *Telekommunikationsgesetz*. This Section forbids the defendant to inform the parents of the deceased about the circumstances and the content of the communication processed via the Facebook account of the deceased and still stored on the defendant's servers. Granting appropriate access would in any case violate the rights of the deceased's communication partners protected by the telecommunications secrecy of §88 of *Telekommunikationsgesetz*. The court was not able to determine that the respective communication partners have consented to such an encroachment on the telecommunications secrecy protecting them.[2]

Explaining this view, the court said that participation in a communication via Facebook does not constitute consent to the transfer of communication content to the heirs of the original communication partner. In particular, it cannot be ascertained that the participants in a communication via Facebook naturally had to assume that the communication content would be made available to the heirs after the death of the communication partner. Rather, the participants in a communication via Facebook were more likely to assume that such a

[1] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.
[2] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.

transfer to the heirs would not take place due to the guidelines on memorial status.[1]

Due to the lack of consent from the communication partner, the defendant cannot be obliged after the applicant's auxiliary request, with which the applicant requests access to the full user account and the communication content contained therein, removing the names and other personal data. Because the telecommunications secrecy also includes the content of the communication, insofar as the plaintiff should mean by removing other personal data that the communication content should be corrected for the points that could allow conclusions to be drawn about the person of the communication partner, such a separation is not possible without the service provider being aware of the content takes away from communication, which is currently denied to him without the consent of the communication partner.[2]

The above reasoning therefore became the basis for amending the judgment and denying access to the account to the heirs. According to the second instance court, considerations of secrecy in communications outweighed considerations of possible succession.

2.3. German Federal Supreme Court (2018)

The decision of the second instance court was appealed by the plaintiff to the German Federal Supreme Court (*Bundesgerichtshof)*. This court, hearing the case on 12.07.2018, ruled in favour of the plaintiff.[3] According to the court, the plaintiff is entitled to demand that the defendant grant the community of heirs access to the deceased's user account and the content contained therein. Such a claim is hereditary and does not conflict with post-mortem personal rights, telecommunications secrecy, data protection regulations or the general personal rights of the deceased's communication partners.

The inheritance of the claim to access to the user account resulting from the user contract is neither excluded by the contractual provisions, nor can an exclusion of inheritance from the nature of the

[1] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.
[2] *Kammergericht Berlin*, 21 U 9/16, judgement of 31.05.2017.
[3] Bundesgerichtshof, III ZR 183/17, judgement of 12.07.2018.

contract. A differentiation according to the type of content of the data stored on the account is also to be rejected.[1]

The right to access the user account and the content stored there arises from the contract under the law of obligations between the deceased and the defendant, which has been transferred to the heirs. According to §1922 (1) of the German Civil Code, the entire property is transferred to the heirs. In principle, this also includes claims and liabilities from contracts under the law of obligations such as the present user contract, whereby the heir enters into the contractual legal position with all rights and obligations. The inheritance nature of claims can be contractually excluded. However, this is not the case here. The nature of the contract also does not result in non-inheritance.[2]

Interesting, in the context of the ruling of the court of the second instance, are in particular the considerations concerning the issue of secrecy of correspondence. The Federal Supreme Court has stated that telecommunications secrecy protects neither the deceased nor the respective communication partner from the heir becoming aware of the content of the user account. This applies both to the content that has not yet been accessed by the deceased at the time of death and to the content that has already been acknowledged and temporarily or finally stored on the defendant's servers. According to the court, from an inheritance law perspective, there is no reason to treat digital content differently, since the decisive criterion of the ultimate personality is equally affected for analogue and digital content. A comparison with the legal situation under inheritance law in the case of analogue letter mail as well as digital content that is printed out or stored on the deceased's media and for which there is a transfer under inheritance law confirms this result. In the case of digital content - should telecommunications secrecy be applied to the heir - the possibility of access for him would depend on the one hand whether the content is embodied in the form of printouts or stored on a medium of the deceased and on the other hand whether it can only be accessed digitally on the provider's servers. The heir would have access to a message sent to the deceased's user account via the defendant's "messenger" if he had saved it on his own medium while the heir would be denied access to the same message, if the testator had left the message on the defendant's server. This different treatment of the same content

[1] Bundesgerichtshof, III ZR 183/17, judgement of 12.07.2018.
[2] Bundesgerichtshof, III ZR 183/17, judgement of 12.07.2018.

depending on the storage medium or the embodiment and thus ultimately on coincidences is not justified. In all cases, the level of confidentiality interest of both the sender and the recipient is the same.[1]

According to §88(3) sentence 1 of *Telekommunikationsgesetz*, service providers are prohibited from gaining knowledge of the content or the specific circumstances of the telecommunication for themselves or others beyond what is necessary for the commercial provision of telecommunication services including the protection of their technical systems. It can be left open whether and with regard to which services the defendant is a provider of telecommunications services or telemedia services. A violation of §88(3) of *Telekommunikationsgesetz* does not exist because the heir of a communication partner, contrary to the opinion of the appellate court, is not an "other" within the meaning of this provision. Others within the meaning of §88(3) of *Telekommunikationsgesetz* are persons or institutions that are not involved in the protected communication process. Those involved in a telecommunications process should be protected from the content and the details of the telecommunications becoming accessible to third parties who are not involved in the process. The heir is not a different person in this sense, but rather, with the inheritance, has become a participant in the communication processes that were not terminated at the time of the inheritance and are therefore subject to the protection of telecommunications secrecy.[2]

In the light of the above, therefore, the parents of a Facebook user's deceased should - by virtue of universal succession - be given access to the deceased's online account. A Facebook account is therefore, according to the court, a hereditary property.[3]

This position, certainly, is a landmark position expressed against the background of continental law, where inheritance is acquired by universal succession. Certainly, the position of German law and practice cannot go unnoticed in the context of those legal systems that have no

[1] Bundesgerichtshof, III ZR 183/17, judgement of 12.07.2018.
[2] Bundesgerichtshof, III ZR 183/17, judgement of 12.07.2018.
[3] Marcel Kubis et al., *Der digitale Nachlass. Eine Untersuchung aus rechtlicher und technischer Sicht* (Bremen-Regensburg: Fraunhofer SIT, 2019), passim.

additional legal regulation concerning the inheritance of digital content.[1] However, the case continued.

2.4. Round two (2019-2020)

The decision of the German Federal Supreme Court did not, as it soon turned out, resolve the heirs' access to the Facebook account. Admittedly, shortly after the Federal Supreme Court verdict, the deceased's mother received a USB stick containing a single PDF file of over 14,000 pages, which Facebook claimed contained a copy of the deceased's account data. However, according to the deceased's mother, the document was unreadable, lacked internal structure and was partly written in English, all of which made it impossible to search for the specific information she was looking for. According to the mother of the deceased, the handover of a USB stick does not grant access in the sense of the Federal Supreme Court judgement that has taken place in the main case. "Granting access" means that the debtor has to do this so that the heirs are able to see the contents of the user account in the same way as a person who logs in to it with the password. In different words, it is not sufficient to grant access only to the communication content held in the user's account, but also to the complete user account. For this reason, the mother of the deceased filed an enforcement application with the court related to the enforcement of the final judgment. The court of first instance (*Landgericht Berlin*), acting as an enforcement authority, found on the 13.02.2019 that Facebook had failed to fulfil its obligation and ordered access to the full user account and the therein the communication content held by the deceased under the user account.[2] According to the court, the debtor cannot successfully counter this by stating that it cannot grant login access to the account in which the creditor can only check the content, but cannot use the functions of the service (e.g. post or send messages). For this reason, the debtor cannot plead that if the heirs were granted access to the account, other users would believe that the account would still be used by the deceased as if she had never died, and would thus be misled. In this respect, too, the debtor can be expected to take technical precautions to ensure that other Facebook users do not receive

[1] Cf. Edina Harbinja, *Legal Aspects of Transmission of Digital Assets on Death* (Glasgow: University of Strathclyde, 2017), passim.
[2] *Landgericht Berlin*, 20 O 172/15, judgement of 13.02.2019.

any suggestions to befriend the user account or receive no birthday reminders. It is incomprehensible why it should not be technically possible for the debtor to override these functions for granting access and to enable a "write-protected" or "passive" mode for access to an account in a memorial state. This is just a matter of programming. Incidentally, the present case is not about to provide the obligee with permanent access to the disputed user account; it should only be given knowledge of the information in the disputed user account in a reasonable time through access - as with any other inspection. Therefore, in the court's view, the enforcement of the judgment in this case must consist in giving the heirs access to the account, which will be analogous to access by the deceased herself to her account.

However, Facebook disagreed with this argumentation and appealed to the court of second instance (*Kammergericht Berlin*). The latter court amended the ruling of the court of first instance and decided on the 9.12.2019 that Facebook was obliged only to provide existing account content. It argued that there was no entitlement to grant access to the account as such and the Facebook was free to decide how to provide the content of the account.[1]

The deceased's mother again disagreed with this view and appealed this ruling to the Federal Supreme Court. The Federal Supreme Court has explained its earlier judgement and on the 27.08.2020 highlighted that Facebook not only had to grant access to the communication content held in the user account, but also had to give the heirs the opportunity to take cognisance of the user account itself and the content on the same way as the original authorised person holding the account was able to.[2] According to the Federal Supreme Court, the concluded contract with its rights and obligations was transferred to the heirs by way of universal succession and therefore the heirs were to be granted access to the user account in the same way as the deceased had previously been granted it. Providing a USB stick with an extensive PDF file does not fulfil the obligation of the debtor. According to the court, the heirs should therefore be able to use the account as the deceased did.[3]

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[1] Kammergericht Berlin, 21 W 11/19, judgement of 9.12.2019.
[2] Bundesgerichtshof, III ZB 30/20, judgement of 27.08.2020.
[3] Katharina Seidler, "Der digitale Nachlass – ein Zwischenstand," *Neue Zeitschrift für Familienrecht* 7, no. 4 (2020): 141–45.

This ruling has caused Facebook to change its Terms of Service. At present, as has already been pointed out, there is a provision stating that after the transformation into the "*In* memoriam" account, only the account custodian, or a person designated by the user in a valid will or other such document in which the user have expressly willed disclosure in the event of death or incapacity, may request disclosure of the contents of the account that has been granted "*In memoriam*" status.

LESSON FOR THE FUTURE

The case of inheritance of a Facebook account, decided according to German law, is an interesting source especially for those lawmakers who do not contain legal regulations concerning inheritance of digital content in their legal system. The ruling will allow similar cases to be solved in other countries which are competent for the settlement of a given succession case. Of course, the doctrine of succession law already indicates many dilemmas in connection with the German ruling.[1] Nevertheless, it would seem that deviation from the view expressed in German law will only be possible if the opposite view is duly substantiated. The German court still does not seem to have answered the question of who owns the content of the deceased Facebook user's account, but has only ruled on the question of access to the content (although this can probably also be understood differently). It is also interesting to note that even if one were to assume full heredity of the content stored in this way, what relevance would there be in this context of a different will expressed by the deceased Facebook user, which the deceased Facebook user is entitled to under, inter alia, one of the provisions of the Terms of Service: "Deleting your account when you pass away: You can choose to have your account permanently deleted should you pass away. This means that when someone lets us know that you've passed away, all of your messages, photos, comments, relations and info will be immediately and permanently removed from Facebook". Therefore, is the German case and its emerging developments a well done lesson for the future?

[1] Alexandra Indra Seifert, "Das digitale Erbe im Spannungsfeld von Persönlichkeitsrechten, Fernmeldegeheimnis und Datenschutz in Deutschland," *European Review of Private Law* 27, no. 5 (2019): 1169–80.

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THE SPORTS ACTIVITY CONTRACT

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Abstract:

According to the provisions of the Law on Physical Education and Sport, the relationship between performance sports people and sports structures requires the conclusion of either an individual employment contract or a sports activity contract. The following scientific material will debate all legal and particular issues in connection with this field.

Key words: *contract; sports activity; contractual liability; salary; taxes.*

INTRODUCTION

The definition of the contract in the Romanian legislation it is found in the Civil Code, art. 1166 that is providing that "The contract is the willing agreement between two or more persons with the intention of setting up, modifying or extinguish a legal relationship".

According to Article 10 of the Romanian Labour Code: "The individual employment contract shall be the contract under which a natural person, called an employee, undertakes to perform work for and under the authority of an employer, whether natural or legal, in return for remuneration called a salary".

According to article 1266 by Romanian Civil Code: "(1) contracts shall be interpreted according to the agreed will of the parties and not according to the literal meaning of the terms. When establishing a consistent will, account shall be taken, inter alia, of the purpose of the contract, of the negotiations carried out by the parties, of the established practices between them and of their conduct after the conclusion of the contract."

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Introduced by Emergency Ordinance No. 38/2017 which amended the Law of Physical Education and Sports No. 69/2000, the sports activity contract replaced the Civil Convention in the relations between sports structures and performance sportsmen.

First of all, we have to define what a sportsman means. According to the provisions of the Law number 69/2000 in agreement with the latest modifications, in article 14 we find that we have two kinds of sportsmen, we mean the amateurs and the professional athletes.

According to the same article, "the professional athlete is the one who fulfils the following conditions:

a) has a professional sport license;

b) is concluding with a sports structure an individual employment contract or a sports activity contract".

The sports structures and the performance sportsmen undertake under the contract concluded between the parties to comply with the specific provisions of the statutes, rules, regulations of the national sports federations and, where appropriate, of the professional leagues in the sport sector concerned and which have as their object the selection work, training, performance and participation in domestic and international competitions.

The specific sports activity contract was regulated by the order of the Ministry of Youth and Sports No 631/890/2017, where it is stated that each sports activity contract must necessarily contain the elements set out in the attached framework model. The parties have the right to introduce specific negotiated clauses only in point VIII[1].

First of all we have to establish the legal characters of this type of contract. It is a *bilateral contract*[2] because the parts of the contract are mutually binding, as we will see when we will discuss the obligations of the contractual parts. Because in this type of contract we are speaking about professional athletes, that means that this is a *contract with pecuniary interest*. If we are speaking about the forming method, we

[1] Sabin Gherdan, "The effects of the sports activity contract during the state of emergency", (juridice.ro, 2020).

[2] Amelia Singh and Livia Pascu, "The nonperformance exceptional of the contract – specific effects of the sinalagmatic contracts", in *Legal and Administrative Studies*, no.15/2016 (Bucharest: C.H.Beck, 2016), 73-81.

have to say that this type of contract can be concluded in a specific form and has to be registered according to the law, so that means that is a *solemn contract*. Being expressly provided by the law we can call this type of contract a *named type of contract*. In the Romanian doctrine, the named contract is a contract settled by express dispositions from the Civil Code or any other special laws and qualified by special names in accordance with the generated operations.[1] The last legal character that we want to talk about it in connection with the performance of the benefits, so we have a contract with a *successive performance.*

Legally speaking this type of contract is considered a mutant. It has ups and downs. For example, in the doctrine it was considered by some specialists an useless legal regular mentation[2].

The sports activity contract and the validity conditions. Being a bilateral contract, the rights and obligations are mutual and interdependent for both parties. Talking about the consent of the parties in our situation we do not have special rules. So, we can consider that the contract is concluded when the parties agreed about the object of the contract. The object of this contract is on one hand the sports activity agreed by the parties and on the other hand, the price of the contract – the sum/price that the sport structure must pay for the sportsman. The object must be determined, to be legal, to belong to the civil circuit. The cause of the contract the legislator did not impose special requests in this field, so that means that will be applied the general rules from the contracts field in accordance with the article 1.236 from Romanian Civil Code, that provides that the cause must exist, to be licit and to be moral. For the concluding of sports activity contracts, no age is specified in an express way, and considering the specificity of certain types of sport, the specific risks, we consider as a proper age, minimum 18 years old[3].

The sports activity contract effects - the rights and obligations of the parties. According to article 14 (2) – Law 69/2000, "the sport structure, but also the professional sportsman, under the contract concluded between them, are bound to respect the specific provisions of

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[1] Adam Dragoi and Radu Gheorghe Florian., *Civil Law. The obligations* (Bucharest: Pro Universitaria, 2014), 41.

[2] Brîndusa Teleoaca Vartolomei, "Contractul de activitate sportivă - o reglementare legală inutilă*"*, in *Labour Law Romanian Reviewno 5* (2018): 51-57.

[3] To be seen Nicolae Slutu and Gheorghe Sorin Slabu, "The concept of the sportscontract – employment contract, drawn from the analysis of the domestic legal provisions", in *Legea si Viata Review* (2015), 18-24.

the statutes, rules, regulations of national sports federations and, where appropriate, of the professional leagues in the sport branch concerned and which have as their object the selection activity, training, performance, and participation in domestic and international competitions ".

The main rights and obligations of the sportsman. First, we will enumerate some of the rights: *the right to be paid by the sport structure*. In accordance with the provisions off the contract, the sports structure must pay the sportsman with the sum and at the deadlines established by the parties. If not, the sportsman has the possibility to make all the legal steps to recuperate the damage; *the right to regular rest (*daily, weekly, annually*); the right to security and health in the sports activity; the right to a periodical medical check-up* – but this is also a obligation[1] - *"The medical examination of legitimate sportsmen shall be carried out on a six-monthly basis, in accordance with the scale of the medical examinations laid down in Annex No. 1, in the sports medicine cabinets within the county specialized ambulances, in the sports healthcare for sportsmen of the municipality of Bucharest and in specialized sports ambulatories, the only health establishments entitled to grant the medical-sports opinion necessary for participation in official training and sports competitions"*[2].

Talking about the obligations, we will try to underline the main obligations of the sportsmen. (1) The obligation to respect the discipline rules, laid down by sporty structure, through internal rules of procedure. „International and national sports organisations have created extensive regulatory frameworks to govern their activities. Associated athletes and clubs are required to comply with the rules set by these organisations. If they do not abide by the rules, a disciplinary sanction can be imposed "[3]. (2)The obligation to comply with the regulations of the sports structure and those laid down by the specific sport field National Federation of the athlete. (3) An obligation to participate in sports events of the sports structure with which it has concluded the sports activity contract; (4) The obligation to undergo periodic medical examinations and

[1] Ministry Order No. 1058/404/24th of April 2003 - For the approval of technical rules on the medical examination of sportsmen, medical and sports assistance in national sports complexes, as well as in national and Olympic lot cantons and medical assistance in sports facilities during training and competitions.
[2] Article 1/ Ministry Order No. 1058/404/24th of April 2003 - Technical Norms.
[3] Rosmarijn van Kleef, *The legal status of disciplinary regulations in sport*, (Springer Link: The International Sports Law Journal 14, 2014), 24-45.

treatments, obligation that we connected with the seme right, already before. We must mention here that, this obligation can prevent a lot of situations like death, bad injuries, etc. Article 55/Law No. 69/2000 provides: *„ (1) Physical exercise in organized forms is carried out only with medical approval. (2) In order to participate in training and competitions, legitimate athletes must undergo regular and whenever necessary medical examination in sport establishments. The participation of legitimate athletes in training and/or their entry in sports competitions shall be subject to the availability of a favourable medical opinion issued only by sport medical establishments* ". Also, if a sportsman does not respect this obligation, he commits a contravention, in accordance with the Romanian special law. (5) The obligation to comply with all relevant anti-doping rules. Doping is the use of harmful substances to health for sports performance. Doping does not only mean steroids, but there is a long list of doping substances used in the most diverse sports from shooting to cycling and from baseball to football. In culturism the use of doping is only more evident (the aim being to increase the muscle mass), not necessarily more frequent or intense[1]. „The sanctions for an anti-doping violation can include: (a) disqualification of results at an event, including forfeiture of medals; (b) a ban from all sport (competing, training or coaching) for up to four years or even life in repeat or the most serious cases; (c) publication of your anti-doping rule violation; (d) financial penalties"[2].

The sport structure has the main following obligations: (1) the obligation to issue, on request, all documents proving the status of participant in the applicant's sport activity; (2) the obligation to ensure the confidentiality of the personal data of participant sports activity; (3) the obligation to comply with all relevant anti-doping rules of the relevant bodies; (4) the obligation to comply with the regulations and statutes of Sport Federations and with the law effective. The general rights and obligations of the parties shall be complemented by the rights and obligations the parties considering those

[1] Teodora Dorminteanu, "Dopajul in sport", in *Noutati si tendinte europene in educatia fizica si sportul universitar* (2008), http://www.conferinte-defs.ase.ro/2008/14_3%20bis.pdf

[2] https://drugfreesport.org.nz/the-consequences-of-doping/ , accessed site on 10th of May 2021.

provided for by the internal rules of the sports structure (public or private law) and will form an integral part of the contract.

We would like to also specify the possible situations, when the contract is terminated: first of all, when the duration of the contract is getting to an end and the parties do not agree the prolonging of the contract; when the contract is terminated by the mutual willing off the both parties, this document must be written, for having legal power; major force; unilateral termination of the contract on founded reasons; when the sportsman is found positive on doping and/or refuses to be tested. Failure by either party to comply with the contract terms shall entail the obligation of the one that is to be blamed, for paying of the damages.

CONCLUSIONS

So, the participants in sports activities may conclude, with a sports structure, an individual employment contract or a sports activity contract, as appropriate. This legal act is the Convention concluded for a fixed period between sports structures and participants in sporting activities (sportsmen, coaches, doctors, nurses, the massages, physical trainers, researchers, etc), which has as its object the pursuit of a sporting activity.

The framework model of the sports activity contract, is set out in the Annex to the Order of the Minister of Youth and Sport and of the Minister of Labour and Social Justice No. 631/890/2017, broadly comprises the contracting parties, the subject-matter of the contract, the duration of the contract, the general rights and obligations of the parties, consideration for sport, cases of force majeure, termination situations, other clauses, dispute settlement and final provisions. What we tried to do in the present material, was to bring together most of the issues correlated with this type of contract and bring into the light the legal steps that must be made for concluding it.

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INTERNATIONAL LEGAL INSTRUMENTS FOR RESOLVING REGIONAL CRISES IN THE EAST (LEBANON, ISRAEL/PALESTINE, IRAQ, SYRIA, YEMEN)

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Abstract:

The Middle East is an area extremely troubled by regional crises of various kinds, including both international and non-international armed conflicts. In these circumstances, the international community, through the United Nations and the system of public international law, is to ensure respect for world peace and security in general and in the Orient in particular.

The object of study of this article is the mechanisms and international legal instruments to prevent and combat the negative effects on regional security in the Eastern Area generated by armed conflicts in Lebanon, Israel/Palestine, Iraq, Syria and Yemen in order to highlight the common elements of UN intervention as well as the specific features of each conflict to emphasize the degree of involvement and cooperation between the UN and regional and local structures in order to ensure peace and security in the region.

Key words: *United Nations; peacekeeping operations; armed conflict; peace and security; regional security.*

INTRODUCTION

The United Nations (UN) ensures that several important goals are achieved in the context of global governance. As peoples and states become more interconnected, more effective international management is needed. Global issues such as terrorism, refugee movements, climate

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change and economic crises are evidence of the undeniable need for international management. The Middle East is facing problems that cover the entire list mentioned above, plus many others. The United Nations is constantly criticized by actors in the international community, whether they are citizens, on all forms of media platforms, or official governing bodies.[1]

The UN is not a perfect system that represents a global governing body. As an institution, the UN does everything it can with what it has. Whether it is the provision of peacekeeping forces or the provision of humanitarian or development aid, the UN is working to protect the lives of millions of people in the Middle East. Occasionally, it comes in the form of peacekeeping, but it can also be in the form of providing the necessary medical equipment, providing training to local residents in conflict areas to increase resilience, or providing education to children whose lives have been affected by the conflict. It is certainly better for the UN to intervene in any possible form than not to intervene at all.[2]

One of the ways in which the regimes in the region have strengthened their power and tried to ensure their survival, even before 2011, is by instrumentalizing sectarian identities. By manipulating fears of political exclusion, claiming to protect certain groups of the population from others, or using fanaticism to discredit their political opponents and rivals, political actors and leaders have strengthened their power and deviated from the idea of reform.[3]

Some authors[4] consider that sectarianism is not new in the region. It is firmly institutionalized in Lebanon's political system and patronage

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

[2] A. Miller, *The United Nations and Middle Eastern Security*. In: *Conflict and Diplomacy in the Middle East External Actors and Regional Rivalries*, 128.

[3] N. Hashemi and D.Postel, *Sectarianization. Mapping the New Politics of the Middle East* (London: Hurst, 2017), 5

[4] F. Haddad, *Sectarianism in Iraq. Antagonistic Visions of Unity* (London: Oxford Press, 2011), 256; B. F. Salloukh, "Overlapping Contests and Middle East International Relations: The Return of the Weak Arab State". In: *Political Science and Politics*, No. 3 (2017): 660-663, [online] https://doi.org/10.1017/S1049096517000348 (accessed 30.01.2021); K. Moore-Gilbert, "Sectarian Divide and Rule in Bahrain: A Self-Fulfilling Prophecy?" In: *MEI Articles*, 19.01.2016 [online]

networks, and since the US invasion in 2003, it has been an important feature of Iraq's highly divided politics and society. The same is true in the Gulf monarchies, where the Al-Khalifa family in Bahrain and the Al-Saud family in Saudi Arabia have for decades exercised power over their Shiite populations through divisive tactics.

According to another group of authors[1], until recently, bigotry was largely rejected and refused in official discourse, and political leaders and government officials often had a delicate balance between engaging in subtle sectarian strategies while seeking to subdue and suppress any obvious sectarianism.

Thus, depending on the circumstances and the socio-political, economic and security situation in the area, depending on the interest of the leaders or governing groups, this element of mobilization is used cynically and treacherously to camouflage the true goals and objectives of political actors in the region.

Since the beginning of the Arab Spring, a new type of regionalization based on increasing the number of refugees, non-state armed groups and cross-border sectarian identification has flourished in the region. At the beginning of the Arab uprisings throughout the region, there was hope for an improvement in the adoption of the international liberal order for individuals from all walks of life, including young activists, trade unionists, middle class members, women, students and Islamists, united to raise their voices against economic deprivation, political repression, corruption and us justice. The slogans addressing bread and freedom in Tahrir Square were almost identical to those in the main markets of other Arab countries. Polls conducted at the top of the 2011 demonstrations showed that the vast majority of respondents believed in "the existence of a unity of the Arab nation."[2]

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https://www.mei.edu/publications/sectarian-divide-and-rule-bahrain-self-fulfilling-prophecy (accessed 30.01.2021)

[1] Ch Salamandra, "Sectarianism in Syria: Anthropological Reflections". In: *Middle East Critique*, vol. 22, Nr. 3 (2013): 303-306.; H. Malmvig, *Allow Me This Time to Speak as a Shi'i: The Sectarian Taboo, Securitization and Identity Politics in Hezbollah's Legitimations of Its War in Syria* (2019) [online] https://doi.org/10.1080/13629395.2019.1666230 (accessed 30.01.2021)

[2] Y. M.. Sawani, "The 'end of pan-Arabism' revisited: reflections on the Arab Spring". In: *Contemporary Arab Affairs*, No.3 (2012): 382-397

The Arab Spring was not the work of a particular political or ideological orientation, and the eruption of the Arab Spring was not a moment of victory for either the Pan-Arab or Islamist tendencies.[1]

It is also important to note that this uprising was a bottom-up phenomenon, which was quite different from previous uprisings led by certain authoritarian leaders or military officers. In addition to the classic organized forms of civil society, such as well-known NGOs in the area, throughout the Arab protests of spring 2011 new forms of civil society activism were observed, symbolically called "active citizens" structures.[2]

Traditional civil society has not been as active in anti-regime demonstrations. The emergence of civil society activism in the Middle East in the 1990s was seen as a positive sign of democratization, but such activism remained ineffective in the fight against state authoritarianism. Civil society organizations have either remained under the direct control of their governments as government-organized NGOs, or operate under strict government oversight, or constitute a new "Arab public sphere" such as young people, women and ethnic minorities in the region.[3]

Unfortunately, the widening of the Arab space that was enthusiastically welcomed during the Arab Spring did not become a generally valid and negotiated form of regional cooperation for a common cause. The Arab streets did not have a common leadership, means and even a common vision with which to create a real transformation. In contrast, following the Arab Spring, conflict has also become an important cause of the increasing emigration of individuals from all social classes and professions.

For example, post-Arab Spring developments have forced a new form of regionalization through the growing number of refugees. Neighbouring countries in the conflict-ridden regions of the Middle East have faced a large number of forced migrants, as happened after the Syrian civil war. In addition, regionalization in the form of the expansion of cross-border radicalization is on the rise. Both cooperating and

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[1] S. Al-Azm, "Arab Nationalism, Islamism and Arab Uprisings". In: *The New Middle East, edited by Fawaz Gerges*, Cambridge: Cambridge University press (2014): 276.

[2] F.Cavatorta "Arab Spring: The awakening of Civil Society. A General Overview". In: *IEMedObs Dossier* (2012): 78. [online] https://www.iemed.org/observatori-en/arees-danalisi/arxius-adjunts/anuari/med.2012/Cavatorta_en.pdf (accessed 30.01.2021).

[3] E. Gheytanchi and V. N. Moghadam, "Women, Social protests, and the New Media activism in the Middle East and North Africa". In: *International Review of Modern Sociology*, No. 1 (2014): 6.

conflicting regional dynamics are at stake simultaneously. All political and military developments in almost all critical regional issues are strongly influenced by several non-state armed actors, including Hamas, Hezbollah, ISIS. The proliferation of non-state actors and transnational armed groups and the growth of tribal, ethnic and sectarian multi-layered identities across the state have led to the search for new forms of organization and cooperation for the Middle East.

Increasing new ways of regionalization caused by civil wars led by transnational armed groups and unprecedented refugee flows pose additional challenges to the security of Middle Eastern nation-states. The ongoing civil wars and their regional repercussions have made the region more interconnected in a negative way, as these repercussions are deeply felt and observed not only in the region but also around the world.[1]

The traditional approach to peacekeeping in the Middle East has now evolved into an approach that also seeks to act in the direction of regional security, emphasizing human security. This reformulation has led to the provision of humanitarian aid for development by the UN in various ways.[2]

LEBANON. The United Nations Interim Force in Lebanon (UNIFIL) has been present since its inception by the UN Security Council in March 1978.[3] Headquartered in Naqoura, southern Lebanon, the mission includes monitoring the cessation of hostilities, providing support to the Lebanese army and providing humanitarian assistance to civilian populations.

In April 2000, the UN Secretary-General received a formal notification from the Government of Israel, outlining their plan to withdraw Israeli forces from southern Lebanon. Since then, an important role for UNIFIL has been to monitor the Israeli-Lebanese border and report any violations committed by either the Israeli Defence Forces (IDF) or the Lebanese army. The area monitored by UNIFIL is best

[1] L. Vignal, "Introduction: Transforming geographies of the Middle East in times of globalization and uprising". In: *The Transnational Middle East-People, Places, Borders*. (London: Routledge, 2016), 302

[2] Miller, "The United Nations and Middle Eastern Security", 129.

[3] The United Nations Interim Force in Lebanon [online] https://peacekeeping.un.org/en/mission/unifil (accessed 14.01.2021)

known as the Blue Line, which is a 120-kilometer stretch from Ras al-Naqoura in southwestern Lebanon to Shab'a in southeastern Lebanon.[1]

The Lebanese Armed Forces (LAF) and UNIFIL are coordinating with each other to ensure the security of the Blue Line - which faces many security problems. LAF and UNIFIL carry out joint military and training exercises, exchange experiences through a joint training program and lead checkpoints and patrols together.[2] Through these types of coordinated efforts, the UN has successfully implemented a long-term security protection dimension.

UNIFIL regularly mediates tripartite meetings between senior LAF and IDF officials, which serve as an essential method for addressing conflict management and building bridges of trust between the parties.[3] UNIFIL has largely succeeded in creating a positive relationship with the LAF which increases the physical security of the Blue Line and holds both parties accountable for any breach of mandate.

In addition to cooperating with LAF, UNIFIL also recognizes the importance of supporting the local population. UNIFIL does this by informing local civilians about UNIFIL's mandates and activities, providing assistance where possible, engaging in the promotion of local culture, customs and concerns, and actively participating in community events. Civil and military cooperation serves as the main tool for interaction between UNIFIL and local communities. Through these actions, UNIFIL interacts with government and community leaders, key religious figures, civil society groups and international organizations involved in development initiatives.

Creating a cohesive environment between UNIFIL and the local communities in which it operates is a key issue in maintaining security along the Blue Line. Understanding and getting involved in promoting local culture and activities provides a unique platform for UNIFIL to do so successfully. UNIFIL also provides free basic services to local people, such as medical and veterinary services. This helps to build a level of

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[1] Pokharel T. UNIFIL. Lebanese soldiers join UN peacekeepers in peace relay march. 03.10.2016. [online] https://unifil.unmissions.org/lebanese-soldiers-join-un-peacekeepers-peace-relay-march accessed (14.01.2021)

[2] UNIFIL Operations. Online https://unifil.unmissions.org/unifil-operations accessed (14.01.2021)

[3] UNIFIL Head chairs regular tripartite meeting with LAF and IDF officials, 20.04.2017 [online] https://unifil.unmissions.org/unifil-head-chairs-regular-tripartite-meeting-laf-and-idf-officials accessed (10.01.2021)

trust that is necessary to ensure the security of local people, as they deal with the day-to-day concerns that arise from positioning in an area where personal security is a concern.[1]

The Taif Agreement which ended the Lebanese civil war (1989), as well as its participation in the Second Gulf War (1990), allowed Syria to play an important role on the Lebanese scene. In 2004, the Syrian occupation faced strong criticism, both from foreign powers such as France and the United States, and from Lebanese politicians.

At international level, this is reflected in Security Council Resolution 1559 of 2 September 2004.[2] Parliament is asked not to amend the Constitution to allow for the extension of the presidential term of Émile Lahoud, close to Damascus, calls for the withdrawal of Syrian troops, and the disarmament of Hezbollah and Palestinian camps and the deployment of the Lebanese army along the border with Israel. A difficult resolution to implement. French activism in this situation can be explained both by the desire to get closer to the United States after the Iraqi episode (2003) and by the personal friendship between President Chirac and former Lebanese Prime Minister Rafic Hariri, in conflict with President Lahoud. Resolution 1757 (2007) authorizes the establishment of a special tribunal to prosecute those responsible for the assassination of the former Lebanese Prime Minister on 14 February 2005.[3]

The most sensitive issues generated by the creation of this ad hoc tribunal were: the diminution of Lebanese sovereignty and the destabilization of the political class, legal inconsistencies and the incongruent use of Chapter VII. Finally, there is no justification for the *a priori* use of Chapter VII. The procedure that established the creation of courts for Yugoslavia and Rwanda, where international crimes (crimes against humanity and genocide) were committed, should not be applied in the case of Lebanon either.

In fact, this is an extension of the jurisdiction of international criminal courts to terrorism, as defined by the Lebanese Criminal Code, in the absence of an international text on the subject.

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[1] Miller, The United Nations and Middle Eastern Security, 130.

[2] UN, Security Council Resolution 1559 of 2 September 2004 [online] https://digitallibrary.un.org/record/529421?ln=en (accessed 25.01.2021)

[3] UN, Security Council Resolution 1757 of 30 may 2007 [online] https://digitallibrary.un.org/record/600560?ln=en (accessed 25.01.2021)

Lebanon also hosts a large population of Syrian refugees as a result of the ongoing war in Syria. The United Nations High Commissioner for Refugees (UNHCR) is tasked with meeting the needs of the refugee population in Lebanon, which is about 1.5 million.

The Syrian refugee population in Lebanon should be considered extremely vulnerable, as a large number fail to complete the necessary documents, which makes it difficult to work, send children to school or receive medical care and the impossibility of registering births. puts tens of thousands of Syrian children born in Lebanon at risk of statelessness. This means a growing concern for security, both in the sense that vulnerable population groups are not meeting basic needs and vulnerable children who do not obtain citizenship in any country. The residency problems facing Syrian refugees create a culture of fear and cause concerns about labour exploitation and sexual abuse.[1]

UNHCR is playing an active role in trying to meet the needs of Syrian refugees in Lebanon, but they are not able to address them to the required capacity. For example, in 2017, only 170,000 Syrian refugees received winter support from UNHCR.[2] Refugees have to endure the harsh weather in winter or even die if basic needs are not met. The international community should play a more active role in providing UNHCR funding for such basic needs. The right approach to basic human needs is a critical element for security, as the population concerned is already vulnerable and susceptible to human rights abuses.[3]

ISRAEL/PALESTINE. In the context of the Israeli-Palestinian conflict, we are dealing with two significantly different national legitimacies. In the Palestinian case, it is above all a matter of status: that of the state. The legal arsenal mobilized by the Palestine Liberation Organization (PLO), then by the Palestinian Authority, is destined to achieve this status, which has an extremely symbolic dimension and some practical provisions.[4]

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[1] Human Rights Watch. February 14. https://www.hrw.org/news/2017/02/14/lebanon-new-refugee-policy-step-forward.

[2] UNHCR. Lebanon [online] http://reporting.unhcr.org/node/2520#_ga=2.243109633.20243646.1495141721-1178618403.1494353381. (accessed 25.01.2021).

[3] Miller, "The United Nations and Middle Eastern Security", 131.

[4] A. Mohammedi, "De l'usage du droit international au Moyen-Orient: approche critique". In: *Revue Québécoise de droit international,* volume 30-2 (2017): 171

Founded in 1964, the Palestine Liberation Organization (PLO) is primarily a national liberation movement. The 1967 Arab defeat exacerbated the Palestinian dimension of the struggle, and the PLO gradually emerged as a key Palestinian player. In 1974 he became an observer at the United Nations General Assembly, and in 1988 it took on the name "Palestine". By a resolution of 15 December 1988, the General Assembly took "note of the proclamation of the Palestinian state by the Palestinian National Council."[1] A wave of bilateral reconnaissance followed: about 90 states by February 1989. In September 1989, Palestine became a member of the non-aligned movement. Following the Oslo Accords and the establishment of the Palestinian Authority, the General Assembly grants Palestine permanent observer status, with a permanent mission to New York and Geneva. As a permanent observer, Palestine already enjoys a special status.

According to some exegetes of the field,[2] pan-Arabism and the idea of Arab Unity reached their peak in the 1950s and 1960s, when they were a strong force for structuring inter-Arab and regional policies in the Middle East. In reality, of course, the idea that "Arab interests" prevailed over the interests of territorially defined Arab states and that eventually all Arabic-speaking territories should merge into a single Arab nation-state gave rise to heated disputes.

The merger of Egypt and Syria in 1958 in the United Arab Republic illustrated the aspirations for territorial unity, but the experience lasted only three years.

The idea of a single Arab Nation-State, backed by the theoretically socialist republic led by Egyptian Gamal Abdel Nasser, clashed with the preferences of Arab monarchies, as analysed by Malcolm Kerr, who later promoted the famous phrase of the "Arab Cold War."[3] Most Arab kingdoms subscribed to a lighter form of Arab nationalism, limited to cooperation and solidarity between Arab states.

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[1] UN, General Assembly Resolution 43/175 of 15 December 1988 [online] https://undocs.org/pdf?symbol=en/A/RES/43/175 (accessed 25.01.2021)

[2] J. Jankowski and I. Gershoni, *Rethinking Nationalism in the Arab Middle East* (New York: Columbia University Press, 1997), 408; M. N. Barnett, *Dialogues in Arab Politics. Negotiations in Regional Order* (New York: Columbia University Press, 1998), 376; A. Dawisha, *Arab Nationalism in the Twentieth Century. From Triumph to Despair* (Princeton: Princeton University Press, 2003), 368

[3] M. H. Kerr, *The Arab Cold War. Gamal 'Abd al-Nasir and His Rivals, 1958-1970*, 3e éd. (London: Oxford University Press, 1971), 166

In fact, in the Arab political arena of the time, pan-Arabism served as a tool to legitimize the ambitions of leadership in the Arab state system and to justify regional aspirations for hegemony. The struggles for pan-Arab leadership have masked the inherent fragility of states, led to conflicts, justified mutual attacks on sovereignty, and perhaps, paradoxically, weakened the Arab state system.[1]

However, the idea of pan-Arab solidarity, in which the Palestinian cause was central, found wide resonance with the Arab public, thus conditioning the foreign policy of many states in the region, often against much more modest national interests.[2] The history of the Israeli-Palestinian conflict shows that the commitment of Arab leaders to the Palestinian cause was generally more rhetorical than factual.[3]

Palestinian activism takes on a new dimension when the Palestinian Minister of Justice submits on 22 January 2009, pursuant to Article 12 (3) of the Statute of the International Criminal Court,[4] a statement by which the Palestinian Government agrees to exercise the Court's jurisdiction over acts committed on Palestinian territory since 1 July 2002.[5] In its reply of April 2012, the Court Prosecutor's Office states that it follows the practice of the Secretary-General of the United Nations to determine whether or not Palestine is a state.[6]

Indeed, the summary of the UN Secretary-General's practice as depositary of multilateral treaties includes in the list of states that have the right to accede to the treaties, and the member states of specialized agencies. Palestine, as a member state of UNESCO, a specialized agency, could therefore legitimately, following this practice invoked by the Prosecutor's Office, accede to the ICC Statute. Instead, the Prosecutor simply asked the Security Council or the United Nations General Assembly to resolve the status of Palestine first. As in the case of the

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[1] E. Solingen, "Pax Asiatica versus Bella Levantina: The Foundations of War and Peace in East Asia and the Middle East". In: *American Political Science Review*, No. 4 (2007): 757-780

[2] Barnett, *Dialogues in Arab Politics. Negotiations in Regional Order*, 158

[3] M. Tessler, *A History of the Israeli-Palestinian Conflict* (Indianapolis: Indiana University Press, 2e éd. 2009), 1040.

[4] Statute of the International Criminal Court, 17.07.1988 [online] https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed 25.01.2021)

[5] J. Salmon, "La proclamation de l'État palestinien". In: *Annuaire Français de Droit International*, No. 34 (1988): 37-62.

[6] Salmon, *La proclamation de l'État palestinien*, 37-42.

above-mentioned effectiveness argument, this cowardice of the Prosecutor's Office illustrates the narrowness of the prospects offered by international law on the Palestinian issue.[1]

Gaza is a major security concern in the Middle East in terms of living conditions, economic stability and security. It is an area that has experienced a high level of violence due to decades of conflict on account of territorial disputes. Hamas maintains control of Gaza, and Gaza citizens are often prevented from leaving due to restrictions on Israeli and Egyptian borders. The infrastructure collapsed due to wars, artillery exchanges and lack of resources to fix them.

Israel's victory over the Arab armies after the 1967 War marked the beginning of the end of secular pan-Arabism.[2] Subsequent events, such as Egypt's separate peace agreement with Israel in 1979 and Iraq's invasion of Kuwait in 1990, seem to indicate that Arab regimes no longer feel guided by the idea of pan-Arabism. Arab unity and solidarity are lacking, despite the occasional interest shown. The three wars waged by Israel in the Gaza Strip, led by Hamas, have led to the return of these inter-Arab divisions, with Egypt and Saudi Arabia accusing Hamas of being a pawn of Iran. At the same time, however, after 1967, the issue of Palestine will continue to have an impact on regional policy, as it will involve reconfiguring state and non-state actors who have defined themselves as part of the "axis of resistance" formed against Israeli control over the Palestinians. Often described by the West as "radical" or "extremist" states or groups, members of this axis included Iran, Syria, various Palestinian factions, and Lebanese Hezbollah.

After the Arab uprisings, the fragmentation of the Arab state system continued and the low emphasis on mastery of Arab unity and solidarity, with the Syrian civil war and the crisis between Qatar and Saudi Arabia being perhaps the most eloquent examples. The Israeli-Arab conflict, and in particular the issue of Palestine, "the main topic of regional concern in the Middle East for over a century,"[3] is no longer a major factor in the political structuring of the Middle East.

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[1] Mohammedi, "De l'usage du droit international au Moyen-Orient: approche critique", 176.

[2] F. Ajami, *The Dream Palace of the Arabs. A Generation's Odyssey* (New York: Pantheon Books, 1998), 368; A. Dawisha, *Arab Nationalism in the Twentieth Century. From Triumph to Despair* (Princeton: Princeton University Press, 2003), 368

[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

Common Arab positions on how to resolve the Arab-Israeli conflict, such as those expressed in the 2002 Arab Peace Plan, are no longer relevant. The aftermath of the US invasion of Iraq in 2003, and in particular the growing antagonism between Saudi Arabia and Iran, has intensified the division between Sunnis and Shiites. At the same time, the agitation of sectarianism in Saudi Arabia can be seen as the kingdom's counter-revolutionary preventive strategy in response to the Arab uprisings.[1] At the same time, anti-Zionism has ceased to be one of the hallmarks of Arab politics. Rather, common hostility to Iran and its allies has allowed for a new rapprochement between Israel and a number of Arab states in the region, including Saudi Arabia, Egypt, the United Arab Emirates and some small Gulf monarchies.

Gaza is one of the first humanitarian crises not only in the Middle East but also in the world. The UN is present in Gaza and offers help through various channels to citizens who need it. However, there are no peacekeeping forces in Gaza. According to the Middle East Monitor news agency, the Israeli government recommended the presence of UN peacekeepers in Gaza, but this proposal was rejected by Hamas. Thus, the UN is able to address security concerns in Gaza only through a humanitarian approach and not through a protectionist approach. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) is present in Gaza. This UN body says Palestinians living in Gaza are "imprisoned" because they face severe restrictions on movement that have intensified since Hamas took power in 2007.[2]

Indeed, Israel has benefited greatly from regional developments since the Arab uprisings. Apart from improving its relations with Saudi Arabia and the Gulf monarchies (and their common antagonism towards Iran), the Assad regime is no longer a threat to Israel. For now, Hezbollah is fighting in Syria, and Egypt shares Israel's aversion to Hamas. Of course, Israel is concerned about the presence of Hezbollah and Iranian forces in neighbouring Syria, especially near its borders, as well as the vast combat experience that Hezbollah has gained in Syria.

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[1] M. Al-Rasheed, "Sectarianism as Counter-Revolution: Saudi Responses to the Arab Spring". In: Nader Hashemi and Danny Postel, *Sectarianization. Mapping the New Politics of the Middle East* (London: Hurst, 2017), 143-15

[2] OCHA, Gaza Strip [online] https://www.ochaopt.org/location/gaza-strip. accessed (14.01.2021)

But, in general, Israel's position in the regional system has undoubtedly strengthened. Popular attraction to the "axis of resistance" has weakened, mainly due to the involvement of Iran and Hezbollah in the Syrian civil war and the conflict in Syria itself. Last but not least, the policies of the right-wing Israeli government enjoy the full support of the US administration.[1]

Continued tensions between Hamas and the Palestinian Authority have led to a serious humanitarian crisis that must be addressed urgently in order to avoid human casualties. In mid-April 2017, the Gaza power plant ceased operations due to a dispute between Hamas and the Palestinian Authority over tax rates for fuel used for the plant. The result of the fuel and electricity crisis in Gaza forced the closure of hospitals and prevented some citizens living in tall buildings from accessing drinking water. This crisis also goes beyond the security of Gaza's borders, as the lack of energy to treat sewage causes poorly treated sewage waste to flow into the Mediterranean Sea on a daily basis.

But even if today the plans for pan-Arab unity that could lead to major changes in the existing state system are no longer a goal of Arab leaders, it would be premature to completely reject the Arab dimension of regional policy.[2]

First, references to the "Arab cause" are still relevant to Arab leaders, to Iran and to Turkey, the non-Arab states, which enter the struggle of Arab-regional policy by presenting themselves as the true defenders of the Palestinians. Second, non-state actors, especially Hezbollah and Hamas, have taken on the role of defenders of the Palestinian cause. Third, contrary to the secularist tradition of pan-Arabism of the 1950s and 1960s, the Arab dimension of Middle Eastern politics is increasingly rooted in religious and pan-Islamist discourse. Finally, the rule of Arab solidarity and the Palestinian cause still resonate strongly with the Arab public. The strong reaction of the Arab people against the war waged by Israel against Lebanese Hezbollah in 2006 and against the Gaza Strip, led by Hamas, in 2008-2009 is proof of this. If we

[1] J. Quero and A. Dessì, "Unpredictability in US Foreign Policy and the Regional Order in the Middle East: Reacting vis-à-vis a Volatile External Security-Provider". In: *British Journal of Middle Eastern Studies* (17.02.2019) [online] https://doi.org/10.1080/13530194.2019.1580185 accessed (14.01.2021)

[2] M. Valbjørn and A. Bank, "The New Arab Cold War: Rediscovering the Arab Dimension of Middle East Regional Politics". In: *Review of International Studies*, vol. 38, Nr. 1, (2012): 3-24

analyse the role of the Arab media, we see that the Arab uprisings and their consequences were further evidence of the social and cultural interdependence of the Arab populations.[1]

Tensions in Gaza have erupted recently, especially after the United States announced it would move its embassy to Jerusalem. Beginning in March 2018, Palestinians in Gaza began demonstrating in the "Great March of Return" to mark al-Nakba (the Catastrophe), in which Palestinians commemorate the mass movement that took place due to the 1948–49 war. The demonstrations, which continued every Friday, led to mass violence on May 14, when at least 60 people were killed and more than 1,300 injured. Israeli forces used live ammunition, rubber bullets and tear gas against protesters who had gathered along the Gaza-Israel border fence.

The disproportionate use of force against the protesters, most of them unarmed, was condemned. UN Special Coordinator Nickolay Mladenov briefed the Security Council and called for an end to the violence in Gaza with the support of the international community, arguing that support would be essential to prevent war. US Ambassador Nikki Haley spoke on the issue, arguing that the move of the US Embassy to Jerusalem reflects the "reality" that it has been Israel's capital since the state's founding.[2] She also argued that there would be no plausible peace agreement in which Jerusalem was not the capital of Israel.

Palestine's initial ambition was to become a full member of the United Nations. However, the procedure required a recommendation from the Security Council, followed by a two-thirds vote of the General Assembly. Faced with a probable stalemate, especially American, in the Security Council, Mahmoud Abbas was persuaded to give up his original idea. Thus, Palestine achieves a "hybrid status" by becoming a non-member observer state,[3] after a vote of more than two-thirds, when only a

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[1] P. Noble, "From Arab System to Middle Eastern System? Regional Pressures and Constraints". In: K. Bahgat and E.Ali and H. Dessouki, *The Foreign Policies of Arab States. The Challenge of Globalization*, 3e éd. (Cairo: American University Press, 2008), 67-167

[2] UN News. Security Council calls for calm following deadly Gaza clashes; diplomats debate US embassy move. (May 15.2018) [online] https://news.un.org/en/story/2018/05/1009792 accessed (14.01.2021).

[3] UN, General Assembly Resolution 67/19, Status of Palestine in the United Nations A/RES/67/19, 29.11.2012.

simple majority was needed. According to Ghislain Poissonnier, although this "hybrid status" has no legal effect on bilateral recognitions, it gives weight to the idea that the state meets the above criteria. However, a resolution of the General Assembly does not create the state, at most it gives weight to a political process. The famous General Assembly Resolution 181 of 29 November 1947[1] on the partition plan serves mainly to legitimize unilateral approaches (1948 for Israel, 1988 for Palestine).[2]

More specifically, however, this status makes it possible to overcome the obstacle highlighted by the Prosecutor's Office of the ICC: Palestine may become a party to major international conventions. This refers to most international bodies based on conventions whose depositary is the UN. This includes the ICC, but also the International Court of Justice (ICJ). Article 35 (1) of the Statute of the ICJ provides for the full membership of the Member States of the United Nations. However, Switzerland and Italy were able to become parties to the Statute before becoming members of the United Nations. Article 35 (2) of the Statute provides that the conditions for non-member States shall be determined by the Security Council. However, Security Council Resolution 9 of 15 October 1946 authorized Non-Party States to file at any time a declaration of acceptance of the jurisdiction of the court.[3] Therefore, Palestine may declare that it accepts the jurisdiction of the Court in order to be able to prosecute it for violations of international law committed against it. However, this possibility is limited by the fact that Israel does not accept the binding jurisdiction clause.

It is clear that the UN has a vital role to play in the future of Gaza and Israel. As long as Gaza and Israel continue their tense relationship, the UN must continue its active presence. Given the potential conflict, the UN must be as proactive as possible in obtaining support from the international community to put pressure on all parties to the perpetrators of violence and work for a peaceful solution.[4]

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[1] UN, General Assembly Resolution 181 of 29 November, 1947 [online] https://unispal.un.org/UNISPAL.NSF/0/146E6838D505833F852560D600471E25 (accessed 14.01.2021)

[2] Gh. Poissonnier, "La Palestine, État non-membre observateur de l'Organisation des Nations Unies". In: *Journal du droit international*, No. 140:2 (2013): 427.

[3] Security Council Resolution 9 of 15 October 1946 [online] https://www.icj-cij.org/en/other-texts/resolution-9 (accessed 14.01.2021)

[4] Miller, "The United Nations and Middle Eastern Security", 132.

Popular support for the Palestinians continues despite the evolution of regional alignments at the state level.[1] The persistent importance that Arab populations attach to the Palestinian cause shows a growing disconnect between Arab regimes and their populations, an increase in the "division between regimes and the people" identified by some researchers.[2]

The weakening of the rule of Arab unity, the low importance given to regional policy at the state level, the Arab-Israeli conflict in general and the Palestinian problem in particular, and the evolution of the positions of a number of Arab states on their relations with Israel are significant changes in the current order in the region. Institutionalized relations between Israel and a growing number of Arab states, which are not Israel's immediate neighbours, could indicate a change in regional order. In other words, we would see a rather radical transformation of the regional order if official relations with Israel became the norm or if Palestine no longer mobilized Arab public opinion.

Iraq. With the destruction of the Iraqi state following the US invasion, fanaticism became institutionalized in the new Iraqi political system. When the Iraqi state collapsed, it left room for a mix of transnational jihadist groups, Shiite militias backed by Iranians and a number of other foreign actors. Finally, as R. Hinnebusch observes, the Iraqi conflict has spread to the region, transnationalized the sectarian conflict and encouraged a new sectarian discourse.[3]

The United Nations Assistance Mission for Iraq (UNAMI) is one of the UN's primary presences in Iraq. Founded in 2003 and expanded in 2007, it remains active today. UNAMI has a goal that is focused on supporting both the government and the people of Iraq and is responsible for many initiatives that are essential to promoting increased security. They work with the government and civil society to coordinate humanitarian efforts for UN agencies, funds and programs across the country.

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[1] Makdisi, "Palestine and the Arab-Israeli Conflict: 100 Years of Regional Relevance and International Failure", 25

[2] M. Lynch. "Power Ploy". In: *The American Prospect* (20.07.2006) [online] https://prospect.org/article/power-ploy/ (accessed 14.01.2021)

[3] R. Hinnebusch, "The Sectarian Revolution in the Middle East". In: *R/evolutions: Global Trends & Regional Issues*, vol. 4, No. 1 (2016): 120-152, [online] http://revjournal.org/hinnebusch-the-sectarian-revolution-in-the-middle-east/ (accessed 14.01.2021)

And in Iraq, the government is widely seen as sectarian (even by some Shiite parties and religious leaders) and therefore lacking in legitimacy. Moreover, securing ethnic and religious identities creates antagonism and provokes fear in society, which is incompatible with the ideas of individual rights, citizenship and inclusion and ends up harming ethnic and religious minorities.

The lack of security of sectarian identities, perceived as threatened,[1] thus legitimizes the use of exceptional means such as violence and fierce repression.[2] While the assurance of sectarian identities is deliberate, once triggered, it builds solid social facts and the illusion of fulfilled prophecy. Campaigns based on fear and sectarian alteration end up creating dynamics of self-sustaining groups and social realities that are becoming difficult to dismantle, as is the case in Iraq and Syria.[3]

UNAMI does not offer humanitarian or development programs, but rather raises the profile of development by engaging in things such as political dialogue, assistance in electoral processes and facilitating regional dialogue between Iraq and its neighbours. The role of the UN in Iraq is strongly focused on the political arena and humanitarian aid - mainly on the refugee population or displaced persons whose number has increased following the conflict with the Islamic State of Iraq and Syria (ISIS). ISIS has occupied the territory of Iraq and Syria since 2014 and has remained a major security concern due to its relentless violence, financial resources and innovative ways of using social media.[4]

The UN's focus is on Mosul, following the recovery of the city from ISIS and the finding of numerous human rights violations, and the UN refugee agency has opened its 12th camp outside Mosul to assimilate the growing number of displaced people, as the previous camp, which can accommodate 30,000 people, was full.

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[1] M. Darwich and T. Fakhoury. "Casting the Other as an Existential Threat: The Securitisation of Sectarianism in the International Relations of the Syria Crisis". In: *Global Discourse*, vol. 6, No. 4 (2016): 712-732

[2] O. Wæver, "Securitization and Desecuritization". In: Ronnie D. Lipschutz, *On Security*. New York: Columbia University Press (1995): 46-86

[3] Ch. Phillips and M. Valbjørn, "What Is in a Name?" The Role of (Different) Identities in the Multiple Proxy Wars in Syria". In: *Small Wars & Insurgencies*, vol. 29, No. 3 (2018): 414-433

[4] S. Mabon and S. Royle, *The Origins of ISIS: The Collapse of Nations and Revolution in the Middle East* (London: I.B. Tauris, 2017), 248

Families arriving at the camps report that the situation in Mosul is getting worse, with no water, food, fuel or basic services. In addition, traveling outside the city in an attempt to reach a camp is a dangerous journey. The situation in Iraq caused by ISIS is a security issue in several different areas: the infrastructure has been destroyed by brutal fighting, hundreds of thousands of people are displaced, and the brutality of ISIS will have persistent effects on the Iraqi people. Funding for humanitarian efforts is not approaching the required level, only 17% of the $ 985 million requested by the Humanitarian Response Plan for Iraq was provided.[1]

The lack of funding from the international community jeopardizes the UN's ability to properly address the humanitarian crisis, which would not help alleviate security concerns. In addition to the necessary basic goods that the UN provides, they are also building field hospitals to help the victims. These field hospitals provide essential services that are needed for the people of Iraq to have access after suffering such a high level of violence from ISIS.

During a trip to Baghdad in March 2017, UN Secretary-General António Guterres pledged to continue his commitment to provide assistance and support for the reconstruction of Iraqi institutions and reiterated the importance of ISIS being responsible for human rights violations, although not he was very explicit about the role that the UN will play in that process.[2]

Even though ISIS appears to have been defeated in Iraq, the UN still has a long way to go to help ensure security in the region. Providing healthcare to citizens to deal with trauma is a strictly necessary step. Rebuilding infrastructure and political institutions will lead to a stabilization that will also contribute to increasing the level of security. Marta Ruedas, UNDP resident representative for Iraq, stressed that roads in Iraq are being repaired, hospitals are becoming operational, electricity is being restored, and people can finally return to work. She also said that more than 60 percent of the nearly 6 million displaced people were able

[1] UN News. April 26. 2017 [online] https://news.un.org/en/story/2017/04/556042-dr-congo-un-seeks-64-million-tackle-humanitarian-crisis-kasai-region. accessed (14.01.2021).

[2] UN News. April 26. 2017 [online] https://news.un.org/en/story/2017/04/556042-dr-congo-un-seeks-64-million-tackle-humanitarian-crisis-kasai-region. accessed (14.01.2021).

to return home. All of these are steps in the right direction, but there is still a long way to go to ensure stability in Iraq. The international community has a responsibility to provide the necessary assistance to the UN to ensure that this goal is put into practice.[1]

SYRIA. The Syrian conflict that erupted in 2011 compromised security across the country and displaced millions of Syrians. Human rights violations took place on a large scale during the Syrian crisis, and the UN responded by calling for an immediate end to violence, the release of political detainees, impartial investigations to end impunity, ensuring accountability and bringing the perpetrators to justice and redress for victims of the conflict. Each of these steps is essential in trying to restore Syria's security. Since the conflict began, Syria has shifted from a middle-income country to one in which four out of five residents live in poverty.

The displacement of Syrians has strained the economies of neighbouring countries, which are trying to accommodate a growing number of Syrian refugees. This creates an external security concern for neighbouring states, as their own development is affected by the absorption of a large number of people that their infrastructure and economies are unable to support. The UN is addressing this security concern, working to build bridges between humanitarian and development responses to the crisis, supporting increased resilience of the most affected communities in Syria and host countries. By strengthening livelihoods, encouraging social cohesion and rebuilding infrastructure.

In Syria, since 2011, the Assad regime has categorized protesters and the opposition as Islamists and Sunni sectarian terrorists eager to establish a majoritarian Sunni regime, while the regime delivered sandbags to Alawite villages to protect them from Sunni anger, thus instilling sectarian fear to minority groups and re-creating self-fulfilling prophecies.[2] The classic security dilemma led to more violent forms of sectarianism with more Sunni massacres in 2012,[3] as a spiral of sectarian violence was set in motion. Today, the younger generation of soldiers and militiamen who have fought in Syria for years are more flexible on

[1] Miller, "The United Nations and Middle Eastern Security", 133.
[2] Salamandra, "Sectarianism in Syria: Anthropological Reflections", 303-306.
[3] Phillips and Valbjørn, "What Is in a Name?" The Role of (Different) Identities in the Multiple Proxy Wars in Syria, 414-433

the subject and seem to have forgotten the official accounts of a Syrian national "mosaic" of ethno-sectarian identities.

In the case of Syria, the use of international law has not gone beyond rhetoric. The Russian and Chinese vetoes were firmly established to avoid the adoption of any resolution under Chapter VII that could lead to the use of force against the Syrian regime. The language of international law in the Syrian conflict has been expressed at four levels: at the level of principles, at the level of invoking international conventions, at the level of international humanitarian law and at the level of the functioning of the Security Council. With regard to the principles of public international law, Russia has promoted the principles of sovereign equality and non-interference. For Moscow, international law serves to prevent rather than allow external intervention in state affairs and regime change by force, strongly supporting this principle and has not made concessions to the Security Council. With regard to the invocation of international conventions, let us cite in particular the Convention on the Prohibition of Chemical Weapons,[1] invoked after the chemical attack of 21 August 2013.

It is quite interesting to note here that the Syrian state was not a signatory at the time of the crime, and the convention could not be opposed to Syria, but conversely, the facts were used to persuade Damascus to sign it. With regard to international humanitarian law, we can cite France's recent motion for a resolution to the Security Council to refer war crimes committed in Syria to the International Criminal Court. Finally, the role of the Security Council was weakened by not being able to "act" or "intervene" this time.

The threats of intervention by Washington, Paris and London after the August 21 chemical attack, independent of the United Nations, pose a real dilemma: international law, in this case the role given by the Charter to the Security Council, could be described as a simple tool in a panoply of tools to act.

In December 2014, the UN launched the Regional Plan for Refugees and Resilience (3RP) to respond to the growing crisis in Syria.

[1] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris on 13 January 1993 [online] https://www.opcw.org/sites/default/files/documents/CWC/CWC_en.pdf (accessed 18.01.2021)

The 2016-2017 3RP initiative is a combined effort of the UN and more than 200 partners with goals that are not limited to the Syrian border. Examples of what the 3RP aims to achieve is the creation of a strong national leadership in response planning through the Lebanon Crisis Response Plan, the Jordan Response Plan and the 3RP chapters in Turkey, Iraq and Egypt.

It also aims to provide a regional protection framework, as well as to promote education for young people. One of the most important aspects of security that 3RP addresses in countries absorbing Syrian refugees is food security - a fundamental human right that must be fulfilled before other concerns can begin to be addressed. In January 2017, rebel groups and a Syrian government delegation participated in talks in Astana, Kazakhstan. The meeting, which was attended by Russia, Turkey, Iran and the UN special envoy for Syria, resulted in a ceasefire agreement in Syria.

In February and March 2017, the Special Envoy convened the parties in Geneva for talks focused on Syria. Topics discussed included governance, drafting a new Constitution, holding elections and counter-terrorism strategies. These talks continued periodically, either in Geneva or in Astana, until the fourth round of talks in Astana in early May 2017. The result of the fourth round of talks in Astana was the signing of an agreement for the creation of four "safe" zones in Syria, which the UN special envoy said was a step in a promising direction.

Funding is needed for both Syrians and refugees from neighbouring Syria countries, where tensions are rising and at risk of spiralling out of control in places like Lebanon. What is most obvious about the relationship between the UN and the Syrian refugees is that there will continue to be a desperate need for funding to ensure possible levels of basic dignity and to meet basic needs.[1]

While sectarian regimes and leaders can use securing sectarian identities to increase their power base, these identity manipulations can paradoxically undermine their long-term power and legitimacy.[2] In Syria, for example, the Assad regime may have difficulty limiting the influence

[1] Miller, "The United Nations and Middle Eastern Security", 135.
[2] R. A. Del Sarto, "Identity and Insecurity: The Rise of Ethno-Religious Politics in Israel and the Broader Middle East". In: *Shifting Global Politics and the Middle East*, Vol. 34 (2019): 56-62.

of Shiite militias in the post-conflict and reconciliation phase that will follow.

In Bahrain and Syria, incumbents have managed to deepen sectarian divisions because it is unclear whether they are able to overcome a situation characterized by the presence of fractured and unstable communities, haunted by suspicion and unrest.[1]

YEMEN. The ongoing civil war in Yemen is one of the most complex issues in the Middle East today. In 2011, the Houthis gained significant power in Yemen as anti-government demonstrations and sentiments spread across the country. By the end of 2011, President Ali Abdullah Saleh had agreed to resign and allow his vice-president, Abdrabbuh Mansur Hadi, to replace him.

Starting with 2013, the Hadi-led government and opposition groups began the process of engaging in a national dialogue, which created the basis for drafting a new constitution that would divide Yemen into six provinces. The United Nations was hopeful at the time, with the UN special envoy for Yemen arguing that the agreement would lead to a democratic government upholding human rights and equal citizenship.[2]

The Houthi opposition rejected the agreement, which can be seen as a catalyst for what was to happen. Throughout 2014, many Houthi supported anti-government protests that erupted throughout Yemen. In September, the Houthis captured the capital Sanaa, leading to the dissolution of parliament, Hadi's forced resignation and a new revolutionary committee to replace the government.

In February 2015, the UN Security Council called on Houthi rebels to withdraw "immediately and unconditionally" from all government institutions, to release President Hadi and to engage in UN-mediated negotiations to organize the democratic transition. In March, the Security Council met to address the ongoing crisis. At this meeting, Jamal Benomar, Special Adviser to the Secretary-General for Yemen, expressed growing concern about the situation in Yemen. He said he was of the opinion that the events leading up to the meeting had led the country to a civil war.

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[1] Moore-Gilbert, "Sectarian Divide and Rule in Bahrain: A Self-Fulfilling Prophecy?" https://www.mei.edu/publications/sectarian-divide-and-rule-bahrain-self-fulfilling-prophecy (accessed 30.01.2021)

[2] A. Orkaby, "Yemen's Humanitarian Nightmare: The Real Roots of the Conflict". In: *Foreign Affairs*, 96(6), (2017): 93-101.

The most notable events were the heavy clashes on March 19 between the Central Security Forces and the people's committees and the bombings that took place on March 20 in Sanaa, which killed up to 140 people. He reported that on March 21 and 22, Houthi militia and Yemeni army units gained control of Taiz, which had geographical significance as a gateway to Aden.[1]

The Security Council met again on April 14 to discuss the importance of addressing the situation in Yemen. Topics discussed at the meeting highlighted the potential humanitarian crisis, the importance of human security and human rights, and the issue of Saudi Arabia's involvement in the crisis. The Security Council acknowledged that President Hadi had requested the assistance of Saudi Arabia, by any means necessary, including military intervention, which eventually happened.[2]

This series of events provides a framework for understanding what led Yemen to a brutal war. The Security Council condemned the actions taken by Houthis and imposed sanctions, but their effectiveness was limited. At this time, the Houthis were not interested in engaging in democratic peace talks and did not recognize the legitimacy of President Hadi.

Yemen is one of the biggest security risks in the international community for several reasons. An estimated 8.3 million people depend on external food aid, while 400,000 children suffer from severe acute malnutrition. Virtually all children in Yemen are in desperate need of humanitarian assistance, as exemplified by UNICEF estimates that 25,000 children in Yemen died at birth or before the age of one month.[3] In addition to severe food shortages, there is a lack of medical supplies. An outbreak of diphtheria has spread rapidly since December 2017 in areas of Yemen, with nearly 700 cases and 48 associated deaths.[4]

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[1] UN, Security Council. (2015, March 22). Retrieved from 7411th Meeting: [online] https://digitallibrary.un.org/record/790438?ln=en accessed (14.01.2021)

[2] UN, Security Council. (2015, April 14). Retrieved from 7426th Meeting: [online] https://digitallibrary.un.org/record/791436?ln=en accessed (21.01.2021)

[3] S. Nebehay. *Reuters. Retrieved from UN hopes imports will help stave off famine in Yemen as diphtheria spreads*, 2018. [online] https://www.reuters.com/ article/ us-yemen-security-un/u-n-hopes-imports-will-help-stave-off-famine-in-yemenas-diphtheria-spreads-idUSKBN1F516M accessed (25.01.2021)

[4] Nebehay. Reuters. Retrieved from UN hopes imports will help stave off famine in Yemen as diphtheria spreads

Cholera has been a significant problem in Yemen, with more than 1 million cases since early 2017, resulting in 2,300 deaths.[1] Less than 50% of hospitals in Yemen are operational, 18% of districts do not have doctors, and 56% of the population does not have regular access to basic health care. There are currently no UN peacekeeping forces in Yemen to ensure that millions of vulnerable people are protected and given the help they urgently need. The United Nations Development Program (UNDP) has identified and subsequently built a method of addressing immediate humanitarian concerns, hoping to alleviate some of the general security concerns that this conflict has created. UNDP approaches its operations in Yemen from a community perspective and aims to create programs that increase the level of resilience. These programs are designed to encourage economic autonomy and resilience.[2]

By resolution 2452[3] adopted unanimously, the UN Security Council established in 2019, for an initial period of six months, the United Nations Mission to Support the Hodeidah Agreement (UNMHA), responsible for facilitating the implementation of the Agreement on the City of Hodeidah and Ports of Hodeidah, Salif, and Ras Isa established by the Stockholm Agreement of December 13, 2018.

The mission is mandated to lead the Redeployment Coordination Committee, to monitor the parties' compliance with the ceasefire in Hodeidah province, to work with parties involved to ensure that the security of the city and the ports of Hodeidah, Salif and Ras Isa is ensured by local forces, and facilitate and coordinate United Nations support to assist the Parties in implementing the Agreement on the City of Hodeidah and Ports of Hodeidah, Salif, and Ras Isa.[4]

On 14.07.2020, the Security Council extended until 15 July 2021 the mandate of the UN Mission to Support the Hodeidah Agreement

[1] Yemen Cholera Response. Weekly Epidemiological Bulletin, 07.07.2018: [online] http://www.emro.who.int/images/stories/yemen/ week_26.pdf?ua=1 accessed (14.01.2021)

[2] Miller, "The United Nations and Middle Eastern Security", 135

[3] UN, Security Council Resolution 2452, on 16 January 2019 https://digitallibrary.un.org/record/1660551?ln=en

[4] "Yémen: le Conseil de sécurité crée, pour une période initiale de six mois, la Mission des Nations Unies en appui à l'Accord sur Hodeïda" (MINUAAH) https://www.un.org/press/fr/2019/cs13664.doc.htm

(UNMHA), by unanimous adoption of Resolution 2534.[1] The Council renewed the mandate of UNMHA, which will lead the Redeployment Coordination Committee and will ensure its operation, in order to oversee the ceasefire and demining operations throughout the province of Hodeidah.[2]

Thus, UN intervention in the Lebanon crisis through the peacekeeping operation (UNIFIL) has played a crucial role in reducing the negative effects of the conflict on the civilian population and has ensured the process of building peace and security in the region, including through programs initiated under UNHCR for the protection of refugees.

Palestine has long been the unifying element of the Arab states in their fight against Israel. In this case, too, the involvement of the UN through the legal instruments and legal mechanisms of action established by the Charter has repeatedly ensured the cessation of active military operations and the return to dialogue of the warring parties.

The PLO's intention to be recognized as a state and implicitly as an entity capable of referring to the International Criminal Court on crimes committed in the area generated divergent positions among members of the UN Security Council, which did not allow the development of an unambiguous solution. At present, this structure is the only organization of a people fighting for liberation recognized by the UN that benefits from a special status.

CONCLUSIONS

Despite the prominent element of ethnic and religious division at the beginning of the Israeli-Palestinian conflict, over time, the sectarian element that has always united the Arab states in their fight against Israel yields to the cynical and pragmatic interests of leaders and states in the region.

In this extremely complicated and complex situation, the role of UN structures and instruments of intervention is of unquestionable utility

[1] UN, Security Council Resolution, on 14 July 2020 https://undocs.org/en/S/RES/2534(2020)

[2] Yémen: le Conseil de sécurité proroge de douze mois le mandat de la Mission des Nations Unies en appui à l'Accord sur Hodeïda https://www.un.org/press/fr/2020/cs14250.doc.htm

and importance, and negotiations on various platforms and strict compliance with the provisions of international law in general and the texts of regional agreements in particular are the only mechanisms which could avoid a return to hostile military action in the region.

The intervention of the United States of America and the Coalition formed at their initiative in Iraq has generated a whole series of challenges and rhetorical questions about the essence of the principles of public international law and the mechanisms for ensuring their observance. The UN has intervened *post factum* to reduce the negative effects on security in the region through its specific instruments which have proved insufficient to restore legal order and the rule of law in Iraq in particular and in the eastern area in general.

The same divisive elements of sectarianism, between Shiites and Sunnis, as well as the divergent interests of actors in the Middle East provoked armed conflict in Syria, and unequivocal positions of permanent members of the UN Security Council did not allow the prompt intervention of a UN-led peacekeeping operation in the conflict, which could have substantially reduced the suffering of the population and its destructive effects on Syria's economic and social system. Even though hostilities in Syria have virtually ceased at the moment, the challenges of restoring the state at all levels are just beginning and are to be achieved with the participation of regional organizations and states in the region under the effective control of the UN.

Most recently, in terms of the start of military operations, there is armed conflict in Yemen. Despite strict UN monitoring of the situation on the ground, the level of security in the area is still severely affected. The United Nations Mission to Support the Hodeidah Agreement (UNMHA) is to intervene in strict accordance with the provisions of its mandate to ensure peace and security in the area of the City of Hodeidah and Ports of Hodeidah, Salif, and Ras Isa.

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CITIZEN PARTICIPATION IN THE EUROPEAN UNION PUBLIC ADMINISTRATION: FROM HISTORY TO ACHIEVEMENTS

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Abstract:

This article aims to analyze the Public Administration of the European Union starting from an analysis of the administrative institutions of the European community, made in terms of their appearance and development, of the mechanisms of substantiation and functioning, as well as of the possibilities of participation of the citizens. The analysis appears to be necessary in the context in which, at EU level, there is a laborious institutional administrative structure, with different and diversified competencies, with jurisdictional areas at different levels, intersecting with the state level and not only. From this point of view, the article aims - based on a qualitative analysis - to identify what we strictly include in the area of the term "EU public administration" and to provide an explanation of them and in terms of their achievements and implementation, following the degree of effective participation and of the possibility for citizens to participate in the community space.

Key words: *public administration; European Union; European public institutions; citizen participation.*

INTRODUCTION. EUROPEAN CITIZENSHIP FROM THE APPLICATION TO THE EU LEVEL TO THE PRINCIPLES OF FUNCTION

The participatory approach to policy-making processes and of the legislation at EU level are guaranteed in the Treaty of Lisbon[2]. In

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[2] Rosenzweigova, I. and V. Skoric, V. and H. Asipovich, *Participarea civilă la procesele decizionale* (Centrul European pentru Drept Necomercial, 2016), 19.

particular, Article 8A of the Treaty of Lisbon states that: "Every citizen has the right to participate in the democratic life of the Union. The decisions shall be taken as openly and as closely as possible to the citizen". In addition, Article 8B provides that "The institutions shall give to the citizens and representative associations, by appropriate means, the opportunity to make their views known and to exchange views publicly in all areas of UE action. The Union institutions shall maintain an open, transparent and constant dialogue with representative associations and civil society"[1].

Furthermore, the document requires to the European Commission to carry out consultations with stakeholders and regulates the right of EU citizens to invite the European Commission to submit a proposal on the issues necessary for the implementation of the Treaty.

Before the adoption of the Treaty of Lisbon, the European Commission produced a series of documents insisting on the importance of the public participation and ensuring guiding principles for its implementation.

In particular, we can speak about the *White Paper on European Governance*, adopted in 2001, which highlights five principles of „good governance", with a view to enhancing the legitimacy of decision-making processes. The White Paper called on the European Commission to ensure its implementation, which led to the adoption of the General Principles and Minimum Standards for consultation by the Commission (EC Principles and Minimum Standards) in 2002[2].

However, in relation to what we call strictly *European citizenship*, the concept aroses with the Maastricht Treaty (TEU) which expressly states that "a citizenship of the Union is established" and continues with the statement „any person who has citizenship of a Member State is a citizen of the European Union"[3].

The citizenship of the European Union complements the national citizenship, without substituting it, making possible the exercise of some rights of the Citizen of the Union in the territory of the Member State in

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[1] ***. (2007). *Tratatul de la Lisabona*, online: https://www.europarl.europa.eu/about-parliament/ro/in-the-past/the-parliament-and-the-treaties/treaty-of-lisbon.

[2] ***.(2001).*Cartea albă privind guvernanța europeană*, online: www.europarl.europa.eu › livre-blanc_ › livre-blanc_ro.

[3] ***. (1992). *Tratatul de la Maastricht*, online: https://www.europarl.europa.eu/about-parliament/ro/in-the-past/the-parliament-and-the-treaties/maastricht-treaty.

which he resides (and not only in the country from which he comes, as previously was provided by the TUE). Therefore: „it is necessary and sufficient for a person to have the nationality of a Member State in order to benefit from Union citizenship; citizenship of the Union will complement and be added to the state citizenship"[1].

Thus, with the establishment of the concept of *European citizenship*, a number of rights were established through the TFUE Treaty, such as: the right to live in the EU and free movement; the right to participate in local elections in the territory of any EU Member State and to be elected (under specific conditions of residence and reporting to specific time periods of each Community State); the right to receive protection from the Community authorities; the right to petition the European Parliament; the right to communicate with Community institutions in the language from which the citizen comes, etc.

The Treaty of Amsterdam also gives European citizens the right to be informed, to have access to information, and by the Treaty of Nice, the European Union has endorsed the fundamental rights of individuals, the Charter of Fundamental Rights of the European Union beeing subsequently transposed by each Member States into national law.

Thus the Treaty of Lisbon detailed the rights of the European citizen in the light of the direct participatory approach previously presented, establishing the following categories of rights: the right to participate in the democratic life of the Union; the formation of a European political conscience and the expression of the will of the citizens of the Union through the contribution of the political parties at European level; the right of citizens to make their views known and to exchange views publicly, in all areas of Union action and with the competent institutions; etc.

Some forms and possibilities for the participation of Community citizens can be identified if we refer to the way in which the European Union has evolved through the adoption of the Treaties as strategic documents through which the functional mechanisms have been based at the supra-state level, and implicitly institutional constructs as actors for the being of the mechanisms activated by the concept of European citizenship.

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[1] N.I. Militaru, „Cetăţenia Uniunii Europene potrivit Tratatului de la Lisabona“, in *Juridical Tribune*, Volume 1, Issue 1 (June 2011): 58.

By establishing some historical milestones for the foundation of the concept of *European citizenship*, as well as a number of rights and responsibilities deriving from this concept, we have identified possible forms of participation of the European citizen: the electoral participation (this being the most widespread and known form of political and public participation); the participation in elections from the perspective of the possible elected; the participation through other Orthodox forms: participation through petitions, public meetings and other public gatherings and debates, or – why not – articipation at rallies, protests, etc.

On the other hand, Baubock argues that there is a paradox of European citizenship, in the sense that although it is established by suprastate-level treaties, it is dependent on the national level, even if the two dimensions of citizenship are not excluded and supplemented. "EU citizenship has a paradoxical nature: it is constitutionally formalised in the Treaties of the Union, but it is dependent on national citizenship in the sense of having access to the former. Its fate depends intimately on the trajectory of EU integration, as well as on changing perspectives on the notion of citizenship of Member States"[1].

Beyond these typologies of public participation at Community level stemming from the provisions of the European Treaties and from the process of European integration, as well as from the development and the evolution of Community construction, the present analysis aims to identify forms of citizen participation activated in relation to the EU institutions.

PARTICIPATION FORMS OF CITIZENS AT EU LEVEL RELATING TO THE INSTITUTIONS

In relation to the rules and the principles of the institutional operations of the European Union, their applicability leads to consequences for EU citizens, which is why the public administration of the EU argues that the public decision-making process at Community level is open and responsive. For this reason, the EU institutions have affirmed their support for activities to „maintain an open, transparent and constant dialogue" (Lisbon Treaty Art. 11.2.) and to have „extensive

[1] R. Baubock, (ed.). *Debating European Citizenship* (European University Institute San Domenico di Fiesole, Italy, Springer Open Acces, Italy, 2019), 2.

stakeholder consultations to ensure that the Union's actions are coherent and transparent' (Lisbon Treaty Art. 11.3)[1].

In accordance with the Treaty on the Functioning of the European Union (TFUE, Title 1), there are three different types of EU competences: exclusive (EU decides alone), joint competences (EU decides with Member States), and support competences (EU assists Member States). On the basis of these powers, certain policies are shaped by implementing acts, regulations, directives, legislation or purely institutional decisions, without any formal impact on legislation, but all of which can have an impact on the lives of Community citizens. In addition, there are decisions taken by Parliament, Courts, advisory bodies such as the European Economic and Social Committee (ESCE) and others with different types of leadership, impact and consequences and – not least – for different levels of government and for each EU resident.

Starting from here, different forms of participation of EU citizens can be identified in relation to different Community institutions and on extremely different issues.

Relationship with the European Parliament and other similar institutions.

The types of participation that can be activated by EU citizens can start from the point of keeping in touch with the elected representatives of each State in Parliament in order to bring to their attention the problems they are faced with and which fall within their competence, in various ways: petitions, audiences, official letters, or official and/or informal communication through the means of new theologies: email, online messaging, videoconferencing, etc. A similar role by reference to the citizens has the European Economic and Social Committee (ESCE) and the Committee of the Regions. In addition, the indirect public action is also available through civil society organisations active in the field of EU issues or political parties, at local, regional and national level, structures that can mediate relations with EU administrative institutions or EU civil servants, or with politicians at the same level.

The relationship with Parliament through petitions. The European citizens may petition the European Parliament either as a group or individually in accordance with Article 227 of the Treaty on the

[1] ***. (2007). *Tratatul de la Lisabona*, online: https://www.europarl.europa.eu/about-parliament/ro/in-the-past/the-parliament-and-the-treaties/treaty-of-lisbon.

Functioning of the European Union. This right includes all EU residents, as well as associations and companies within the Union. The petition may submit an individual request, complaint or observation on the application of EU law, or a call on the European Parliament to take a position on a specific issue.

The relationship with the European Commission. Community citizens have the right to „citizens initiative" addressed to the European Commission, which can propose amending, supplementing, updating legislation in the light of competences and issues in which the EU can legislate. A *citizens initiative* must be supported by at least one million EU citizens from at least 7 of the 28 Member States. A minimum number of signatories is required in each of these 7 Member States. The rules and procedures governing the *citizens' initiative* are set out in an EU regulation adopted by the European Parliament and the Council of the European Union in February 2011 (online: http://ec.europa.eu/citizens-initiative/public/welcome).

Relations with the European Commission can also be shared by the right to request public consultations or to participate in institutional consultations. The consultations arise especially when the modification of a Community public policy is being prepared or a new policy is prepared to be legislated and implemented. **Your voice in Europe** is the point of access by the European Commission to a series of consultations and ways in which the citizens can convey certain views on EU policies throughout their development. As with the consultations, the access to *Your voice in Europe* is on the basis of online registration. The European Commission has over time requested consultations on different topics and policies such as: The 2020 Digital Agenda, Climate Action, etc.

The relationship with the European Ombudsman. The European citizenship offers the possibility to lodge a formal complaint(s) concerning measures taken at Community level The European Ombudsman is the equivalent of what we call the the Layer of the people in Romania. The institution rovides assistance to European citizens in 24 official languages in order to resolve the different types of disputes that may arise between EU citizens and EU institutions. Legal Service is also open to non-European citizens, including business or organizations with different operating areas, registered in the EU (legal persons).

Advice from SOLVIT. SOLVIT is a mechanism for solving the various types of problems provided by the European Commission. This

kind of advice can be requested by EU citizens in this capacity, in relation to which they contact different public authorities within the Union, or as representatives of EU trade unions or Community-based companies. The problems that can be solved by this type of advice relate mainly to the relationship between citizens and the various public authorities which do not apply European law, or to problems that may arise from the perspective of the borders of EU territorial jurisdiction – cross-border reorganizations, etc.

Active participation such as e-participation. The citizens can reach closer to the representatives of the EU administration both by using official websites of the institutions and through the social media channels that EU institutions, bodies and agencies use to inform, consult, also discuss or interact with EU citizens and other stakeholders in EU issues. For an overview of these channels can be used at least at the national level: The European Commission Representation in Romania, the Facebook channel of the European Commission Representation in Romania, the Europe direct Romania Center Network, or the website: http://ec.europa.eu/yourvoice/discussions/, with the extension of the activation of discussions as an event of online interaction between citizens.

Requesting specific Community services. In relation to the educational services or to the labor market access at EU level, European citizens have been guaranteed access to the EURES portal. The portal can be accessed in all the official languages of the EU Member States as a pillar of the labor mobility, with educational offers that guarantee equal rights for all those who active in this market. In spring 2015, more than 161 000 vacancies were published and 142 000 CVs submitted in EURES[1].

On the other hand, at the administrative level, there is increasing talk of applying the principle of **"implicit interoperability"[2]**. To this end, to the citizens must be guaranteed the access to documents in all the languages of the EU Member States and the possibility of transmitting

[1] ***. (2021). *ABC-ul cetățeanului european: instrumente pentru o cetățenie activă*, online: https://europedirect-tm.ro/prioritati/consultari-cu-cetatenii-instrumente-pentru-cetatenie-activa, 6.

[2]***. (2020). *Calitatea administrației publice*, online: https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet quality-public-administration_ro.pdf.

them in this way. The findings point to a possible slow improvement in interoperability in the EU: currently, an electronic document issued abroad is accepted in only 31% of cases and a foreign electronic identity document can only be used in 22% of cases[1].

Egovernment Action Plan[2] identifies other rights of the citizens at European level that underpin the opportunities for participation. The citizens' participation must respect the principle of "implicit cross-border character"[3] under which the EU citizens who wish to start a business or to operate their own businesses at Community level must not face difficulties from the perspective of cross-border services.

Irrespective of the type of citizen participation identified at European Union level and the way in which the Community citizens relate or may relate to the Community administrative system, the issue remains open and raises challenges in the context where the European Union is intended to be an increasingly democratic, supra-state building with strong direct participation from citizens, as open as possible to mobility and acceptance, and certainly respecting the elements of state sovereignty.

CONCLUSIONS. DISCUTIONS AND PROVISIONS

The challenges of citizens' participation at the European Union level derive from a number of different types of analysis, whether we actually relate to what is meant by the concept of European citizenship, but also from what is actually applied, of the relations between the community citizen and the community institution that are laid down at this level and also what is actually implemented and applied and not only.

Thus, a first challenge differentiates between *de jure* citizenship

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[1] ***. (2021). *ABC-ul cetățeanului european: instrumente pentru o cetățenie activă*, online: https://europedirect-tm.ro/prioritati/consultari-cu-cetatenii-instrumente-pentru-cetatenie-activa, 7.

[2] ***. (2016). *Planul de acţiune privind guvernarea electronică*, online: http://eguvernare.blogspot.com/2016/04/planul-de-actiune-al-ue-privind.html,

[3] ***. (2021). *ABC-ul cetățeanului european: instrumente pentru o cetățenie activă*, online: https://europedirect-tm.ro/prioritati/consultari-cu-cetatenii-instrumente-pentru-cetatenie-activa, 7.

and *de facto* citizenship[1]. Even if the Treaties states its concept and operating mechanisms, rights are conferred which come together with sets of obligations, in practice many of them are not really respected. Isin şi Saward consider that European citizenship is an abstract concept because – derived from the people/demos (as well as the concept of national citizenship) – at EU level it is difficult to understand and, above all, to apply the concept of *demos*[2].

Moreover, as long as the concept of the European Union is structurally abstract in nature, as a suprastate construction, without being completely subsumed in the traditional federative structure and without a fundamentally adjusted act, the concept of European citizenship will suffer and will have to adapt.

Last but not least, the concept of European citizenship gives rise to freedoms and rights that can lead to "liberal and feminist manifestations", of the various types of minorities that further assert their rights and freedoms. In this context, the question that can arise referrs to how far these kinds of social, cultural movements can be manifested in order to preserve this spirit of European citizenship, as a concept that is so diverse, but which must also generate feelings of unity and belonging.

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RULE OF LAW AND EXCEPTIONAL SITUATIONS

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Abstract:

The doctrine of the lawful state comes from the German theory and jurisprudence, but is now a requirement and a reality of the constitutional democracy in contemporary society. Presently, the lawful state is no longer merely a doctrine but a fundamental principle of democracy consecrated in the Constitution and international political and legal documents. In essence, the concept of the lawful state is based on the supremacy of law in general and of Constitution in particular. Essential for the contemporary realities of the lawful state are the following fundamental elements: the moderation of the exercise of state power in relation to the law, the consecration, guaranteeing and observance of the constitutional rights of man especially by the state powers and, last but not least, the independence and impartiality of justice.

In this study we analyze the most important elements and features of the lawful state with reference to the contemporary realities in Romania in the context of the requirements expressed in the political and legal instruments of European Union. An important aspect of the analysis is the separation, balance and cooperation of the state powers, in relation to the constitutional provisions.

The excess of power of the public authorities, the excessive politicking and failure to respect the independence of justice are aspects of contemporary social and state reality that contravene to the requirements of the lawful state. Are analyzed the most significant aspects of the Constitutional Court jurisprudence and the jurisprudence of administrative courts in regard to the guaranteeing of the lawful state attribute in Romania, as well as, regarding the power excess.

In exceptional situations, such as the state of emergency or the state of alert established for a long time on the Romanian territory, the rulers have restricted the exercise of some essential fundamental rights, restrictions that seriously affect the private and social life of the people.

Key words: *Conditions of the lawful state; separation and balance of the powers; the supremacy of law; guaranteeing of the fundamental rights; exceptional situations, restriction on the exercise of certain rights and freedoms.*

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I. BRIEF CONSIDERATIONS ON THE NOTION OF THE RULE OF LAW

The notion of state attributes means its defining dimensions as they result from constitutional provisions, as an expression of the political will and determined by the political regime and at the same time values of principle of constitutional order.

The rule of law, pluralism, democracy, civil society are unquestionable universal values of contemporary political thinking and practice and are found to be expressed in the Constitution of Romania as well as in international documents. The state attributes configure its quality as constitutional law subject and define the power, but also the complex reports between the state and citizens and the other constitutional law subjects. The attributes of the Romanian state regulated by the provisions of art. 1 para. 3 of the Romanian Constitution: 1. rule of law; 2. social state; 3. pluralist state; 4. democratic state.

The rule of law is one of the most discussed concepts of constitutional law and is unquestionably related to the transition from the state law to the rule of law. In the literature, contradictory opinions were sometimes affirmed, according to which the rule of law corresponds to an anthropological necessity or is a myth, a postulate and an axiom, and on the other hand, the rule of law is a pleonasm, a legal nonsense.

The concept of the rule of law is a constitutional reality whose foundation is found in the mechanisms of the exercise of state power, in the relations between power and liberty of every individual of society and in the application of the principle of legality to the entire state activity, but also in the behaviour of each member of society.

The rule of law has formed and spread over three major models:

1. The English model of "Rule of Law" is characterized by the limitation of the monarch's power and, on the other hand, by preserving the power of the parliament, which in terms of constitutional law means:a) the restriction of the powers of the monarch and their recognition of a power constituted by the norms of positive law, b) the necessity to found acts of the executive directly or indirectly on the authority of the Parliament, c) the obligation of all subjects of law to submit to the law of jurisdiction. 2. The German concept emphasizes the need to ensure the legality of the administration and its judicial control;

3. The French conception regards the rule of law as a legal state, proclaiming and maintaining the principle of legality. 3. The French concept considers the rule of law as a legal state, which proclaims and defends the principle of legality.

In the expression rule of law there are two aspects of the legal, seemingly contradictory but still complementary: normativism and ideology. In the normative plane, the rule of law appears as a structural principle of the Constitution along with other essential attributes of the state, materializing the fundamental values on which the existence of society and state are based.

From the normative point of view, the requirements of the rule of law are manifested in a double sense: a) the formal meaning expresses the requirement that the state and its organs observe the laws, strictly subordinate to the juridical rules regarding the composition of the state bodies, their attributions and their functions, and b) the material meaning - the requirement that the state bodies, exercising their functions, comply with the legal guarantees concerning the exercise of citizens' fundamental rights and freedoms.

In the field of ideology, the rule of law confers a logical system of ideas by which people represent their society, the state, in all its manifestations, and which confer the legitimacy of the state.

The term "rule of law" is not a simple logical concept but it expresses a fundamental constitutional necessity according to which: a) the state is indispensable for the law in order to create for it its norms and to ensure the finality and effectiveness of the legal norms; b) the law is indispensable for the state to express power by establishing a general and binding behaviour.

In essence, the rule of law expresses a condition of power, a movement to rationalize it, but also a new conception of law, its role and functions. Professor Tudor Drăganu, in his paper[1], proposes an interesting and comprehensive definition of this concept of constitutional law: "The rule of law is considered to be that state which was organized on the basis of the principle of separation of powers of the state, the application of which justice acquires real independence and pursues through its legislation the promotion of the rights and freedoms inherent

[1] Tudor Drăganu, *Introducere în teoria și practica statului de drept* (Cluj Napoca: Dacia, 1993), 128.

in human nature, ensures the strict observance of its regulations by all its organs in all their activity."

The definition defines the main elements of the rule of law - the separation of powers as a reality of the state activity, in the application of which justice acquires real independence and pursues through its legislation the promotion of rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs, in their entire activity".

This definition renders the basic features of the rule of law – separation of powers, as reality of the state activity, the application of the principle of legality in the activity of all the state bodies, the observance and the guarantee of fundamental human rights. Also, from the same definition result the basic features of the rule of law, respectively: a) the freedoms of the human being require guarantees of security and justice through the primacy of law and in particular the Constitution; b) the moderation of the execution of the power requires the organization and adaptation of the functions of the erratic organisms and a hierarchical normative system.

II. CONDITIONS OF THE RULE OF LAW

In the final document of the Copenhagen Summit in 1990 was stated that the rule of law does not simply mean a formal legality, and in the Charter of Paris from 1990 the rule of law is prefigured not only in terms of human rights but also of democracy, as the only governing system.

From the corroboration of the principles written in international documents, as well as in relation to the constitutional law doctrine, we consider as conditions or characters of the rule of law the following: 1. the accreditation of a new concept concerning the state, especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from the civil society, the responsibility of the state and the authorities that make it, and the moderation of constraint as a means of intervention of the state in society by appropriate and reasonable forms; 2. capitalization of the rations and mechanisms of the principle of separation of powers in the state; 3. the establishment and deepening of an authentic and real democracy; 4. institutionalization and guaranteeing of the rights and freedoms of man and citizen; 5. the

establishment of a coherent and hierarchical legal order and of an area of law.

The systematic functionality and consistency of the rule of law must be ensured by a number of regulatory systems, namely: a) political control by Parliament as one of its essential functions through various institutional means b) administrative control that is carried out in the system public authorities, either on their own initiative or at the initiative of citizens; c) judicial review of the legality of administrative acts entrusted to either the courts of common law or the specialized courts; d) control of the constitutionality of laws; e) control of the observance of fundamental rights and freedoms through the bodies of the authority and the judiciary; f) the conciliation and control procedure, which is carried out through the institution of the "ombudsman" or the People's Advocate; g) free access to justice and organizing the court activity in several degrees of jurisdiction.

The consecration of the rule of law in the Constitution of Romania is achieved not only by art. 1 para. 3 of the 1st thesis, but also by many other constitutional provisions expressing the content of this principle of organization and exercise of power in a democratic society. In this respect we reiterate the provisions of art. 16 para. 2, which provide that no one is above the law and those of art. 15 para. 2 proclaiming the principle of the un-retroactivity of the law, principles essential to the entire construction of the rule of law. The content of the rule of law is expressed in particular in the constitutional provisions regarding the separation and balance of state powers as well as those regarding the organization, functioning and attributions of the state institutions. The provisions refer to the fundamental rights, freedoms and duties of the citizens, to the mechanism of the separations of powers, pluralism, free access to justice, independence of courts, and the organization and functioning of parliamentary, administrative and judicial control. They can be considered as a constitutional normative expression of the content and requirements of the rule of law.

The rule of law is not a state whose essence is exhausted by constitutional regulations and other normative acts at a given moment. The rule of law is not exclusively an institution of constitutional law but must become a reality found at the level of the conduct of each subject of law, whether it is a state organ or a simple citizen. This means and implies a complex evolutionary process in which all the structures of

society participate, and at the same time a process of perfection on the ideological and moral level in order to improve the activity of the organs of state and to effectively establish the principle of legality, to form a civic behaviour in the spirit of observance the law and the fundamental values of democratism.

The Constitution of Romania establishes, in its normative content, the main guarantees of the rule of law:

a) the constitutional regime, that is, the establishment in the Constitution of the fundamental principles of organization and activity of the three powers. Establishing the legal regime applied to the revision of the Constitution;

b) the direct or indirect popular legitimacy of state and public authorities;

c) ensuring the supremacy of the Constitution through political or judicial control, as well as ensuring the rule of law, over other normative acts;

d) the exercise of fundamental rights and freedoms may be restricted only temporarily, only in cases expressly determined in proportion to the circumstance justifying the restriction and without suppressing the very right or fundamental freedom;

e) independence and impartiality of justice.

Therefore, art. 21 para. 2 of the Constitution of Romania stipulates that no law may impede the free access of a person to justice for the protection of legitimate rights, freedoms and interests[1].

III. APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY IN TERMS OF STATE ORGANIZATION OF POWER

From the complexity of the issue of the rule of law, we further on refer to the implicit application of the principle of proportionality in the constitutional provisions on the state organization of power.

This principle is explicitly expressed in the Constitution of Romania only in the provisions of art. 53, but it is implicitly found in other constitutional regulations as it has been emphasized in the specialized literature. The constitutional principle of proportionality is a synthesis of other principles of law and expresses the ideas of fairness, and the correctness of the state's dispositions to the intended purpose. We

[1] Marius Andreescu and Andra Puran, *Drept constituțional. Teoria generală a statului* (Bucharest: C.H. Beck, 2018), 65-75.

consider it a criterion in relation to which the powers of the state are organized in a state of law because by its application a dynamic and functional balance is realized in the institutional diversity of the state system. We also underline the fact that this principle confers legitimacy and not only the legality of state decisions and is a criterion already used in case-law which establishes the demarcation between the exercise of power within the limits of the Constitution and laws and on the other hand the excess of power in the activity of the organs of the state in situations where state decisions have the appearance of legality but are also not legitimate because they are not appropriate to the intended purpose defined by constitutional or secondary legislation. We believe that the constitutional principle of proportionality can be considered a requirement of the rule of law.

Further on, briefly analyze the application of the principle of proportionality to the state organization of power in our country, as it results explicitly or implicitly from the constitutional provisions applicable.

The principle of the separation of powers in the state, considered to be a foundation of democracy, is at the same time a reflection on the moderation and rationalization of state power. "Balancing these powers by judiciously distributing the powers and equipping each of them with effective means of control over the others, thus defeating the inherent tendency of the human power to grasp the whole power and to abuse it is the condition of social harmony and the guarantee of human freedom". In its classical form, as it is known by the decisive contribution of Montesquieu, the principle of separation of powers in the state affirms that in any society there are three distinct powers: legislative, executive and judicial power. These three powers must be exercised by separate organisms independent of each other. The purpose of this division is that power should not focus on a single state organ, which would naturally tend to abuse the prerogatives entrusted to it. "In order that power not be abused, it is necessary that by the arrangement of things power stops power" - says Montesquieu. At the same time, the division of state power is necessary to respect individual rights and freedoms, so that one power opposes the other and creates itself instead of a single force, a balance of force.

In order to achieve these goals, the organs of the state must be independent of one another in the sense that no one can exercise the

function entrusted to the other. Consequently, it is not possible for an organ of the state to be subordinated to another, if it exercises a separate power.

The doctrine states that: "The theory of separation of powers is in fact an ideological justification of a very concrete political purpose: weakening the power of the governors as a whole, limiting one another. It is considered that the separation of powers has two well-defined aspects: a) separation of parliament from the government; b) separation of jurisdictions against the governors, which allows them to be controlled by independent judges[1]. The theory and principle of the separation of powers in its classical form were criticized in doctrine. "Montesquieu's error", wrote Carré de Malberg, "is certainly to have thought it possible to regulate the game of the public powers by their mechanical separation and, in a certain way, mathematical, as if the problems of the state organization were susceptible to be solved by procedures of such rigor and precision"[2].

In the doctrine, other inaccuracies and limitations were noted as well, among which we recall: from the terminology used, it is not clear whether a "state body" or a "function" is to be understood by power; power is unique and indivisible and belongs to a single titular - the people. That is why we cannot speak of the division of powers, but, possibly, the distribution of the functions involved in the exercise of power; the separation of powers, conceived in the form of opposition between them, is likely to block the functioning of state authorities. It is not possible for the sovereign exercise of the completeness of each of the static functions to be assigned to a separate authority or group of authorities. None of the state organs perform a function in integrity, and consequently the steady organs cannot be rigidly and functionally separated; in most constitutional systems, as a result of the existence of political parties, the real problem is not the separation of powers, but the relationship between the majority and the minority or, in other words, between the governors and the opposition. There is no antagonistic relationship between parliament and government. A government that has a parliamentary majority will work in close association with the

[1] Ioan Muraru and Elena Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. II (Bucharest: All Beck, 2003), 121.
[2] Raymond Carré de Malberg, *Contribution a la theorie general de l'Etat* (Paris: Tenin, 1992), 35.

parliament, which is considered a modern state of their efficiency; the legislative function is not equal to the executive function. Execution of the law is by definition subject to legalization. If the two functions are in hierarchical relations, then the organs that perform those functions are in the same ratios.

It should also be underlined that, in doctrine, there is more and more talk of a decline of legislative power in favour of the executive; the separation of powers does not solve the issue of guaranteeing fundamental human rights. Constitutional justice is the main guarantor of respect for fundamental rights, but it does not find its place in the classic scheme of separation of powers in the state. In the case of the theory of separation of powers in state it was said that "the myth" far exceeds the reality. In fact, it is the dogmatic confidence to impose on a concrete reality a pre-established theoretical and abstract framework[1]. The criticisms formulated and the modernization tendencies cannot result in the abandonment of this principle. "The great force of the theory of separation of powers in the state - said Professor Ioan Muraru - lies in its fantastic social, political and moral resonance".[2] It should not be forgotten that the principle is enshrined, explicitly or implicitly, in the constitutions of the democratic states. From the perspective of our research theme, it is important to consider the autonomy of the state authorities and the relations between them in order to prevent separatism and rigidity.

The myth of absolute separation of powers is in fact, Carré de Malberg says, irreconcilable, "with the principle of unity of the state and its powers"[3]. The will of the state, he continues, being necessarily a single one, must be maintained between the authorities that held a certain cohesion, without which the state would risk being harassed, divided and destroyed by the opposite pressures to which it would be subjected. It is thus impossible to conceive that the powers in the state are equal. "That is why, in any state, even in those whose Constitution is said to be based on Montesquieu's theory and pursues a certain equalization of powers, invariably will find a supreme organ that will dominate all the others and

[1] Olivier Duhamel and Yves Meny, Dictionnaire constitutionnel (Paris: PUF, 1992), 972-975.
[2] Muraru and Tănăsescu, *Drept constituţional şi instituţii politice*, 9-11.
[3] Carré de Malberg, *Contribution a la theorie general de l'Etat*, 23.

thus achieve the unity of the state"[1]. As the author states, it is not so much about separation, but rather about the "gradation of powers". There would then be a single power that would first manifest through acts of initial will - the legislative power - and would be exercised at a lower level through law enforcement acts - the executive power.

It follows that the powers of the state are unequal, but this cannot have the significance of subordination, nor can allow for excess power. "State means also force, hence the risk of escaping from the control of the holder, of considering himself being the owner of the power"[2]. At the same time, a coherent functioning of the organs of the state is not possible, nor can it be conceived, unless there are some relations between them.

It was said that, given the existence of political parties and their access to power, "the real problem is not that of the relations between the institutionalized powers but of the relations between the majority and the minority, between the government and the opposition, especially when the government comes from a parliamentary majority, comfortable and homogeneous and leaning on it".[3]

In a wider sense, it must be stressed that democracy generates a majority that leads, imposing its will and values to minorities, but they also have the opportunity to express themselves and their rights have to be respected. Achieving the democratic and functional balance between the majority and the minorities is the solution to avoid what the doctrine is called the "tyranny of the majority". Undivided power - says Sartori[4], - is always an excessive and dangerous power. Thus, the tyranny of the majority, relevant from a constitutional point of view, is defined according to the rights of the minority, especially if the right to opposition is complied with or not. The main problem in this context is that the minority or the minorities have the right to oppose, have the right to opposition.

The relationship between the majority and the minority involves the analysis of the very complex interaction between those that govern and the ones that are governed. Interaction consists of a multilevel

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[1] Carré de Malberg, *Contribution a la theorie general de l'Etat*, 23.
[2] Muraru and Tănăsescu, *Drept constituţional şi instituţii politice*, 19.
[3] Ion Deleanu, *Drept constituţional şi instituţii politice*, vol. I (Bucharest: Europa Nova, 1996), 95.
[4] Giovanni Sartori, *Teoria democraţiei reinterpretată* (Bucharest: Polirom, 1999), 137.

process in which majorities and minorities are materialized in different ways and at different levels. The rule that allows the functioning of such a complex system of democracy is the application of the principle of majority in decision-making. However, Hamilton observed very well: "Give all the power to many, and they will oppress the few. Give all the power of the few, and they will oppress the many"[1].Therefore, the problem is to avoid giving all or most of the power to all, by distributing it, alternately and/or at the same time to the majority and minority.

Therefore, in order to avoid dogmatism, in order to respond to these problems of social, political and state realities, it is necessary to reconsider the theory of the separation of powers in the state from the point of view of the principle of proportionality. The fundamental idea has already been stated: the moderation of power and the balance in the exercise of power that actually reflects, to a certain extent, the balance of social forces. When discussing the content and meanings of the separation of powers, it is less about separation, but especially about the balance of powers[2] . Balancing the powers in the state by judiciously distributing the powers and equipping each with effective means of control over the others, thus stabilizing the tendency to capture the whole power and to abuse it, is essentially the application of the principle of proportionality to the organization of state power. This is the condition of social harmony and the guarantee of human freedom [even though, until now, an explicit reference to the principle of proportionality has not been made in the specialized literature, it results from the context of supporting some authors: "So, weight and counterweights in the power tiles so that none of them dominates the others. It would not be so much a separation of powers, but especially about their relative autonomy and their mutual dependence: the balance of powers"[3].

Rethinking the separation of powers in terms of the constitutional principle of proportionality can be answered, in our opinion, to all the problems listed above.

The principle of the separation of powers in the state was not explicitly enshrined in the Constitution of Romania before its revision in 2003, but from the analysis of the constitutional texts, the doctrine

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[1] Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* (Philadelphia: Lippincott, 1941), 203.
[2] Deleanu, *Drept constituţional şi instituţii politice*, vol. I, 80.
[3] Deleanu, *Drept constituţional şi instituţii politice*, vol. I, 80.

ascertained that the balance of state powers as a principle was found in the content of the norms of the Constitution Through the Review Law, the Romanian derived constituent expressly enshrined this principle, referring not only to the separation of powers but also to the balance between them: "The State is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy" [Art. 1 para. 4].

The necessary balance between state authorities is the expression of the principle of proportionality applied in the matter of organizing the institutional system of power in Romania. State authorities are neither equal nor independent in the absolute sense. The balance that a proportionality relationship implies is based on differences but also on interrelations that allow the functioning of the institutional system so as to avoid excessive concentration of power or exercise of the same, as well as the excess of power, especially by violating human rights and fundamental freedoms. The finality of the proportionality ratio between public authorities is "the establishment of balanced correlations between the governors and the ones that are governed, complying with the public freedoms"[1].

We will refer to some of the constitutional regulations concerning the Romanian state institutional system, which reflects the principle of proportionality:

A. Elements of difference between state authorities, meaning the autonomy of each category of organs and their position within the system:

Public authorities are governed distinctly by the rules contained in Title III of the Constitution. These are the "three classic powers" in the traditional order: legislative, executive and judicial power.

The Constitution confers a certain degree of prerogative to Parliament in relation to the other state authorities: "Parliament is the supreme representative body of the Romanian people and the sole legislator authority of the country" (art. 61 para. 1);

Besides the classic scheme of the separation of powers in the state, the Constitutional Court achieved constitutional power (art. 142 and subsequent of the Fundamental Law), which is the guarantor of the supremacy of the Constitution, the only constitutional jurisdictional

[1] Ioan Muraru and Mihai Constantinescu, "Rolul Curţii Constituţionale în asigurarea echilibrului puterilor în stat", *Dreptul* no. 9 (1996): 7.

authority of Romania, independent of the any other public authority [art. 1 para. (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished]. The People's Advocate is also independent of any other public authority. He is appointed by the Parliament in the joint session of the Chambers [art. 65 para. (2) letter i)]. Ex officio or at the request of persons injured in their rights or freedoms, the People's Advocate may refer the matter to the public authorities in order to take measures to eliminate acts or facts that affect subjective rights or legitimate protected legal interests (art. 58 and subsequent). It has the power to notify the Constitutional Court, in the situations provided by art. 146 letters a) and d);

The bicameral structure of Parliament is an expression of the balance involved in the principle of proportionality. Thus, Chambers are equal but are functionally differentiated in the exercise of their legislative powers. The distinction between the Chamber referred first (of reflection) and the Decision Chamber, made by art. 75, expresses the "quasi-perfect" bicameralism, which is a proportionality ratio. We agree with the opinion expressed in the literature, according to which "the system of parliamentary bicameralism in Romania must be preserved, but it must be transformed into a differentiated bicameralism. Thus, to the law of democratization and efficiency can be ensured, and to the legislative organ a representativeness and responsibility increment"[1].

The difference between the length of the term of office of some state authorities contributes to a proportionate ratio between the powers of the state, is the expression of the balance and not of the formal equality, in order to ensure the good functioning of the Romanian institutional system. Thus, the duration of Parliament's mandate is 4 years (art. 63), of the President of Romania is 5 years (art. 83), of the members of the Superior Council of Magistracy is 6 years (art. 133), the mandate of the judges at the Constitutional Court is 9 years, and the president of this institution is elected for a period of 3 years (art. 142), the judges of the courts appointed by the President of Romania have practically an indefinite mandate in time because they are irremovable under the law (art. 125). The People's Advocate mandate is 5 years (art. 58).

[1] Ioan Muraru and Andrei Muraru, „Scurtă pledoarie pentru un bicameralism parlamentar diferenţiat", *Revista de drept public* no. 1 (2005): 8.

B. The specialty literature highlighted the particularities of the relations between the state authorities, which in our opinion materialize the principle of proportionality, because the relational balance also implies the difference. In this respect, it was stated that: "The election of the President of Romania by the people, an essential feature of the presidential republics, combines in our country with the pre-eminence of the Parliament, as a result, mainly, of the parliamentary origin of the government, thus defining a semi-presidential political regime".[1]

The set of interrelations between the different categories of organs of the state is the form of achieving the balance and mutual control of the powers. These relations, which form the "identity card of the state power system"[2], presuppose the autonomy of the state authorities and the differences between them. The complex structure of the state power system is a concretisation of the principle of proportionality, in other words, it strikes a balance between the powers of the state, which are based on autonomy, differentiation and interrelations. The more the constitutional regulations in the field manage to materialize the requirements of the principle of proportionality, the more exists the guarantee of avoiding some forms of concentration of the state powers, the tyranny of the majority or minorities and obviously the excess of power.

The concern of the Romanian constituent legislator to achieve a functional balance between the powers of the state, between these and society, is obvious, if we refer to the provisions of art. 80, according to which: "The President exercises the function of mediation between the powers of the state as well as between state and society", but also to the provisions of art. 146 letter e) according to which our constitutional court has the competence to resolve constitutional legal conflicts between public authorities. We also need to remember the role of mediator and balance factor for the powers of the state, but also for the society that justice has. In this respect, the provisions of art. 124 of the Constitution consecrate the general "uniqueness, impartiality and equality" of justice, which represents important guarantees for the achievement of the functions of the judicial power in society.

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[1] Mihai Constantinescu, "Echilibrul puterilor în regimul constituţional din România", in *Dreptul* no. 3 (1993): 3.
[2] Deleanu, *Drept constituţional şi instituţii politice*, vol. I, 201.

Of course, the system of state power is an open, dynamic one, implying not only the multiplication of its constituent elements or their reorganization, but also of the functions that correspond them and of the interrelationships between the elements of the system. Within the internal system, the social-political system, and externally the system of the international community of states represent the "environment" with which the state authorities interact. Therefore, the balance, as a particular aspect of the principle of proportionality, between the powers of the state must be understood in its dynamics, including in the continuous process of interpreting and applying the constitutional provisions in the matter.

Proportionality, as a principle of constitutional law, has a concrete dimension. The existence of a proportionate, balanced relationship between the state authorities, between them and society, is verified in practice through the functioning of the political and social system, the avoidance of crises, or, when they occur, through the capacity of the state authorities to manage these, complying in any situation with the principles of the rule of law. Essential for the fulfilment of the requirements of separation and balance between the powers of the state, but also for stability, in its social and political system dynamics, from the perspective of pluralism in society, there is the existence of a proportionate balance between the majority and the minorities between the government and the opposition.

IV. ASPECTS OF THE CONSTITUTIONAL COURT CASE-LAW ON GARANTEEING AND COMPLYING WITH THE REQUIREMENTS OF THE RULE OF LAW

At the end of this analysis we shall refer to some decisions of the Constitutional Court which we consider relevant to the rule of law.

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to observe the law[1].

At the same time, it has been stated in the case-law of the constitutional court that the rule of law, ensuring the supremacy of the Constitution, also realizes "the correlation of all laws and all normative

[1] Decision no. 232 of July 5th 2001, published in the Official Gazette no. 727 of November 15th 2001; Decision no. 53 of January 25th 2011, published in in the Official Gazette no. 90 of February 3rd 2011.

acts with it"[1].

The requirements of the rule of law concern the major purposes of state activity, namely the supremacy of law, which implies the subordination of the state to the law. In this respect, the law provides the means by which the political options or decisions can be censored and performs the abolition of any abusive and discretionary tendencies of the state structures. Further on, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of the public powers and establishes guarantees, including of a judicial nature, that ensure the observance of citizens' rights and freedoms, primarily by limiting the state authority, which represent the framing of the public authorities' activities within the limits of the law.

The case-law of the Constitutional Court expresses the main requirements of the rule of law in relation to the goals of the state activity. Thus, by case-law is achieved a very eloquent synthesis of the doctrine on the notion and features of the rule of law. It is significant in this respect the Decision no. 17 of January 21st 2015[2], by which the Constitutional Court gives an explanation concerning the state of law, enshrined in art. 1 para. (3) thesis I of the Constitution: "The requirements of the rule of law concern the major purposes of its activity, prefigured in what is commonly called the reign of law, a phrase involving the subordination of the state to the law, the guarantee of the means to allow the law to censor political choices and, in this context, to weigh the potential abusive, discretionary tendencies of the static structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of the public powers that must act within the limits of the law, namely within the limits of a law expressing the general will. The rule of law enshrines a series of safeguards, including jurisdictional, to ensure that citizens' rights and freedoms are complied with by the state's self-restraint, namely the involvement of public authorities in the coordinates of law".[3]

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[1] Decision no. 22 of January 27th 2004, published in the Official Gazette no. 233 of March 17th 2004.

[2] Decision no. 17 of January 21st 2015, published in the Official Gazette no. 79 of January 30th 2015.

[3] Decision no. 70 of April 18th 2000, published in the Official Gazette no. 334 of July 19th 2000.

The principle of stability and security of legal relations is not explicitly enshrined in the Constitution of Romania, but, like other constitutional principles, it is involved in the constitutional normative provisions, respectively art. 1 para. (3), which enshrines the rule of law. In this way, our constitutional court accepts the deduction, by way of interpretation, of the principles of law implied by the express rules of the fundamental Law. In this respect, by means of the Decision no. 404 of April 10th 2008[1], the Constitutional Court stated that: "The principle of stability and security of legal relations, although not explicitly enshrined in the Romanian Constitution, is deduced both from the provisions of art. 1 para. (3), according to which Romania is a state of law, democratic and social, and from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its case-law[2]. Furthermore, our constitutional court has considered that the principle of security of civil legal relationships is a fundamental dimension of the rule of law[3]

Constitutional Court decides constantly for clarity and predictability of law, which are requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of legal provisions through other provisions contained in the same normative act lead to the violation of the principle of security of legal relations, due to the lack of clarity and predictability of the norm, principles which constitute a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of art. 1 para. (3) of the fundamental Law [4]

Concerning the rule of law, the Constitutional Court has shown that justice and social democracy are supreme values. In this context, the militarized authorities, in this case the Romanian Gendarmerie, exercise, under the law, specific powers regarding the defense of public order and tranquillity, of citizens' fundamental rights and freedoms, of public and

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[1] Decision no. 404 of April 10th 2008, published in the Official Gazette no. 347 of May 6th 2008.

[2] Decision no. 685 of November 25th 2014, published in the Official Gazette no. 68 of January 27th 2015.

[3] Decision no. 570 of May 29th 2012, published in the Official Gazette no. 404 of June 18th 2012; Decision no. 615
of June 12th 2012, published in the Official Gazette no. 454 of July 6th 2012.

[4] Decision no. 26 of January 18th 2012, published in the Official Gazette no. 116 of February 15th 2012.

private property, of prevention and detection of crimes, and other violations of applicable laws, and the protection of state institutions and the fight against acts of terrorism. Consequently, the Constitutional Court ruled: "By the possibility of militarized authorities to find contraventions committed by civilians, art. 1 para. (3) of the Constitution is not affected in any way, regarding the Romanian state, as a rule of law, democratic and social"[1]

Human dignity, together with the freedoms and rights of citizens, the free development of human personality, justice and political pluralism, are supreme values of the rule of law (art. 1 para. (3)). In the light of these constitutional regulations, it has been stated in the Constitutional Court's case-law that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful of religious or philosophical beliefs of parents, which is why organizing school activity must achieve a fair balance between the process of education and teaching religion, and on the other hand with respect for the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviours specific to a certain attitude of belief or philosophical, religious or non-religious beliefs must not be subject to sanctions that the state requires for such behaviour, regardless of the person's motivation for faith. "As part of the constitutional system of values, freedom of religious conscience is attributed to the imperative of tolerance, especially to human dignity, guaranteed by art. 1 para. (3) of the fundamental Law, which dominates the entire value system as a supreme value"[2]

It is also interesting to note that our constitutional court considers human dignity as the supreme value of the entire system of values constitutionally consecrated, value that is found in the content of all human rights and fundamental freedoms. At the same time, it is an important aspect that requires the state authorities in their entire activity to first consider respecting the human dignity.

It should be noted that in its case-law the Constitutional Court also identifies the content components of human dignity, as a moral value but at the same time constitutional, specific to the rule of law: "Human

[1] Decision no. 1330 of December 4th 2008, published in the Official Gazette no. 873 of December 23rd 2008.

[2] Decision no. 669 of November 12th 2014, published in the Official Gazette no. 59 of January 23rd 2015.

dignity, in constitutional terms, presupposes two inherent dimensions, namely the relations between people, which refers to the right and obligation of the people to be respected and, in a correlative way, to respect the fundamental rights and freedoms of their peers, as well as the relation of man to the environment, including the animal world".[1]

V. THE UNCONSTITUTIONALITY OF RESTRICTING THE EXERCISE OF CERTAIN RIGHTS DURING THE EXISTENCE OF A STATE OF EMERGENCY AND A STATE OF ALERT. THE EXCESS OF POWER

Exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there being obviously the danger of excess of power.

In doctrine there is no unanimous opinion on the legal signification of exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the freedom of decision of the administration within the framework allowed by law, and the opportunity evokes a *de facto* action of the public administration, in exceptional situations, necessary action (therefore opportune) but against the law. Jean Rivero considers that exceptional situations refers to certain factual circumstances which have a double effect: the suspension of the application of the ordinary legal regime and initiation of the application of a particular legislation to which the judge defines the requirements. Another author identifies three features for exceptional situations: 1. The existence of abnormal and exorbitant situations or serious and unforeseen events; 2. The impossibility or difficulty to act in accordance with the natural regulations; 3. The necessity of a quick intervention for the protection of a considerable interest, under serious threat.

Excess of power can be manifested in these circumstances by at least three aspects: *a)* the appreciation of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent state authorities, by virtue of their discretion, to go beyond

[1] Decision no. 1 of January 11th 2012, published in the Official Gazette no. 53 of January 23rd 2012; Decision no. 80 of February 16th 2014, published in Official Gazette no. 246 of February 7th 2014.

what is necessary for the protection of the seriously threatened public interest; *c)* if these measures unduly, unjustifiably limit the exercise of the constitutionally recognized fundamental rights and freedoms.

The existence of crisis situations – economic, social, political or constitutional – does not justify the excess of power. In this sense, Prof Tudor Drăganu stated: "the idea of the rule of law requires that they (exceptional situations *n.n.*) find appropriate regulations in the text of the constitutions, whenever they have a rigid character. Such a constitutional regulation is necessary to determine only the areas of social relations, in which the transfer of power from Parliament to Government can take place, to emphasize its temporary nature, by setting deadlines for applicability and to specify the purposes for which it is performed"[1].

Of course, the excess of power is not a phenomenon manifested only in the practice of executive authorities, being met also in the activity of the Parliament or of the courts.

We consider that the discretionary power recognized to the state authorities is exceeded, and the measures ordered represent an excess of power, whenever the existence of the following situations is found:

1. The principles of the supremacy of the Constitution and of the law, of the rule of law and of the separation of state powers are not respected.
2. The ordered measures do not aim a legitimate purpose.
3. The decisions of public authorities are not appropriate with the factual situation or with the aimed legitimate purpose, in the meaning that they exceed what is necessary for the achievement of this purpose.
4. There is no rational justification for the measures ordered, including in situations where a different legal treatment is established for identical situations, or an identical legal treatment for different situations.
5. By the measures ordered, the state authorities restrict the exercise of fundamental rights and freedoms, without there being a rational justification representing, in particular, the existence of an adequate relationship between these measures, the factual situation and the legitimate aim pursued.

The exceptional state, respectively the state of emergency and subsequently the state of alert established by the rulers on the Romanian territory, similar to the existing situation in other countries of the world, in order to limit the spread of the pandemic created by the Covid-19

[1] Tudor Drăganu, *Introducere în teoria și practica statului de drept*, 132.

virus, generated the adoption of numerous normative acts by which a significant number of fundamental rights and freedoms are restricted and correlatively a significant constitutional jurisprudence on the constitutionality of these measures.

In the following, we briefly analyze this jurisprudence but also the legislation in force in order to highlight aspects of the excess of power of state authorities.

The Constitutional Court by two decisions, Decision no. 152/2020 and Decision no. 157/13 May 2020 found the unconstitutionality of some provisions of GEO no. 1/1999 and GEO no. 21/2004 on the National Emergency Management System, regarding the actions and measures ordered during the state of emergency regarding the restriction of the exercise of certain rights.

By Decision no. 152/2020[1], the Constitutional Court, among others, admitted the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of GEO no. 1/1999 on the state of siege and the state of emergency are unconstitutional. Also, it ascertained that the GEO no. 34/2020 on the modification and amendment of the GEO no. 1/1999 on the state of siege and the state of emergency is unconstitutional, in its ensemble.

In order to pronounce this decision, the Court held that the constitutional prohibitions provided in art. 115 para. 6, not to adopt emergency ordinances that may affect the regime of fundamental state institutions, the rights, freedoms and duties provided by the Constitution, electoral rights, have taken into account the restriction of the Government's competence to legislate in these essential areas instead of Parliament.

Legislating on the legal regime of the state of siege and the state of emergency, GEO no. 1/1999 is the primary regulatory act which restricts the exercise of fundamental rights and freedoms, an act based on which public authorities with competences in crisis management (President of Romania, Parliament of Romania, Ministry of Internal Affairs of Romania, military authorities and public authorities, provided for in the decree establishing the state of siege or emergency) issue normative administrative acts (President's decree establishing the state of siege or state of emergency, military ordinances and orders of other public authorities) implementing the primary rule, identifying, depending on the

[1] Published in the Official Gazette No 387/13 May 2020.

particularities of the crisis situation, the rights and fundamental freedoms whose exercise is to be restricted.

"However, taking into account all these arguments, the Court notes that, incidentally, the normative act with such an object of regulation affects both rights and fundamental freedoms of citizens and fundamental state institutions, falling within the scope of the prohibition provided by art. 115 para. 6 of the Constitution. Thus, the Court finds that the legal regime of the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, as a formal act of the Parliament, adopted in compliance with the provisions of art. 73 para. 3 lit. g) of the Constitution, in the regime of organic law".

Regarding the GEO no. 34/2020 for the modification and amendment of the GEO no. 1/1999, the Court has ascertained that it has been adopted with the violation of art. 115 para. 6 of the Constitution.

The normative act modifies the legal regime of the state of siege and of the state of emergency under the aspect of contravention liability in case of non-compliance or immediate non-application of the measures established in GEO no. 1/1999, introducing complementary contravention sanctions, such as the confiscation of goods intended, used or resulting from the contravention and the temporary suspension of the activity.

The Court recalls that the main sanctions and the complementary sanctions are sanctions specific to the contravention law, applicable to the subject of law who violates the legal norm of contravention law by conduct contrary to it. They have a preventive-educational role and represent a form of legal constraint, targeting, in particular, the patrimony of the perpetrator. Therefore, considering the legal nature of the contravention sanctions, their effect on the patrimony of the perpetrator, as well as the jurisprudence of the Court, results that the statement of certain norms in this area implicitly affects the right to property, stated by art. 44 of the Constitution, as well as the economic freedom, provided by art. 45 of the Constitution restricting the exercise of these rights which violates the prohibition established by art. 115 para. 6 of the Constitution.

At the same time, the normative provision of the inapplicability of the legal norms regarding decisional transparency and social dialogue, in fact their suspension during the state of emergency or siege, affects the fundamental rights in consideration of which these laws were adopted, as well as the regime of a fundamental state institution, so that the

emergency ordinance by which such a suspension is operated contravenes the interdiction provided by art. 115 para. (6) of the Constitution.

Given all these arguments, the Court has ascertained that the GEO No. 34/2020 for the modification and amendment of the GEO No. 1/1999 is unconstitutional, in its ensemble, because it has been adopted with the violation of the constitutional statements of art. 115 para. 6 limiting such competences.

The notion of "law" by which the legal regime of exceptional states can be established is interpreted in a narrow sense, respectively as a normative act of the Parliament, excluding the normative acts of the Government with express reference to the executive ordinances. At the same time, a necessary interpretation of the interdiction provided by art. 115 para. 6 of the Constitution in the sense that by emergency ordinances, including those issued in exceptional situations, the Government may not establish primary regulations regarding the restriction of the exercise of certain rights. Such measures may be instituted primarily by law only, as a legal act of Parliament.

It is obvious that the normatively materialized intention of the Government to restrict the exercise of certain rights and fundamental freedoms with the violation of its legislative competence in this area and the non-compliance with the constitutional interdictions, represent an excess of power which the Constitutional Court has ascertained and removed.

By the same decision, the Court found that the provisions of art. 28 para. 1 corroborated with art. 9 para. 1 of GEO no. 1/1999 does not indicate clearly and unequivocally, within the legal norm, the acts, facts or omissions that constitute contraventions nor do they allow their identification easily, by referring to the normative acts with which the incriminating text is in connection.

We reproduce an excerpt from the motivation of our constitutional court: "The provisions of art. 28 of GEO no. 1/1999 not only does not concretely foresee the facts that attract the contravention liability, but establishes indiscriminately for all these deeds, regardless of their nature or gravity, the same main contravention sanction. As regards the complementary sanctions, although the law provides that they are applied according to the nature and gravity of the offence, as long as the offence

is not circumscribed, it is obvious that neither its nature nor its gravity can be determined to establish the complementary applicable sanction.

In conclusion, the Court finds that, since the provisions of the law subject to constitutional review impose a general obligation to comply with an indefinite number of rules, with identifiable difficulty, and establish sanctions for minor offenses, they violate the principles of legality and proportionality governing the contravention law.

Thus, the Court finds that the provisions of art. 28 of GEO no. 1/1999, characterized by a deficient legislative technique, do not meet the requirements of clarity, precision and predictability and are thus incompatible with the fundamental principle of respect for the Constitution, its supremacy and the laws, provided by art. 1 para. 5 of the Constitution, as well as with the principle of proportional restriction of rights and fundamental freedoms, provided by art. 53 para. 2 of the Constitution. For the same arguments, the Court states that the imprecision of the legal text subjected to constitutionality control also affects the constitutional guarantees characterizing the right to a fair trial, stated by art. 21 para. 3 of the Constitution, including its component on the right to defense, fundamental right stated by art. 24 of the Constitution.

By Decision No 157/2020[1], the Constitutional Court, among others, has accepted the exception for unconstitutionality stated by the People's Advocate and ascertained that art. 4 of the GEO no. 21/2004 on the National Emergency Management System is constitutional to the extent to which the actions and measures ordered during the state of alert does not aim the restriction of the exercise of certain rights and fundamental freedoms.

The Court ascertained that the actions and measures ordered during the state of alert, based on the GEO no. 21/2004 cannot aim rights and fundamental freedoms. The Court also notes that the delegated legislator cannot in turn delegate to an administrative authority/entity what he himself does not have in jurisdiction. "As the Court has constantly stated, from the corroboration of the constitutional norms stated by art. 53 para. 1 and art. 115 para. 6 it follows that the impairment/restriction of rights or fundamental freedoms can only be achieved by law, as a formal act of Parliament".

[1] Published in the Official Gazette No 397/15 May 2020

The arguments of the Constitutional Court, as well as the solutions given to these constitutional disputes are important guarantees for respecting the rights and freedoms of citizens especially in exceptional situations when increases the danger that the executive will take discretionary measures that are in fact excess of power.

Our Constitutional Court noted that "It is indisputable that the legislation providing for the legal regime of crisis situations requiring exceptional measures presupposes a greater degree of generality than the legislation applicable during the normal period, precisely because the peculiarities of the crisis situation are the deviation from normal (exceptionality) and the unpredictability of the serious danger affecting both society as a whole and each individual. However, the generality of the primary norm cannot be attenuated by infralegal acts that complement the existing normative framework. Therefore, the measures that organize the execution of legal provisions and customize and adapt those provisions to the existing factual situation, to the areas of activity essential for managing the situation that generated the establishment of the state of alert cannot deviate (by amendments or completions) from the framework circumscribed by the norms with the force of law, so they cannot target rights and fundamental freedoms".

By Decision no. 457/2020[1], the Constitutional Court admitted the exception of unconstitutionality raised by the People's Advocate and found that the provisions of art. 4 para. 3 and 4, as well as of art. 65 lit. s) and ș), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), ș) and t) and of art. 67 para. 2 lit. b) regarding the references to art. 65 lit. s), ș) and t) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic are unconstitutional.

The Court notes that the Parliament's approval of the measures adopted by the Government's decision to establish the state of alert creates a confusing legal regime for the Government's decisions.

The Court notes that the criticisms formulated by the People's Advocate are grounded, with the consequence of the unconstitutionality of art. 4 para. 3 and 4 of Law no. 55/2020, since, through these texts of law, the Parliament cumulates the legislative and executive functions, a situation incompatible with the principle of separation and balance of powers in the state, enshrined in art. 1 para. 4 of the Constitution; the legal regime of Government decisions is distorted, as acts of law

[1] Published in the Official Gazette No 578/1 July 2020

enforcement, enshrined in art. 108 of the Constitution; a confusing legal regime of Government decisions is created, such as to raise the issue of their exemption from judicial control under the conditions of art. 126 para. 6 of the Constitution, with the consequence of violating the provisions of art. 21 and art. 52 of the Constitution, which enshrines free access to justice and the right of the injured person by a public authority.

In relation to art. 65 lit. s)-ș), art. 66 lit. a), b) and c) and art. 67 para. 2 lit. b) of Law no. 55/2020, criticized for unconstitutionality, the Constitutional Court has noted that the compliance of the law is mandatory, but it cannot pretend to a subject of law to comply with a law that is unclear, imprecise and unpredictable, because he cannot adjust his behavior depending on the normative hypothesis of the law". This is why the legislator must show special attention when adopting a normative act (Decision no. 1 of January 10, 2014, published in the Official Gazette of Romania, Part I, no. 123 of February 19, 2014). A legal provision must be precise, unequivocal, to establish clear, predictable and accessible norms whose application does not allow arbitrariness or abuse (Decision no. 637 of October 13, 2015, published in the Official Gazette of Romania, Part I, no. 906 of December 8, 2015).

Legislative acts with the force of law and administrative acts of a normative nature by which contraventions are established and sanctioned must meet all the quality conditions of the norm: accessibility, clarity, precision and predictability. The determination of the facts whose commission constitutes contraventions must be made in compliance with these requirements, and not left, arbitrarily, at the discretion of the ascertaining agent, without the legislator having established the necessary criteria and conditions, the operations of ascertaining and sanctioning contraventions. Also, in the absence of a clear representation of the elements constituting the contravention, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, when solving the complaint on the record of finding and sanctioning the contravention. Based on these considerations, our constitutional court found the unconstitutionality of these texts of law. In Romania, derogations specific to the state of emergency are regulated at the constitutional level, including in terms of increased powers offered to the executive, i.e. the President of Romania, and not the Government. To "build" by law a new institution – the "state of alert", with an obvious regime less restrictive than the state of emergency regulated by the

constituent legislator – but allowing the circumvention of the constitutional framework governing legality, separation of powers in the state, conditions of restriction the exercise of certain rights and freedoms, contradicts the general requirements of the rule of law, as enshrined in the Romanian Constitution.

The aspects that formed the object of the constitutionality control of the Constitutional Court with reference to the exceptional state established on the Romanian territory are not the only abusive and unconstitutional measures of the state authorities ordered and applied during this period.

In our opinion, human dignity and fundamental rights have been seriously violated, such as: the right to life, the right to family and private life, the right to health care, access to culture, the right to education, the right to a decent standard of living and especially the freedom of conscience, the autonomy of religious cults, their freedom and especially of the Orthodox cult and the autonomy of the Orthodox Church, majoritarian in Romania.

The space does not allow us to develop these aspects, but we emphasize that the restrictive measures imposed by law and applied by excess of power by state authorities, do not respect the principles of supremacy of the Constitution and the law and the requirements of art. 53 of the Constitution and especially the principle of proportionality, because they are not suitable for different specific situations, (for example the religious communion of Orthodox believers participating in a service in the Church cannot be considered a simple civil meeting) and far exceed what is necessary respectively combating and preventing the spread of the pandemic.

Respect for the supremacy of the Constitution and the law, guaranteeing the rights and fundamental freedoms of citizens, elimination of manifestations of excess of power by the rulers during the existence of exceptional situations are clearly expressed by the Constitutional Court in the following considerations of Decision no. 457/2020: The Venice Commission recalled that "the concept of a state of emergency" is based on the assumption that in certain political, military and economic emergencies, the system of limitations imposed by the constitutional order must yield in in the face of the increased power of the executive.

However, even in a state of public emergency, the fundamental principle of the rule of law must prevail. The rule of law consists of

several issues that are all of paramount importance and must be fully maintained. These elements are the principle of legality, separation of powers, division of powers, human rights, state monopoly on force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation of citizens and supervision by these of the decision-making process, decision-making, transparency of government, freedom of expression, association and assembly, the rights of minorities, as well as the rule of the majority in political decision-making. The rule of law means that government agencies must operate within the law and their actions must be subject to control by independent courts. The legal security of persons must be guaranteed".

CONCLUSIONS

Antonie Iorgovan said that an essential problem of the rule of law is to answer the question: "where discretionary power ends and where the abuse of law begins, where the legal behaviour of the administration ends, materialized in its right of appreciation and where the violation of a subjective right or legitimate interest of the citizen begins?" Therefore, the application and observance of the principle of legality in the activity of state authorities is a complex issue because the exercise of state functions presupposes the discretionary power with which the organs of the state are invested, or in other words the authorities' "right of appreciation" regarding the moment of adoption and the content of the measures imposed. What is important to emphasize is that discretionary power cannot be opposed to the principle of legality, as a dimension of the rule of law.

The excess of power can be manifested in these circumstances by at least three aspects: a) the appraisal of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent authorities of the State, by virtue of discretion, to go beyond what is necessary to protect the publicly threatened public interest; c) if these measures unduly and unjustifiably restrict the exercise of fundamental rights and freedoms constitutionally recognized.

The key issue for the practitioner and the theorist is to identify criteria by which to establish the limits of the discretionary power of the

state authorities and to differentiate it from the excess of power that must be sanctioned. Of course, there is also the question of using these criteria in court practice or constitutional litigation.

Concerning these aspects, the opinion of the specialized literature was that the purpose of the law will be the legal limit of the right of appreciation (of opportunity). For discretionary power does not mean a freedom beyond the law, but one permitted by law. Of course, "the purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of the organs of the state, and can therefore be considered a criterion for delimiting discretionary power from excess of power.

As can be seen from the case law of some international and domestic courts in relation to our research theme, the purpose of the law cannot be the only criterion to delimit discretionary power (synonymous with the margin of appreciation, term used by the ECHR) of the State may be an excess of power not only in the case where the measures adopted do not pursue a legitimate aim but also in the case that the measures ordered are not appropriate to the purpose of the law and are not necessary in relation to the factual situation and the legitimate aim pursued.

The adequacy of the measures ordered by the state authorities to the legitimate aims pursued is a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan, who considers that the limits of discretionary power are set by: "positive written rules, general principles of law, principle of equality, principle of nonretroactivity of administrative acts, right to defense and principle of contradictory, principle of proportionality" Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess of power in the work of state authorities. And by this is an essential principle of the rule of law.

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SEVERAL ASPECTS CONCERNING THE FUNCTIONS OF JURIDICAL RESPONSIBILITY OF THE STATE

Elena MORARU [1]

Abstract:

The functions of juridical responsibility are a complex systemically phenomenon. Their influence is determined by diverse elements of the juridical responsibility.

Each stage, form of juridical responsibility achievement has certain functions. Juridical responsibility achieves regulations functions preventive and repressive, repairing and educational.

The distinguished features of the juridical responsibility functions are characteristic to a well determined purpose: the reflexion of influencing direction, the influence character the conditioning with the legislations of social development and performing of social relationships.

Key words: *The functions of juridical responsibility juridical responsibility; regulations functions preventive; repressive repairing and education.*

INTRODUCTION

The researching of juridical responsibility of the state should start by the definition of the proper notion but we will mention that this definition presents some difficulties.

It is absolutely obvious that the juridical responsibility of the state is a complex phenomenon composed of two categories: juridical responsibility and state.

The idea of responsibility being characteristic to the normal social life has a very wide sphere of understanding and action. The immense majority of human actions are susceptible or super juridical responsibility

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because the individual does not action in the environment "independently passive or neutral but it is being done in a social environment – f. e. y. human one as part of which the parameters of action are evaluated, valued".

The responsibility means in general sense – the obligation of everyone to support the consequences of no respecting of some rules of behave our, a obligation belonging to the author of the fact being contrary, to these rules which wears the seal social disapproval of such conduct including indisputably and inevitably the juridical one being a major component of it.

In its diverse manifestation forms according with author's (M. Costin) opinion the juridical responsibility constitutes the central domain the cornerstone of the law proving in a large measure its efficiency[1]

The law does not define the concept of juridical responsibility. From the multitude of juridical norms none one gives a definition of juridical responsibility, the legislator is being limited only to establish the conditions in which the physical or juridical person may be replied to answer, the principles and limits in which may interfere one or other between these forms the character and extending of the sanction that may be applied[2].

Starting from the established conditions by law in which may be engaged the juridical responsibility basing on these ones and on the principles detaching from them, the doctrine gave to the juridical responsibility either proper definitions typical to some right branches or being applicable to the general right.

We mention that the juridical responsibility represents one of the forms of social responsibility. The juridical responsibility and social one have preestablished relationship like between part and entire and all that they mentioned earlier concerning the social responsibility has an absolute relationship with juridical responsibility too[3].

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[1] M. Costin, *Răspunderea juridică în dreptul Republicii Socialiste România (*Cluj: Dacia, 1974), 19.

[2] H. Diaconescu, „Este răspunderea penală a persoanei juridice în dreptul roman o răspundere pentru fapta altuia", in *Dreptul, no. 3* (2006): 148.

[3] E. Moraru, „Social responsability – a special relationship". In: *The international conference „European union's history culture and citizenship: Current problems of Europea Integration,* 2-nd Edition, Piteşti (2009): 753

The notion of the juridical responsibility the fundamental definition of this one its construction determine the juridical and organizing mechanism of the juridical responsibility theory, the place and the role of the phenomenon of juridical responsibility in the entire law system[1]. For these reasons even that we understand by the notion of "juridical responsibility" is represented the problem of approached methodology.

Professor D. Baltag reveals certain specific characters to the juridical responsibility which we are supporting[2].

Firstly, the juridical responsibility represents one of the forms of social responsibility.

Secondly, the juridical responsibility has as basis the juridical norm, responsibility measures being especially indicated in the sanction of juridical norms.

The reason of *de facto* of the responsibility is represented by the structure of illicit fact *in the third turn*. We should mention that it is obligatory the confirmation of the presence of all elements of this structure.

In the fourth turn, the juridical responsibility is characterized by certain limits or fences of organizational or/and patrimonial character which the culprit is obliged to support in the process of execution of regulated measures by the sanction of juridical norms.

In the fifth turn, the juridical responsibility is a form of manifestation of the state compulsory.

In the sixth turn, the juridical responsibility represents the process of realization of financial norms in the protection relationships of right order.

Thus the juridical responsibility should be understood as a cumulus plurality of offices of actions and process relations forming an entire a whole, a unique process that has the quality of form and mean of achievement of the norms of material right.

In this way we note that the problem of juridical responsibility remains to be discussed and with a lot of equivocal in the doctrine of foreign and autochthone specialty. The prolonged disputation on the

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[1] М. Д. Шиндяпина, *Стадии юридической ответственности* (Учебное пособие. М.: Юрайт, 1998), 9

[2] D. Baltag, *Teoria răspunderii şi responsabilităţii juridice* (Chişinău: Tipografia Centrală, 2007), 31-34

problem of juridical responsibility for the present was not ended with the elaboration of unitary conception in this sense. For example, the doctrine has not a unique definition of the phenomenon of "juridical responsibility". But at the same time we should understand that it can not exist a unique definition at all, what it is unique is the fact that this one represents one of the fundamental pillars of the right system, the one of the factors with the determined impact on the good functioning of this system. As a result, the research of the juridical responsibility represents one of the advantages both of the general theory the right and of the sciences of this area.

As a consequence of the prolonged debates on the theme of juridical responsibility occurs also the treatment enough varied of the problem of juridical responsibility of the state.

It is absolutely obvious that the existent diverse conceptions concerning the juridical responsibility let trace on the treatment of the state responsibility of the state body and civil servants. In the context of the present work, we consider to be timely the passing to the proper analysis of the juridical responsibility projecting it directly on the state institution. Thus, we can start to analyze those elements of juridical responsibility of the state, which reflect the essence of this juridical phenomenon.

At the beginning while speak about the essence and functions of juridical responsibility of the state.

Speaking about the essence of the juridical responsibility of the state we will pay attention to t its objectives. Thus, as it is accepted in unanimity the principal purpose of the juridical responsibility is identified with the mission of this one in society. The final goal of the responsibility is to exclude the illicit facts from the daily life. But it is an ideal goal while in reality is being tended to the minimization of the number of illicit facts and of negative consequences which attract these ones for the society.

Taking into account that we have said earlier, we maintain the opinion for revealing the next objectives of the juridical responsibility of the state in the internal right. Firstly, the responsibility of the state has as objective the defense of right order, of the right and interests of the victims of illicit facts; secondly, the responsibility of the state is oriented toward the maximum possible compensation of the damages caused by the acts and illicit facts of the states bodies and civil servants; thirdly, the

institution of the state responsibility contributes to the diminution of the number of illicit facts by warning possibly authors of the illicit facts about the inevitability of their sanctioning as a result of ignoring the law; fourthly, it contributes to the juridical education of the citizens and civil servants too[1].

The objectives of the juridical responsibility find their reflection in the functions of juridical responsibility of the state. In the scientific works devoted to the functions of juridical responsibility are presented classifications and definitions diametrically opposite sometimes the functions and goals of the juridical responsibility being identical considered. The most this fact is conditioned by the various conception of the juridical responsibility.

Starting from the existent ideas in the doctrine we maintain the opinion of the professor D. Baltag, that by the functions of juridical responsibilities we should understand the principal directions of the influence of juridical responsibility on the social relations, the people behavior, the morality, juridical conscience, the culture in which is being disclosed the responsibility essence, its social destination and by which are reached the purposes of juridical responsibility[2].

As we see the functions of juridical responsibility are defined by the right theory as being the principal directions through which are being reached the responsibility objectives and in which is reflected the mission of this one. Otherwise said, the objectives of the juridical responsibility determine the functions of this one.

Defining the notion of juridical responsibility of the state, we may make the following conclusions:

- the functions of the juridical responsibility are the essential directions of the influence of juridical responsibility on the social relations, the behavior of the individuals, morality, juridical conscience, culture in which is being revealed the essence, its social mission and through which are reached the aims of the juridical responsibility;
- the functions of juridical responsibility are a complex systemic phenomenon. Their influence is promoted by various elements of

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[1] E. Moraru, „Political responsabiliti of states: international practice“. In*: The international conference „European union's history, culture and citizenship: The European Union – Establishment and Reforms – 3nd Edition”,* Piteşti (2010): 512.

[2] D. Baltag, *Teoria răspunderii şi responsabilităţii juridice* (Chişinău: Tipografia Centrală, 2007), 31-34.

juridical responsibility. To each stage, form of achievement of the juridical responsibility corresponds certain functions. Juridical responsibility achieves settlement, preventive, repressive, repairing and educational functions;

- the distinctive features of the juridical responsibility functions are characterized by the well determined purpose, the reflections of the influencing direction, the character of the influence, according with the laws of social development and performing the social relation.

Generalizing the exposed opinions we can make the conclusion that the juridical responsibility of the state, of its bodies and civil servants achieves the following function: *preventive, repressive, repairing, regulatory and educational*.

The repression function (sanctionners) is oriented to the cessation or modification of the social relations, existent juridical relations and establishing of some concrete juridical relations between the right subjects being necessary for achieving juridical responsibility (relations of juridical responsibility). So its action objects are social relations, concrete juridical relations. The result of this action is the cessation of the concrete social relations and the appearence of a new juridical relation that did not exist previously. After the repression function occurs the restriction of juridical statute of the person.

It also exists a specific object to the function action of repressing of the juridical responsibility the conscience of offender. The function of repressing toghether with the limitations in concrete rights also contains the sentencing of the culprit expressed by the sentence of the judgement (or an other act of right application) deliberately by the jugement sentence is being condemned both the deed and the person which had commited it. The condemning being accompanied by the limitation in rights with objective character may bring to the moral sufferers expressed by so named *subjective perception*, but as any subiective perception it may exist or may be absent, only the same punishment by the content and volume can be perceived by some condemned as unbearable suffering.

The means of achievment of repressing function of the juridical responsibility are various: condemning, reduction of the patrimonial sphere, deprivation of subjective rights, privation with personal character. Concomitently with the repressing function is being achieved the repairing function of juridical responsibility whose action object are the social relations violated .

Any illicit deed – constitutional, criminal administrative, disciplinary, civil, financial ecological – violates social relations and cause damages to various its elements. When the social relationships are regulated by the juridical norms it occurs the violation of some social relations specific to juridical ones. O. S. Ioffe acertained that is not possible that by virtue of dialectical correlations to be violated the juridical norm without the violation of concrete juridical relation. The illicit deed making an attempt on the social relationship, concomitently makes an attempt on their juridical form too (juridical relations) undermining the regulation and order of the social life violating the established obligation the illicit deed causes damages to the subjects of law[1].

The object of the repairing function is also formed by the individual behaviour. Acting concomitently with the repressing function the repairing function forces the culprit to a law of conduct, compensates the state losses, of the farmed part. It occurs the forcing of the culprit for repairing the patrimonial sphere of the harmed part, the moral sphere (to beg pardon in public), to remove the commited damages in execution of the works, to pay the contractual damages, fine etc.

The regulation function of the juridical resposibility of the state has the mission not to permit the appearance juridical relations of protection. The repressing and repairing function of the juridical responsibility can not appear if it is not violates the regulation of the juridical responsibility. The existence of the regulation function serves as premise in appearance of other functions of juridical responsibility regulates the reaction of the state to the commited illicit act. But this function does not consist only „in the regulation of the state negative reaction about the violation of the human rights of citizen" in reality its destination is much more ample[2].

The means of achieving of the regulation function of juridical resposibility are the fixing in the juridical norms of the structure of licit conduct by establishing of the obligations, interdictions, permissions, encouragements.

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[1] О. С Иоффе, *Ответственность по советскому гражданскому праву. Л.* (1955): 80.

[2]М.Н. Трофимова, *Карательная функция юридической ответственности. Вестник ВУИТ. Сер. Юриспруденция, Вып. 7. Тольятти: Изд-во ВУиТ* (1999): 81.

As important as, in comparison with the regulation function is also the preventive function of the juridical responsibility. The preventive function is formed of preventive particular action and general preventive action.

Creating the prohibitive norm the state builds the prototype of juridical relations that appear as a result of illicit act. Just the existence of the norm has the goal to warn the appearance of these juridical relations. The preventive function acts on the will and conscience of the subjects with modufied psychologico-moral qualities on those persons that previously had commited illicit facts or on the persons that are predisposed to commit illicitones. This action object is connected first of all with the specific of achieving of the particular prevention, A series of scientists put in direct relation the achievment of particular prevention with the action on the will and conscience of all the subjects of juridical responsibility and not on those ones being predisposed to commit illicit acts[1].

The preventive action is formed from the summary action of introduction and punishment (sanction). Acting on the will and conscience of the subject having delictual capacity, finally the preventive function forms his legal conduct, regulates the normal social relations and does not admit the development of social injurious relations.

The preventive function is oriented toward the will and conscience of the subjects with delictual capacity. Among these subjects they may distingtuish two groups: the persons which commited illicit acts or disposed to commit them and persons which previously did not commit illicit acts.

The effective functionning og the juridical resposibility of the state is impossible without its instructive function but the fact that the instructive function acts on the will and conscience of the subiects with delictual capacity is not even so, that is why for clarifying this problem it is necessary to resort to the theoretical prototype of the personality structure which the criminal scientists group it under certain signs: social demographie, penal right, social manifestations in various domains of the vital activity: moral achievments, psychological, biological characteristics, the domain of necessity – motivation, the normative valorical characteristics of the conscience.

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[1] А. А. Алферов, *Права личности и юридическая ответственность (теоретические вопросы единства и взаимосвязи),* (Москва, 1998): 130.

The instructive function is not oriented only to the inner world of the offendors, but of all subjects with delictual capacity too. If the inside world of the deliquents is correction then the inside world of other subjects needs the formation and consolidation of values, reasons of positive orientations. To the subject with delitual capacity thay should forn to him the respect of the law.

As N. I. Matuzov[1] remarks „We must distinguish obeying to the law and respecting it. The conduct subordinated to the law is often based on the fear, compulsion, while the repecting of the law is based on the deep convinction to respect the law, right that is a condescend wish of the individual for respecting law from all heart."

Acting on the individual juridical conscience the instructive function also influences on the collective juridical conscience.

At the basis of the investigated material we would like to make some conclusions:

- the essence of juridical responsibility of the state is reflected in these objectives. In their turn the objectives are being reflected in the juridical functions of the state;

- the content of the juridical responsibility functions of the state consists in the object of acting, formal foundations, real grounds, the means of achieving the results of action (consequences);

- the objects of juridical responsibility functions is being formed by the mode of regulation of social relations, juridical relationships the behavior of collective and individual subjects on the basis of juridical responsibility. The acting objects of diverse functions contain their specific, the specific of which depends how may be oriented the function action on concrete elements of social relations (subjects, things, various goods and interests). Following of the action on same separated elements of the social relations it occurs the formation, modification, performing, reestablishment of these ones etc[2].

If the object of acting represents the juridical relationships then the elements of these ones are the subjective nights and juridical obligations. The social relations and juridical relationships are formed from the benevolent conduct of the subjects bearer of obligations and rights, so we

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.[1] Н. И. Матузов, *Правовой нигилизм и правовой идеализм. В:„Теория государства и права". Курс лекций. Под ред. Н. И. Матузова, А. В. Малько,* 594.

[2] D. Baltag and E.Moraru, *Statul subiect al răspunderii juridice* (Chișinău, 2015), 40.

can speak about a general object and directly of the social relations.

Thus it is being manifested the conscience, will and juridical conscience:

- the repressing function (sanctioning) is oriented to cessation or modification of the social relations, of existent juridical relationships and establishment of the concrete juridical connection among the right subjects being necessary for the achieving of juridical responsibility (relations and juridical responsibility). The repressing function together with juridical restrictions includes in themselves the condemning of the culprit expressed by the sentence of the judgment (or other act of right applying);

- the means of achieving of the repressing function of juridical responsibility are the condemning, reduction of patrimonial sphere, the privation of subjective rights with personal character; establishment in the juridical norms of sanctioning concrete juridical restrictions, the abolition of the physical subject or collective one of the social relations;

- as quality of action are the social relations, juridical relationships, right order, goods (interests) subjective rights, the behave our of the culprit, the moral psychological climate of the society, social equity. Each stage of the juridical responsibility has its specific of reestablishment of social relations. For the appearance of the state repairing function are necessary the offence and existence of juridical norm by which is foreseen this offence but for existing dynamic repairing function is being required a foundation of procedure – the decision of the competent body;

- the means of achievement of the repairing function of juridical responsibility of the state are: the fixation in the juridical norms of the delinquent obligations to repair the caused damage, establishment in juridical norms of the obligations of competent organs for forcing the delinquent to repair the caused damage;

- the function of regulation of juridical responsibility of the state is designated not to admit the appearance of protection juridical relations;

- the repressing function and repairing one of the juridical responsibility cannot appear if it is not violated the action regularly of the juridical responsibility;

- the existence of the settlement function serves as premise for appearance of other functions of juridical responsibility;

- the interdictions, obligations, permissions stimulations; the constituent elements of the legal behavior influence the subjects conduct with delictual capacity forming the legitimate conduct of these ones but the regulating function of the juridical responsibility contributing thus, to the stability of some positive social relations, favorable to the society;
- the people conduct passing through the system of juridical prescriptions is being ordered; an apart place in the regulation of the social relations belongs to the stimulations on the one hand as a measure of responsibility, and on the other hand, as a method of regulating that encourages the citizens to a licit conduct;
- the instructive function is oriented to the inner world not only of the offender but of all subjects with delictual capacity. If the inside world of the offenders must be corrected them inner world of other subjects needs to form and consolidate the values, reasons, the existent positive orientations;
- establishment of obligations, punishment, condemning, stimulating, establishment of component element of illicit and licit actions, threat with punishment (sanctioning) juridical informing of the citizens establishment of obligations for repairing the caused damage represent the means of achieving of the instructive function. It is obviously that these ones combine the means by with help of which are achieved the functions of repressing, preventive, regulative repairing of juridical responsibility but this one also proves that the instructive function is independently of the rest functions of juridical responsibility, this one being distinguished by the goal and action object[1].

CONCLUSION

On the basis of those exposed we would like to do a mention and namely, that the essence of juridical responsibility functions of the state are visible only in sanctioning, prevention and instruction of civil servants and state bodies which exercise the public authority from the name and/or by virtue of the mandate on state behalf.

[1] Baltag and Moraru, *Statul subiect al răspunderii juridice*, 44.

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REGIONAL DEVELOPMENT IN THE CONTEXT OF THE AGREEMENT OF EU-RM

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Abstract:

The importance of regional development is to improve the standard of living, the quality of life of citizens in a region/specific area and the country in general.

The implementation of regional development as a public policy in the European Union implies the acceptance of the following principles: the respect of local self-administration, the encouragement of partnerships of regional development between stakeholders at different levels of public administration; the stimulation and efficient use of initiatives in the regions; the support of ongoing development of potential regions.

For Moldova, the regional development - since the liberal - democratic governance was established in September 2009 and till nowadays - has become an imperative assumed. Thus, Republic of Moldova had undertaken many actions in the implementation of regional development policy in accordance with the requirements of EU policies.

However, we see that there are still problems such as: lack of experience, inadequate regulatory framework realities in regional development etc. In this way, the regional development in the context of decentralization requires that local authorities will become effective partners, both in the strategic planning process, and in the exercise of implementing projects funded national and international. The ability of local authorities to participate effectively in the development and implementation of regional projects needs an increasing their autonomy.

The purpose of the present article is to analyze the existing opinions in the specialized literature, the judicial regulations regarding the status of local public administration in the Republic of Moldova and other countries. In conclusion, we will make proposals to modernize the legislation of the Republic of Moldova in this field, in order to successfully implement the policy of decentralization and local autonomy in our state, but also to ensure the increase of institutional capacity of local public administration and regional development policies.

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Key words: *region; decentralization; local autonomy; local government.*

INTRODUCTION

The importance of regional development lies in improving the standard of living and quality of life of citizens in a given region / territory, as well as the country in general. The implementation of regional development as a public policy in the European Union implies the acceptance of the following principles: observance of the local self-administration; encouraging partnerships of actors that are involved in regional development at different levels of government; stimulation and effective use of regional initiatives; support for the further development of the potential of the regions.

At the European level, there is a complex system for the development, financing and implementation of regional projects. Already, each state of the European Union has its own system and mechanism for implementing regional development policies, as well as different areas of intervention. The budget for regional development at the European level is one of the largest, accounting for 1/3 of the EU budget or 386 billion of euro. This shows that the problem of regional development is seriously perceived by the European politicians[1].

1. REGIONAL DEVELOPMENT IN THE REPUBLIC OF MOLDOVA

For the Republic of Moldova, regional development, since the establishment of the liberal-democratic government in September 2009 and until now, has become an assumed imperative. Mainly, Law no. 438-XVI from December 28, 2006, on regional development[2] ensures the

[1] V. Guțuți and V. Plișca, *Regional development in the context of the EU-Moldova association agreement: Position of the Ministry of Regional Development and Construction*,1.
http://www.old.viitorul.org/public/files/DR/DR_Acord_Asociere_final.pdf

[2] Law No. 438-XVI from December 28, 2006 on the Regional Development in the Republic of Moldova.

legal framework of regional policy and development, defining: objectives, institutional framework, competencies and specific tools for the implementation of the regional development policy in the Republic of Moldova.

Thus, the Law on the regional development in art. 2 paragraph (1) provides the following main objectives of regional development: obtaining a balanced and sustainable socio-economic development on the entire territory of the Republic of Moldova; reducing the imbalance of levels of social-economic development between regions and within them; strengthening financial, institutional and human opportunities for the socio-economic development of the regions; supporting the activity of local public authorities and local self-administration bodies, focused on the socio-economic development of settlements and coordinating their interaction with national, sectoral and regional strategies and development programs.

Chapter II "Institutional Framework" of the Law no. 438-XVI provides two levels of organization of the institutional framework for regional development: the national level and the regional level.

For the purpose of executing the Law no.438-XVI was adopted the Government Decision no. 127 from February 8, 2008, by which it was decided to create an institutional framework and approved the Regulations on the activities of the relevant institutions: Regulation on the National Coordination Council for Regional Development; the Framework Regulation on the Regional Development Council; the Framework Regulation of the Regional Development Agency and; the Regulation for the formation and use of the National Fund for Regional Development Resources[1].

The realization of the provisions of the Law on regional development started with the approval and implementation of the national regional development strategies (NRDS) and the regional development strategies (RDS).

During 2010 – 2020, the significant efforts were made at the level of central and local public authorities in order to create and develop a legal framework and mechanisms for the implementation and promotion

[1] Government Decision no. 127 of 08.02.2008 on the measures to implement Law no. 438-XVI of December 28, 2006 on regional development in the Republic of Moldova. Annexes 1,2,3 and 4 // Official Gazette no. 34-36 from 19.02.2008.

of regional development policy in the Republic of Moldova. But in our country we cannot talk about regionalization itself, as it has been made only from the perspective of the developing regions as statistical unit and not as administrative units with legal personality. Still, certain commitments have been done on the Governmental level based on the EU-Moldova Association Agreement, ratified by the Moldovan Parliament by Law No. 112 as of July 2, 2014 and included into the Government's Activity Program, which provides Moldova's government policy framework for the years 2016-2018. Title IV, Chapter 20 "Regional development, cross-border and regional cooperation" states: The Parties shall promote mutual understanding, and bilateral cooperation in the field of regional policy, including methods of formulation and implementation of regional policies, multi-level governance and partnership, with special emphasis on the development of disadvantaged areas and territorial cooperation, with the objective of establishing channels of communication and enhancing exchange of information and experience between national, regional and local authorities, socio-economic actors and civil society[1].

2. OBSTACLES TO REGIONAL DEVELOPMENT AND EUROPEAN INTEGRATION

So, in present, we have to note that there are still problems, such as:

- the normative framework is not corresponding to the realities of the regional development. Unfortunately, in the Administrative Code, that was adopted in 2019, instead of systematizing all acts in the administrative field with a strict definition of the competence of both central and local public authorities, including in the policy of regional development, were combined only two laws – the Law on Petitions and the Law on Administrative Proceedings;
- the lack of experience in the field, since there is no generally accepted model of economic development and there is no correlation with the "territorial" development characteristic of regional development

[1] Maria Orlov and Oxana Paierele, "Regional development policy for a balanced local development", *Analele Universităţii Bucureşti, Seria Ştiinţe politice*, Year XVIII, Issue 2 (2016): 21-32.

policy[1]. In this context, regional development in the context of decentralization aims to ensure that local authorities become effective partners both in the strategic planning process and in fulfilling the responsibilities for the implementation of projects, financed from the national and international funds. The ability of local public authorities to participate effectively in the development and implementation of regional projects, requires an increase in their autonomy;

- failure to implement the territorial-administrative reform and delay in financial decentralization are contextual obstacles that further complicate the management of regional development in the Republic of Moldova[2]. Thus, at the moment in the Republic of Moldova there are 34 second – level administrative – territorial units[3], although, in accordance with the Law on Regional Development were created six regions of development, namely: RD North, RD Center, RD South, RD Chisinau, RD Gagauzia and RD Transnistria.

The administrative-territorial organization has, as finality, the creation of territorial units. They are called to respond to a good management of public affairs in favor of the local community, through the local public administrative authorities. However, in order to ensure the efficiency and effectiveness of the activities of these authorities in the territorial units, we believe that for a long time, it was necessary to take the following actions: a new structure of the administrative-territorial organization, which would concentrate financial and material resources provided by regional centers with economic, social and municipal point of view, as well as optimization of the number of administrative – territorial units, approaching in this sense to the European environment[4]; respectively, the decrease of the number of civil servants in the local public administration, which can further influence a successful planning and administration. While the territorial administrative reorganization and the reform in public administration is needed, regional development

[1] E. Țugui, *Regional development in the Republic of Moldova: European paradigm and national particularities*, 285. https://zenodo.org/record/3358898/files/RSI_2017_3-4_pp275-287.pdf.

[2] Țugui, *Regional development in the Republic of Moldova: European paradigm and national particularities*, 285.

[3] The law on administrative-territorial division of Republic of Moldova, No. 764-XV from 27.12.2001.

[4] V. Popa, *The effects of decentralization: the role of the Government representative in the administrative-territorial units* (Chisinau: TISH, 2008), 59.

policy keeps on promoting growth of local collectivity's autonomy by participating at drafting regional strategies and participating at implementation of regional projects by respecting the inter-municipal cooperation principles. Respecting the correlation between national, regional and local strategies gives the opportunity to diversify the limited local budgets funds. Local initiatives can be implemented by a series of national and international supported measures;

- the Regional development policy in the Republic of Moldova contains the objectives, that are aligned with the cohesion policy of the European Union, to ensure the equity and efficiency "territorialized", but national development strategies do not exactly define the balance between equity / convergence and efficiency / competitiveness[1].

CONCLUSIONS

Finally, in order to comply with these practices, and more specifically, we are talking about regional development in the context of decentralization, local authorities must become effective partners, both in the process of strategic planning and in the implementation of tasks for fulfilling of the projects, financed from the national and international funds. But the ability of local public authorities to effectively participate in the development and implementation of regional projects requires an increase in their autonomy. That is possible, in our opinion, due to the improvement, first of all, the legislation in the administrative field, by systematizing all the acts in this field, with a specific definition of the competence of the public administration authorities, to ensure the increase of institutional capacities within the policy implementation, including in the field of regional development.

[1] Țugui, *Regional development in the Republic of Moldova: European paradigm and national particularities*, 285.

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ROMANIA'S STEPS IN ORDER TO AVOID THE ACTION FOR DAMAGES BY THE EUROPEAN COMMISSION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AS A RESULT OF THE NON-TRANSPOSITION OF THE UNION LEGISLATION

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Abstract:

In order to avoid such an approach of the European Commission, Romania has as main obligation the awareness and responsibility for transposition and application of Union legislation by national institutions with implementation responsibilities and strengthening the interinstitutional dialogue with Commission representatives.

We consider, in this sense, the provisions of art. 258-260 TFEU, regarding the pre-litigation and contentious stages of the action regarding the non-fulfillment of the legislative transposition obligation, texts based on which, numerous infringement proceedings were initiated against Romania in various fields. Moreover, Romania must be aware that such an approach ultimately has a single purpose, undesirable by any Member State, that of imposing financial sanctions by the CJEU in the contentious stage of this action.

In our study we will identify domains, union approaches and concrete solutions of Romania in these cases.

Key words: *procedure; non-fulfillment of obligations; sanctions; union normative act; normative act of transposition.*

INTRODUCTION

According to Article 17 TFEU, the European Commission acts as a guardian of Union law by ensuring that Member States apply the

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provisions of the Union Treaties as well as the measures adopted by the Union co-legislator.

Article 258 TFEU confers on the European Commission the power to bring an action before the CJEU against any Member State which fails to fulfill its obligations under primary Union law in this case "where the Commission considers that a Member State has breached any of its obligations under the Treaties, it shall give a reasoned opinion on that matter after giving the State concerned the opportunity to submit its observations.

The ways in which the European Commission learns about the violation of European Union law are:

a) the automatic notification of the situations of omission of the notification of the national transposition legislation. Specifically, the Commission monitors the measures applied by states to transpose directives, so that it has an electronic notification system through which the transposition notification documentation is entered by the Member State directly into the Commission's database;

b) the complaint submitted to the Commission by any individual having as object any legislative measure transposing a directive or decision, respectively the administrative measure creating the framework for the application of a regulation, considered incompatible with the Union norms.

Any natural or legal person may file a complaint regarding the existence of a conflict between the internal and the union norm. It is not necessary for the person concerned to justify an interest in bringing an action before the CJEU, nor to prove an injury as a result of the alleged infringement. The only condition that must be met for the complaint to be upheld is that it concerns the infringement by a Member State of a rule of European Union law.

It is recommended that the complaint contain at least the following elements:

• the facts imputed to the Member State concerned;

• the steps taken by the applicant, regardless of the level they have reached;

• provisions of Union law which have been infringed;

• information on the existence of a possible European financing.

Once the complaint has been lodged, the Commission has the discretion to decide on it, and its services will assess whether or not the complaint will be dealt with.

Within 12 months from the date of registration of the complaint with the General Secretariat, the Commission must either close the case or proceed to the next step. The complainant is informed through the Directorate-General for this area of the actions taken by the Commission in response to his complaint, of the decision to initiate infringement proceedings against a State, and of any legal action.

In relation to the violation of union law, the European Commission gives the state concerned the opportunity to remedy the problem identified by initiating a non-contentious, formal procedure and only in the last instance notifies the CJEU. All these steps are known as the infringement procedure.

What are the types of infringements of Union law?

Neither European Union legislation nor the literature has identified an exhaustive list of these violations, so the answer to this question is given by the CJEU jurisprudence. Specifically, the Court held:

• adoption of national normative acts incompatible with the union ones;

• non-communication, omission of notification of national normative acts transposing the union legislation, respectively violation of the obligation to notify the European Commission the transposition legislation;

• maintaining the national legislation incompatible with the union one, giving rise to the so-called legislative parallels;

• erroneous or delayed transposition or non-transposition of union directives;

• lack of cooperation of the Member State. We recall in this sense, Article 4 paragraph 3 of the TFEU which regulates that "based on the principle of loyal cooperation, the Union and the Member States shall respect and assist each other in carrying out the tasks deriving from the Treaties. Member States shall take any general or special measures necessary to ensure fulfillment of the obligations arising out of the Treaties or resulting from acts of the institutions of the Union. ".

I. BRIEF CONSIDERATIONS ON THE FORMAL PROCEDURE AND THE JUDICIAL PROCEDURE AT THE DISPOSAL OF THE EUROPEAN COMMISSION FOR THE MONITORING AND SANCTIONING OF A MEMBER STATE IN ORDER TO EFFICIENTLY TRANSPOSE THE UNION LEGISLATION

The European Commission has, at the level of the European Union, legislative competences, being the main legislative initiator, forming together with the European Parliament and the Council, the union decisional triangle.

We also retain the Commission's attributions of Member States' oversight. Specifically, according to art. 17 para. (1) of the Treaty on European Union, the European Commission aims to ensure the application of the Treaties by the Member States, the measures adopted by the institutions for that purpose and also supervises the application of Union law under the control of the Court of Justice of the European Union. The infringement procedure is initiated by the Commission against states that do not comply with their Union obligations, mentioned below:

a) Failure to fulfill the obligation to communicate the national measures for transposition of the union directives;

b) Non-transposition or non-correct application of the union law.

In both cases, the Commission may initiate a formal procedure by which it will find that the State concerned has failed to fulfill its obligations under the EU Treaty.

In this sense, the procedure begins with a letter of delay, addressed by the European Commission to the state concerned, requesting it to submit its observations and arguments within 2 months. At this stage, the goal is the voluntary compliance of the state concerned.

Following the analysis, if one finds that the State has failed to fulfill its obligations under EU law, such as failing to communicate in time the measures transposing the provisions of the Directive, the Commission may send a formal request - reasoned opinion, requesting the State to end of the infringement, setting a deadline in this regard.

If, within the time limit set, the State does not respond to the reasoned opinion or the answer is unsatisfactory, the Commission may decide to refer the matter to the Court of Justice of the European Union for a declaration of a breach of Union law by the defendant State.

If, by decision, the CJEU establishes that the State concerned has infringed EU law, the national authorities must take action to comply with the Court's judgment.

If the Member State does not remedy the situation, the Commission may refer the case back to the European Union court, but this time the Commission proposes that the Court impose a financial penalty[1], in the form of a lump sum[2],, and a daily fine[3].

The penalties are calculated taking into account:

- the importance of the rules violated and the impact of the violation on the general and private interests
- the period in which EU law was not applied
- the country's ability to pay (fines must have a deterrent effect)

The amount proposed by the Commission may be amended by the Court in its judgment.[4]

Regarding the judicial steps taken by the Commission, analyzing the text of art. 258 TFEU we can see that the initiation of the action is the "prerogative" of the Commission, being the only one able to establish the opportunity of this judicial approach. Moreover, the CJEU will not "weigh" the reason for this approach.

The Commission also publishes an annual report examining key aspects of the application of EU law and sets out the procedures for finding non-compliance, broken down by policy area and country.[5]

II. ROMANIA AND THE NUMEROUS INFRINGEMENT PROCEEDINGS INITIATED BY THE EUROPEAN COMMISSION

From the moment of accession to the European Union and until now, Romania has been targeted by numerous infringement procedures, many of them being stopped after going through the first stage of notification. We refer, in the following, to some of the union norms and the problem of their non-transposition in the adequate term.

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[1] See Article 2 (3) TFEU.
[2] It is calculated for the time elapsed from the pronouncement of the first decision.
[3] It shall be calculated from the date of the second judgment until the Member State ceases to infringe.
[4] EUR-Lex - 12008E260 - EN - EUR-Lex (europa.eu).
[5] Procedure for failure to fulfill obligations | European Commission (europa.eu).

Specifically, most such procedures have been initiated in the field of environment.

The eloquence of this area is the case according to which the Commission notifies Romania of the inadequate and partial transposition into national legislation of Directive 92/43 / EEC on the conservation of natural habitats and of wild fauna and flora and requests its observance of Union law.

By initiating the formal procedure, the European Commission finds that the Romanian legislation does not explicitly mention that the conservation measures included in the management plans must take into account the ecological needs of the natural habitat types and species present on the territory of those sites. National legislation also limits the scope of the main provisions of the Directive to activities carried out on Natura 2000 sites. This excludes all other possible causes of damage or disturbance from outside the sites. In view of the fact that environmental governance plays a key role in facilitating the proper functioning of the various sectoral rules, the Commission has decided to send Romania a letter of formal notice.

Romania had two months to remedy the situation. The infringement procedure was stopped, the Directive being transposed by Emergency Ordinance no. 57/2007.[1]

We add to the above-mentioned field, infringement proceedings initiated against Romania in the field of energy and climate regarding the energy performance of buildings.

Specifically, on 3 December 2020, the European Commission decided to send letters of formal notice to Belgium, Bulgaria, Croatia, Greece, Hungary, Italy, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia and Romania since these ones did not transmit their national long-term renovation strategies. Under Directive 2010/31 / EU, Member States had the obligation to submit to the European Commission, the national long-term renovation strategies until March 10, 2020, an obligation not fulfilled, not even by Romania. Thus, the above-mentioned states had two months to fulfill their obligations, otherwise the Commission would send a reasoned opinion.

In Romania, at present, in order to take over the provisions of the above mentioned directive, we are working on a legislative project to

[1] GEO NR.57 / 20 June 2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna.

amend and supplement Law no. 372/2005, which is in a process of approval within the Ministry of Regional Development and Tourism. , not being submitted to Parliament. The project aims to fully transpose the provisions of Directive 2010/31 / EU containing, inter alia, provisions on ensuring stricter protection in terms of promoting the energy performance of buildings, including sanctions for non-compliance.

Currently, Romania is the subject of a new infringement procedure regarding the defective transposition of Directive 2010/75 / EU on industrial emissions (integrated pollution prevention and control) by GEO no. 101/2017 for amending and supplementing Law no. 278/2013 on industrial emissions.

Thus, within the formal procedure, the European Commission found:

- the failure of the Romanian legislator in transposing the directive, so that at present the national legislation is not adequate to the union one, retaining the small and inefficient sanctions
- the failure of the Romanian administration that fails to implement the existing legislation in a coherent way;
- the failure of the judicial system, unable to confirm the sanctions, thus annulling any effectiveness.

At the moment of May 2021, Romania is within the two-month deadline to remedy the deficiencies found by the Commission. Otherwise, the Commission will move to the second stage of the formal procedure, in which it will send a reasoned opinion to Romania, and later it can be acted at the level of the CJEU, where it risks financial sanctions.

Last but not least, the Commission sent a letter of delay to Germany, Portugal and Romania in February this year following the incorrect transposition of the Money Laundering Directive 2015/849 / EU, the deadline for its transposition being 27 June 2017. Following the evaluation of the transposition measures notified by the Member States mentioned above, the Commission concluded that several provisions of the Directive have not been correctly transposed into national law by Law no. 129/2019 and the legislative gaps in the notified Member States affect the EU as a whole. In this regard, the Commission has decided that these states must address key issues in combating money laundering such as customer precautionary requirements, or the transparency of central registers of beneficial owners.

Romania risks initiating new infringement proceedings in case the Ministry of Justice does not make the efficient and adequate transposition of the following directives being implemented, according to the terms stipulated in their very content.

- Directive 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting in relation to non-cash means of payment. It has a transposition deadline of 31 May 2021. On 19 October 2020, the draft law that would transpose the directive on combating fraud and counterfeiting in relation to non-cash means of payment was put up for public debate on the website of the MJ.
- Directive 2019/1023 on preventive restructuring frameworks, debt remission and forfeiture, as well as measures to increase the efficiency of restructuring, insolvency and debt remission procedures has a phased transposition deadline in 2021, 2024 and 2026. According to MJ „*The transposition will be done with the support of the European Commission, within the Strategic Program for Structural Reforms (PSRS). According to the timetable of the draft assistance, the text of the draft transposition law will be subject to extensive public consultation*. "
- Directive 2019/1151 of the European Parliament and of the Council amending the law on the use of digital instruments and processes in the context of company law has a transposition deadline staged in 2021 and 2023. Regarding this, the Ministry of Justice claims that *finalization, to be submitted, in the next period, to public debate and inter-institutional consultation* ".
- Directive 2019/1937 of the European Parliament and of the Council on the protection of persons reporting infringements of Union law has a transposition deadline of 17 December 2021. "*In order to finalize the draft transposition law, an inter-institutional working group was set up, with over 20 institutions involved, in which there were extensive consultations. At this moment, we are working on the intermediate version of the draft law, which will be put up for public debate in the next period* ", MJ also claims.

- Directive 2019/2121 amending the law on cross-border transformations, mergers and divisions has a deadline of transposition January 2023.[1]

CONCLUSION

The action in ascertaining the non-fulfillment of the obligations represents an instrument through which the application of the union law is ensured. Moreover, it can be considered as a mechanism for ensuring legislative uniformity at union level.

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5. GEO no. 57 / 20 June 2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna.
6. Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing some normative acts.

[1] Romania has 77 infringement proceedings opened by the European Commission (europalibera.org).

THE EFFECTS AND THE ROLE OF THE DECISIONS PRONOUNCED BY THE CONSTITUTIONAL COURT OF ROMANIA IN THE PROCESS OF SOLVING THE LEGAL CONFLICTS OF CONSTITUTIONAL NATURE

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Abstract:

The Constitutional Court of Romania is the guarantor of the supremacy of the Constitution and the only institution which has the atribution to solve the legal conflicts of a constitutional nature between public authorities, atribution which involves an obligation to settle this kind of disputes by showing the conduct in accordance with the constitutional provisions to which public authorities must comply with. Thus, the resolution of legal conflicts of a constitutional nature is not a purely theoretical academic exercise, but it is a more intricate process which implies the understanding of the constitutional rules that public authorities must respect but also the establishment of the proper conduct the parties involved in the conflict should embrace. If this hadn't been the proper way to solve this type of disputes, there would have been no need for a complex procedure, the mere statement of the Court, regarding the interpretation of the constitutional provisions to which the conflict was related, beeing more than sufficient.

Key words: *legal conflicts; decisions; Constitutional Court; public authorities.*

INTRODUCTION

The year 2003 brings important changes especially for the Constitutional Court of Romania, due to the fact that, through the constitutional revision, a new attribution was introduced in the task of the Constitutional Court, namely that of solving legal conflicts of a constitutional nature between public authorities.

By acquiring this new attribution, the Constitutional Court began to occupy a special position within the constitutional and political

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architecture of Romania, representing the moment when the interest in the Constitutional Court and the role it plays in society became legitimate, considering the fact that it is a mechanism for achieving the balance between the state powers, a vital mechanism for the rule of law. From this moment, it become the guarantor of the Constitution and the arbiter of legal conflicts of a constitutional nature.

Taking into consideration the complex and ambiguous features that characterizes this new concept of ″legal conflicts of a constitutional nature″ and the way in which the occurrence of such situations affects the proper running of the rule of law and the institutional balance, it becomes obvious why the task of solving these type of constitutional disputes between the public authorities could only be entrusted to the Constitutional Court of Romania as the only institution that realizes the constitutional jurisdiction, being independent from the legislative, executive and judicial power.

Moreover, by introducing this new attribution in its task, the aim was not to increase the role of the Constitutional Court within the rule of law, nor to increase the volume of its activity, but the main objective was to improve the relations between the public authorities of the state, the protection of the constitutional principles of the state and the constitutional order in order to maintain the rule of law, within the framework established by the principle of separation and balance of powers in the state.

By virtue of its power to solve legal conflicts of a constitutional nature, the activity of the Constitutional Court is not limited to finding the existence or non-existence of such a conflict between two or more public authorities, on the contrary, it has an active role that involves: the obligation of the Constitutional Court to settle the dispute which was brought in its attention; to indicate the proper conduct, in accordance with the constitutional provisions, to which the public authorities must comply with in order to eliminate the possibility of future similar disputes; to pronounce a final, binding and enforceable decision regarding the respective conflict.

Regarding the indication of the conduct the public authorities must adopt in the future in similar situations, this also relates to the obligation of the Constitutional Court to resolve legal conflicts of a constitutional

nature. If things were not perceived in such a way, then the settlement of constitutional disputes would not achieve the purpose for which it was entrusted to the only Constitutional Court within the state - namely restoring institutional balance and ensuring the proper functioning of the rule of law.

Based on these hypotheses, from my point of view, it cannot be considered objectives achieved and implicitly legal conflicts of a constitutional nature settled if, in advance, the Court does not effectively remove the institutional blockages generated and does not establish a solution capable to prevent the occurrence of future similar conflicts, actions which, obviously, can only be carried out by a decision pronounced by the Constitutional Court, a decision which, coming from the only institution which is empowered to act in this matter by a constitutional attribution[1], could not have but a definite, obligatory and of course executory character.

In order to understand the phenomenon of legal conflicts of a constitutional nature from the point of view of the decisions pronounced by the Constitutional Court, I will briefly review the procedure followed by the Constitutional Court until the moment of pronouncing such a decision.

I mentioned earlier that the fundamental law is the one that provides for the Constitutional Court to solve organic disputes, but even if this attribution is expressly stipulated in the constitutional provisions, the actual procedure is regulated by the law on the organization and functioning of the Constitutional Court of Romania.

Thus, the request for solving a legal conflict of a constitutional nature must be formulated in writing and of course it must be motivated, the legislator expressly establishing as mandatory the mentioning of the parties involved, the legal texts on which the conflict is based, the position of the parties and also the opinion of the person who made the request[2].

Once the request has been received, the President of the Court must communicate it to the parties of the dispute, requesting them to express, in writing, and within the period indicated and established by him, their own point of view on the content of the conflict and also to indicate the

[1] The Constitution of Romania, article no.146 , letter e).
[2] Law no. 47/1992 on the organization and functioning of the Constitutional Court with subsequent amendments and completions, article no. 34 paragraph 2.

possible solutions. After receiving the last point of view on the case, but not later than 20 days after the receiving of the request, the President of the Court must set the time for the hearing and summon the parties, the debate always takes place in terms of contradiction. The deliberation is made in secret and only the judges who participated in the debates will be present.

After completing these steps, the Court pronounces a decision adopted with the vote of the majority of judges, the result of the deliberation being noted in a minute, which is signed by the judges who attended the hearing and by the assistant magistrate.

The decision through which a legal conflict of a constitutional nature is settled is final, generally binding, and it is communicated to the author of the notification and to the parties in conflict, before its publication in the Official Gazette of Romania, Part I[1].

Regarding the effects of the decisions of the Constitutional Court of Romania in the process of solving legal conflicts of a constitutional nature, it should be mentioned that it is regulated by the provisions of the fundamental law, namely of article no 147 paragraph (4): ″The decisions of the Constitutional Court shall be published in the Official Gazette of Romania. From the date of publication, the decisions are generally binding and have force only for the future″.

Thus, the decisions of the Court in the domain of legal conflicts of a constitutional nature, like any other decisions pronounced by the Constitutional Court of Romania, have the authority of res judicata, and by publishing them in the Official Gazette, the Constitutional Court is given the power to establish a real legal obligation for the public authorities, in order to settle that conflict.

Therefore, the Court has the possibility to indicate any solution it deems necessary and in the same time has the possibility to bind the authority that generated the conflict to adopt a certain conduct that respects the principle of constitutional loyalty in order to avoid the emergence of similar situations in the future.

Due to the fact that these organic disputes arise between public authorities and that they generate institutional blockages within the state,

[1] Iulia Antoanella Motoc and Cristina Turcu and Ioana Marilena Chiorean, „Constitutional Justice Functions and relations with other public authorities“, *National Report for the XVth Congress of the Conference European Constitutional Courts*, presented by the Constitutional Court of Romania, 28.

it becomes obvious that the most predictable solutions that the Constitutional Court can pronounce in such cases are the two that are also opposite: stating the existence of a legal conflict of a constitutional nature and of course stating the non-existence of a legal conflict of a constitutional nature.

Things are clearly simplified in the second category because, after examining the factual and legal situation that was brought in its attention, after verifying the fulfillment of the admissibility conditions and subsequently finding the lack of certain essential normative coordinates, the Constitutional Court has only to state the non-existence of a legal conflict of a constitutional nature.

This solution does not imply that, in reality, there is no dispute between the authorities involved, or that the way in which they act is the correct one from a constitutional point of view. Far from this, the decision through which is stated that there is no legal conflict of a constitutional nature often involves the existence of an institutional litigation but which does not meet the necessary criteria to generate a real institutional blockade and thus being cataloged as a legal conflict of a constitutional nature. (*The Court clearly states that the opinions, the judgments of value or the statements of the public authority - such as the President of Romania, or the head of a public authority - regarding other public authorities do not constitute by themseves legal conflicts of a constitutional nature*[1]*; The Court notes that there are no other grounds based on the provisions and principles of the Constitution that justify a reconsideration of these theses. The Court emphasizes that in the performance of their constitutional duties, the representatives of public authorities have an obligation to avoid creating conflicts between powers. The constitutional status of the President and the Prime Minister, as well as their role in the constitutional democracy, obliges them to choose appropriate forms of expression, so that their criticisms against the state powers do not constitute elements that could generate legal conflicts of a constitutional nature between them*[2]*)* remaining at the stage of political dispute, institutional conflict, or a conflict of any other nature except one of a constitutional nature.

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[1] Decision no.53/2005 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 144 of 17th of February, 2005.

[2] Decision no.435/2006 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 576 of 4th of July, 2006.

Regarding the situation in which the Court states the existence of a legal conflict of a constitutional nature, at this point, there are outlined two other options: a decision establishing the existence of a legal conflict of a constitutional nature and as a result there is indicated the conduct that public authorities must follow in order to avoid the occurrence, in the future, of similar conflicts[1], as well as a decision establishing the emergence of an organic conflict which subsequently ceased to exist as a result of the fact that the authorities involved in the dispute embraced an attitude in accordance with the Constitutional provisions[2].

The decision through which is admited the emergence of a legal conflict of a constitutional nature and is seeked the removal of the institutional blockage by indicating the proper way of action, I consider the ideal version for solving such disputes for at least two reasons: the first because the Court effectively resolves the disputes, it is not limited to the simple fact of ascertaining them[3], and the second emerges from the characteristics of the pronounced decisions, respectively final, binding, executory and opposable erga omnes.

From all these features specific to the constitutional decisions, the following hypotheses can be deduced: once the existence or non-existence of a legal conflict of a constitutional nature between two or more public authorities has been established in a certain situation, that decision cannot be reversed; the fact of stating a conflict as a legal

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[1] Decision no. 98/2008 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 140 of 22th of February, 2008; Decision no. 270/2008 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 290 of 15th of April, 2008; Decision no. 12222/2008 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 864 of 22nd of December, 2008; Decision no. 838/2009 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 461 of 3rd of July, 2009; Decision no. 1431/2010 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 758 of 12th of November, 2010; Decision no. 1525/2010 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 818 of 7th of December, 2010.

[2] Decision no.356/2007 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 322 of 14th of May, 2007.

[3] Daniel Marius Morar and Mihaela Senia Costinescu, „The principle of separation and balance of powers in the state in the jurisprudence of the Constitutional Court of Romania", 3, https://www.ccr.ro/uploads/RelatiiExterne/2016/Interventia%20dl.%20judector%20Daniel%20Marius%20MORAR.pdf.

conflict of a constitutional nature inevitably involves an obligation to solve it by indicating the proper way of action precisely in order to remove the institutional blockage in which the parties were involved; this decision must be apllied to other public authorities which, although they were not part of the conflicts, they still have the capacity to become active subjects of legal conflicts and, consequently, the decision is also applicable to them, and therefore they have to adopt that behavior established by the Constitutional Court.

Concerning the fact that in the field of solving legal conflicts of a constitutional nature, the decisions of the Constitutional Court produce erga omnes effects, this feature is related to the initial purpose for which this new attribution was introduced in the competence of Court, namely to restore the institutional balance of the state and ensure an adequate framework for the proper functioning of the rule of law, an aim that could be reached only if an overall sameness of the way in which the public authorities exercise their own constitutional attributions could be achieved, a sameness that would imply acting within the limits established by the fundamental law.

Returning to the decisions through which the Constitutional Court of Romanian states the existence of a legal conflict of a constitutional nature, from the extensive jurisprudence of the Constitutional Court in this field, there shall be mentioned some of the decisions that proved to be extremely relevant in this direction.

Thus, regarding the solutions that establish the conduct that must be followed precisely in order to avoid the occurrence of similar conflicts in the future, I consider as being representative two of the constitutional decisions, namely decision no. 98/2008 and decision no. 683/2012.

In the first decision, in order to remove the institutional blockage constituted within the state as a result of the President′ s repeated refusals to appoint a minister at the proposal of the Prime Minister and Prime Minister′ s repeated refusals to modify his initial proposal, but also to avoid the emergence of another similar blockages in the future, the Court, taking into account both the provisions and the constitutional principles, establishes that the President may reject for precise reasons, the Prime Minister′s proposal only once, and that the lastter must propose another person for that position than the one he initially indicated[1].

[1] Decision no. 98/2008 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 140 of 22th of February, 5.

Although the Constitutional Court has fulfilled its constitutional attribution to settle the legal conflict of a constitutional nature by indicating the conduct to be followed, there have been situations in which public authorities have initiated similar legal disputes[1] without taking into account the Court's previous decision, conflicts which were solved by the Constitutional Court with reference to this initial decision.

In the second mentioned decision there was found a legal conflict of a constitutional nature between the President and the Government represented by the Prime Minister, regarding the representation of the Romanian state at the European Council, a conflict that was settled through a decision which stipulated very concretely the fact that, in general, the one who represents the state and who leads the Romanian delegation to the European Council is the President, and only by exception the Prime Minister, this hypothesis being possible only in the situation when the President himself delegates this attribution to the Prime Minister[2].

This means that, in a similar situation, a legal conflict of a constitutional nature regarding the representation of the Romanian state in the European Council will be avoided for the simple reason that the President will have the priority of representation and only if he cannot exercise this attribution, he will delegate it to the Prime Minister.

As it can be noticed, both decisions contain extremely precise provisions on how public authorities will have to act in similar situations in order to avoid institutional blockages that affect the proper functioning of the rule of law, aspects that are not so well observed in the content of the other decisions of the Constitutional Court which, however, refer to the conduct that the authorities will have to embrace in their future institutional relations.

Regarding the category of decisions which establish the existence of legal conflicts of a constitutional nature which, however, ceased to exist as a result of the adoption of an attitude in accordance with the Constitution, I recall the only case in which such a situation was incident, respectively decision no. 356/2007. The object of this case is again the

[1] Decision no.504/2019 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 801 of 3rd of October, 2019, 19.

[2] Decision no.683/2012 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 479 of 12th of July 2012, 15.

President's refusal to appoint a person proposed by the Prime Minister as Minister.

Although the occurrence of the institutional blockage was inevitable in the circumstances of the case, it did not persist for a long period of time, due to the fact that, both parties involved in the conflict revised their attitude in due time and began to exercis their powers in accordance with the constitutional provisions: the President rejected the Prime Minister's initial proposal for the post of Minister of Foreign Affairs asking for another recommendation, the Prime Minister complied and nominated another person for the same position, and the President appointed the second nominee for the post of Minister of Foreign Affairs.

In these circumstances, the Court noted that the premises for the occurrence of a legal conflict of a constitutional nature had been accomplished, but that it had ceased to produce effects as a result of the attitude adopted by the two circumstantial subjects[1].

I am of the opinion that this solution pronounced by the Constitutional Court is the appropriate one because the purpose of solving a legal conflict of a constitutional nature is not to penalize the party that infringed the exercise of its own duties or the attributions of another public authority, but the aim is to remove the existing institutional blockage and to prevent the emergence of another similiar situation. However, in the present case, as long as the institutional blockage ceased to exist, it is obvious that the Constitutional Court could not persist to setlle the disputed, which in reality no longer existed, by indicating the conduct to be followed.

Should it had not proceeded in such a manner, taking into account all the characteristics of its decisions, the Constitutional Court would have exceeded its own fundamental attributions and it would have became a political arbiter which favors only one of the two parties involved in the disputed because, regardless of its opinion, it could not satisfy the interests of both active subjects.

It should be mentioned that, by establishing this attribution of solving legal conflicts of a constitutional nature, the Constitutional Court of Romania has acquired an obligation to state on any litigation about which it has been notified. Therefore, the Constitutional Court does not have the right to allow the persistence of a situation that affects the

[1] Decision no. 356/2007 of the Constitutional Court of Romania, published in the Official Gazette of Romania no. 322 of 14th of May 2007, 9.

activity of a public authority, by adopting a passive position, considering that the provisions of the fundamental law do not provide the way to resolve the various conflicts that may arise between the public authorities of the state. On the contrary, the Court has a constitutional attribution to settle the dispute by indicating the conduct to be followed and to remove, through its decision, the institutional blockage.

Thus, the Constitutional Court pronounces a decision whenever it is notified with regard to the occurrence of a legal conflict of a constitutional nature arisen between two or more public authorities, a decision through which each conflict is settled depending on the circumstances of the case. So, the decisions pronounced by the Constitutional Court of Romania in the domaine of legal conflicts of a constitutional nature differ, as it is obvious, from case to case depending on the circumstances, but in order to insure the main purpose of the proper functioning of the rule of law and to restore the institutional balance of the state, they will always have a definitive, obligatory, executory character and will produce erga omnes effects regardless of the adopted solution.

CONCLUSIONS

Considering the specific political and economic contexts that generate legal conflicts of a constitutional nature, the stakes and the conjunctural political pressures, I am of the opinion that the Constitutional Court of Romania has an important function in the current context, and its decisions pronounced by virtue of the attribution of solving legal conflicts of a constitutional nature plays an extremely important role in the ensurence of the institutional balance within the state.

Moreover, in this conjuncture, inevitably the Constitutional Court becomes a kind of arbiter between the state authorities obviously being placed outside them; it becomes a balancing factor that asserts itself more and more actively within the system of government, it becomes an essential element for the well functioning of the public powers, finally being considered a vital mechanism for the rule of law.

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ANALYSIS OF NORWEGIAN EDUCATION SYSTEM - ADVANTAGES AND OPPORTUNITIES

Tatiana TUTUNARU[1]

Abstract:

Norwegian politics in the field of education is based on the principle of equal rights to education for all members of society, regardless of their social and cultural background and place of residence in Norway.

Recent studies on the education system have shown that students in Norway are considered the happiest during school activities. As a result, it is natural to wonder what makes this difference in perception at Norwegian level compared to other European states. The answers that we can identify by analyzing the foundations of the educational system in this state can serve as a basis for understanding why this happens. In this sense, the starting points take into account the very structure of the Norwegian state as well as that of their educational system and learning environment.

Key words: *Norwegian educational system; kindergarten; high school; primary school; governance and funding; learning environment.*

INTRODUCTION

Recent studies have shown that Norway stands out with a high level of well-being, constantly placing itself among the happiest countries in the world. The life of students in this country proves their degree of happiness during the school program and in society. This aspect does not limit to happiness of citizens, but also manifests itself through democracy, political rights, the absence of corruption, mutual trust of citizens, social cohesion, gender equality and equal distribution of income.

According to these results, it is natural to ask where does this difference between Norwegian education and that of other European

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systems comes. A fundamental analysis in this sense, following the form of organization of the state, will lead us to identify the remarkable means of education in this country.

The Kingdom of Norway is a constitutional monarchy with a system of parliamentary government, its territory consists of the western part of the Scandinavian Peninsula, the island of Jan Mayen and the Svalbard archipelago.

With a total area of 385,207 sqm[1] and a population of 5,391,369, Norway has an average birth rate of 11.3%. The predominant ethnic groups at 94.4% are Norwegians (including the Sami people - approximately 60,000), other European countries 3.6%, and non-European 2%.[2]

Norway is divided both politically and administratively into counties and municipalities. The eleven administrative units - "fylker" as they are called are each controled by a governor, called "fylkesmann", who is the representative of the king and the state in each county and ensures the connection between the state, municipality and population.

The country's economic development is the result of close ties with the European Union and the United States. Norway is a founding member of the United Nations, NATO, the Council of Europe, the Antarctic Treaty and the Nordic Council, a member of the European Economic Area, the WTO and the OECD as well as the Schengen Area, but chose not to be a member of the European Union. This decision was based on the results of two referendums in 1972 and 1994, where the population expressed a negative choice to join the EU.

Norway is a highly rich country, with a high standard of living to which substantial revenues also play a part due to its vast reserves of oil and gas, which account for about a quarter of the country's gross domestic product (GDP).[3]

In the last decade, the highest Human Development Index has been obtained, followed by Australia and Switzerland and with an employment rate of 62.2%.[4]

However, what does the education system in Norway have to give compared to other European countries?

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[1]https://www.kartverket.no/til-lands/fakta-om-norge.
[2]https://www.ssb.no/en/befolkning/statistikker/folkemengde/aar-per-1-januar.
[3]https://www.reuters.com.
[4]Human Development Indicators, http://hdr.undp.org/en/countries/profiles/NOR.

It provides a quality education for all, as it is an important goal and represents the basic concept of educational policy. According to the system, children and youngsters have an equal right to education, regardless of where they live, the social and cultural environment or any special needs. The system is organized in the perspective of lifelong learning, to cope constructively with changes in society.

Education, which is considered mandatory for economic, social and cultural development of a nation, has become a priority in political debates since 1990.

The principles underlying these policies are:

- A high general level of training for the whole population;
- Equal opportunities for all citizens in terms of access to education;
- Institutional decentralization;
- Meeting the qualification requirements on the labor market;
- Lifelong learning;

A comprehensive education system, with a smooth transition between levels.

The fundamental values of the latter are:

- Democracy-manifested through rights, participation, solidarity, influence and responsibility;
- Welfare, empathy, respect and protection;
- Competence obtained through learning, development, playtime nd growth.

This study describes how the Norwegian education system works and the effects of national education policies on pupils and youngsters.

In the first part of the paper we propose to present the general aspects of the history of the Norwegian educational system and its structure. The third section of the study is dedicated to the presentation of the budgetary framework of this sector which provides the necessary support for all activities covered by the beneficiary-centered education system, in order to develop it in a productive environment to well-being, happiness, and personal fulfillment through knowledge. Thus, some important aspects related to this national objective are indicated.

Knowing that a developed economy requires a well-trained workforce, the relationships between students in high-school and the state are highlighted, and between them and potential employers.

1. DEVELOPMENT OF EDUCATION IN NORWAY

The first schools in this country date back to the Middle Ages. After it became an archbishopric in 1153, schools were built in cathedrals to educate priests in the cities of Trondheim, Oslo, Bergen and Hamar. After the unification with Denmark in 1536, the cathedral schools were transformed into Latin schools and all cities were required to have such schools.

In 1736, education became compulsory for all children, and its effectiveness was later noted.

From 1827 "folkeskole" - the popular primary school, became compulsory for 7 years, and from 1969 for 9 years.

Between 1970 and 1980, "folkeskole" was replaced by "grunnskole" (primary school). In poorer counties, such as Finnmark and Hedmark, there was the smallest number of residents (up to 38%) who completed only compulsory primary education.[1]

After the Second World War (1939-1945), the concept of equality became increasingly important for Norwegian society. This was applied at the school level, all children benefiting from the same level of quality of education. No differences were allowed between children from rich or poor families, between boys and girls. From 1997 until now, 10-year education is compulsory. In order to be part of the group of the best twenty education systems in the world, the Norwegian state had implemented over time, a series of reforms that have contributed to improving students' performance, but also their well-being.

2. STRUCTURE OF THE EDUCATIONAL SYSTEM

In Norway, education is compulsory and free for all children between the ages of 6 and 16.

The Norwegian high-school system is divided as follows:

- Preschool education, "Barnehage" (optional education);
- Primary school - "Barneskole" (grades 1-7, compulsory education);
- Secondary education, high school, "Ungdomsskole" (grades 8 - 10, compulsory education);
- High school, advanced level - "Videregående skole" (grades

[1]https://www.k12academics.com/.

11-13)

I. Preschool education

Kindergartens are pedagogical institutions for school-age children, those who reach the age of one year, by the end of August, are entitled, upon request, to be placed in a kindergarten, and those who reach the age of one year in September or October are entitled to this place, starting with the month in which they reach this age. Until 2005, the administration of kindergartens fell within the competence of the Ministry of Children and Families. To ensure the coherence and continuity of education of children and young people, they have been transferred to the Ministry of Education and Research.[1]

The overall responsibility for quality development, management, funding of kindergartens and the allocation of financial resources rests on the government. The county governors ensure the connection between the Ministry of Education and the district institutions. Municipalities are responsible for the provision and administration of municipal kindergartens, as well as for the approval and supervision of both public and private kindergartens. Municipalities must also ensure that they are registered and comply with legislative regulations and the framework plan. They have an active responsibility for guidance and control, but also for ensuring the public subsidies necessary for the units registered within the respective municipalities. Kindergarten owners are responsible for the educational services provided and for hiring qualified staff, in accordance with the law.

According to the framework plan, the objective is to teach and care based on respecting childhood values. Children are familiar, from an early age, with the notions of numbers, spaces, shapes, nature, human body, religion, language and communication, all of which are complemented by outdoor activities and playtime. An important goal during this period is to improve language skills for all children, especially for learning Norwegian by children from minority language families. Additional funding is being given to this purpose.

One of the objectives of early education is to familiarize children with society and the environment, by spending time doing various

[1]The Kingdom of Norway, *Facts about education in Norway*, Published by Statistics Norway December 2016,

specific activities of visiting and communication. For this purpose, partnerships are organized between schools units and local units for the common use of the existing premises (swimming pools, gyms, theaters, cinemas, the local fire station, museums, parks and others).

Regarding the annual planning/school calendar, the kindergartens decide, autonomously, on the organization of time during the holidays, in collaboration with the parents' council.

II. Primary and secondary school

Primary school (Barneskole) and secondary school (Ungdomsskole) include education for children aged 6 to 15, from the first to 10th grade. Local authorities are required to provide care and supervision services for students, before and after school, from grade I to grade IV. The Norwegian state bears the overall responsibility for the application of education laws, respecting the content of the program and funding per student. The and county authorities are responsible for supervision, management of complaints related to regulations, participation in quality development, information and guidance on various administrative issues.

In the first year of primary school, students spend most of their time participating in interactive educational games and learning about social structures, the alphabet, basic mathematical notions, and developing their communication skills in English. In grades II-VII, the following subjects are addressed: mathematics, English, science, religion, music along with geography, history and social education (in the 5th grade).

In primary school, grading does not exist. However, the teacher usually sends feedback to the parents-an analysis of the student's school situation. Also, introductory tests are practiced, which help the teacher get to know his students better in terms of cognitive abilities. With the beginning of lower secondary education, at the age of 12-13, students are graded for learning outcomes.

According to statistics from recent years, from a demographic perspective, Norway has a dispersed population on territories and many of the primary and secondary schools operate with small student numbers. The percentage of schools with less than 100 students has decreased from 40% to 35%, recently, as these represent only 9% of the entire school population; schools with more than 300 students

representing 26% of the total educational institutions in the country and are attended by 53% of the country's school population.[1]

Subjects studied during these decade: Norwegian, intensively taught foreign languages, especially Spanish, social science, mathematics, religion, ethics, arts and crafts, natural science, nutrition and health, music, physical education, and other optional subjects. Native language and mathematics have the highest number of teaching hours at primary and secondary - lower levels, representing almost 40% of the total number of teaching hours (5,234 hours at primary level and 2,622 at lower secondary level). In the latter, students have various optional subjects including foreign languages. In secondary school, English is not the main foreign language taught, the most popular language being Spanish, followed by German and French.[2] Therefore, students in lower secondary education with sufficient basic knowledge can attend one or more schooling courses, disciplines from the upper secondary curriculum.

III. Upper secondary education

Upper secondary education (Videregåendeskole) offers three years of general education or four years of vocational training after 10 years of compulsory education. The duration of the apprenticeship period is two years of vocational training in upper secondary education, followed by one or two years of practical training. Usually, the age group of 16-19 years (grades 11-13). In this cycle, disciplines are deepened in order to obtain qualifications that exceed the lower secondary level. Students who have completed lower primary and secondary education, or the equivalent, are entitled to three years of upper secondary education either for the purpose of preparing for admission to higher education or for their vocational training. Higher secondary education and vocational training consist of 12 different programs, as follows:

- 3 general study programs (physical education, sports and music, dance, drama)

[1]Statistics Norway, „Facts about education in Norway", 2017, https://www.ssb.no/en/utdanning/artikler-ogpublikasjoner/_attachment/287176?_ts=158d834b638.

[2]Norwegian Ministry of Education and Research, „Education – from Kindergarten to Adult Education".

Specialization in general studies, with two alternatives in the first year:

- specialization in general studies;
- specialization in general studies-arts, crafts and architectural studies.
  - 9 vocational programs (construction, design, arts and crafts, electricity and electronics, health and social work, media and communication, agriculture, fisheries and forestry, food industry, services and transport, machinery and industrial production).

In the third year of study, students can choose an additional program to prepare for admission to university education.[1]

According to recent statistics, 97% of students go directly from 10th grade to upper secondary education-there is an increase in upper secondary education, especially among migrant students. The most popular options for professional studies are in the field of health and social care, engineering and industrial production. Students from the non-university tertiary cycle, do not pay tuition fees in state institutions. Moreover, they benefit from a relatively low salary premium compared to graduates from other countries (28% compared to 57%, the average of OECD countries). According to the Norwegian National Institute of Statistics, by 2020, about 196,300 students have been enrolled in upper secondary education and 37,000 have been apprentices.

3. **FINANCING THE NORWEGIAN EDUCATION SYSTEM IN THE CONTEXT OF DECENTRALIZATION**

Up until the mid-1980s, Norwegian education was strongly centralized. Responsibility for national curricula, examinations, funding, innovation, curriculum and methods of development planning rested on the shoulders of the Ministry of Education.

The attributions of the local authorities were mainly the provision of human resources (teaching staff) and the administrative management of schools. As general regulatory trends of the last two decades, some attempts to decentralize the education system have been noted.

Today, the Government of Norway sets the objectives and the legislative framework, and the decision-making depends on the

[1]Frilseth, Liv, *The Norwegian Model for Education for All in Upper Secondary School*, 2012.

management of schools: the primary ones depend on the municipalities and the secondary ones depend on counties. Municipalities also ensure the right to a place in kindergarten all children from the age of one. Tertiary institutions are largely autonomous in their decisions, including in the way financial resources are allocated. Norway has generous funding for the whole education system: public and private education, with the various institutions obtaining most of the funding from public sources. Public education is free, except for the preschool level, where parents must pay a fee (part of the expenses). Along with decentralization, an important change was the allocation of lump sums to municipalities. Therefore, the opportunity arises to use state financial support flexibly and the possibility to address various aspects of educational needs, as assessed by local authorities.

National standards are ensured through the application of legislation, regulations, curriculum and framework plans. The bodies that contribute to the elaboration of the educational policy are the following:

- The Norwegian Directorate for Education and Training (*UDIR-Utdanningsdirektoratet*), within the Ministry of Education and Research, has responsibilities for supervising preschool, primary and secondary education;
- The Norwegian Agency for Quality Assurance in Education *(NOKUT - Nasjonalt organ for kualitet i utdanningen)* is an independent body within the same ministry. The Board of Directors of NOKUT is the supreme governing body of the agency. Its main objectives are: ensuring and promoting the quality of education, supervision, information and contributing to the development of the quality of Norwegian higher and vocational higher education as well as information, recognition and equivalence of studies conducted in another country.
- The Association of Municipalities (*Forening for Utdanning)* aims at the interests of public and private kindergartens. Decisions in preschools, primary and lower secondary schools are decentralized.

The offices of local governors provide the link between the central education authorities, municipalities and counties. In Norway there are 430 municipalities that operate and administer kindergartens, primary and lower secondary schools, while in the 11 counties the authorities are responsible for upper secondary education and training. This decision

was made because the government considered that municipalities know better the needs of a community.[1]

Thus, decisions are mostly made at local level, with only 20% being taken at the central level, compared to the OECD average of 36%.[2]

So, the end results are:

- Training is a public responsibility;
- All public education and training are provided free of charge;
- Tuition costs and study materials are covered from public budgets;
- The provision of services in this field is of high quality and allows a wide range of options, regardless of the geographical location of the institution and social factors.

The Norwegian state also provides scholarships and loans to students from poorer families, [3] the educational sector is allocated a significant share of GDP. In any civilized society the teacher has had and will continue to play a key role in training the student to perfect his personality. The teacher represents a support for developing autonomy and for its formation in the spirit of responsibility and civic culture. Therefore, the issue of remuneration for teaching is essential for the state. According to specialists, a person working in Teaching/Education in Norway typically earns around NOK 54,100 per month. Salaries range from NOK 25,900 (lowest average) to NOK 98,700 (highest average), the actual maximum salary is higher.[4]

According to data provided by the OECD, the salary of a Norwegian teacher with over fifteen years of experience is $ 45,771 / year for the primary level, and that of a novice teacher up to $ 42,275 / year. Comparatively, it is equal to that of a teacher from United States, but it is 1.6 times smaller than that of a teacher in Luxembourg.

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[1]Anne Welle-Strand, „Norway Moving away from Populist Education", *Acta Pedagogica Vilnensia* (2004): 106-110.

[2]OECD, „Education Policy Outlook Norway", 2013, *http://www.oecd.org/norway_EN.pdf.*

[3]OECD (2019), PISA 2018 Results (Volume I): „What Students Know and Can Do, PISA", OECD Publishing, Paris, https://doi.orgn.

[4]http://www.salaryexplorer.com.

4. CURRICULAR ASPECTS AND SCHOOL RESULTS

Factors that have a significant effect on student performance are work, early education, parental education, family income, learning environment and motivation. School results have an overview of students' knowledge and performance. This is why, the 2018 PISA study shows that students in Norway scored higher than the OECD average in reading, higher than the OECD average in mathematics and the average in science did not significantly differ from the OECD average. The increase in student performance compared to previous years is due to government policies, which since 2015, have decided to establish "scientific municipalities" (vitenskap kommuner), designated for the period 2015-2019, with the task of implementing measures aimed at improving school results in mathematics and science. Furthermore, the government has established the introduction of an additional hour per week at the primary level and specific measures to strengthen science education at the other levels. Municipalities, however, can decide whether additional lessons will be implemented from the 5th, 6th or 7th grade.[1]

School in Norway is for all children, focused on the unitary learning experience and the common learning content. At the same time, education is individually adapted as a statutory right and a fundamental principle of the national curriculum. This aspect is also expressed in the framework plan "equal and adapted education in a common school based on a common curriculum"

The study of the native language is important for understanding, communicating and developing cultural identity. The curriculum offers students the opportunity to find their own "personality", to learn to express themselves, to be heard and to receive feedback. Thus, this subject is a democratic public arena, which provides students with the necessary conditions to participate in social and professional life. A major goal for Norwegian education is linguistic trust and belief in one's own culture for developing personal identity but also respect for other cultures with social participation and lifelong learning.

The Norwegian state also pays attention to the Sami minority people (indigenous people living in Northern Scandinavia). Of the approximately 70,000 inhabitants, 40,000 live in Norway and the rest in

[1]https://www.regjeringen.no/.

Sweden, Finland and the Kola Peninsula. In this regard, in collaboration with the Sami Parliament, a separate curriculum for primary and secondary education and training of students has been developed. The curriculum is partially distinct, for subjects such as their language and parallel curricula are adapted for natural sciences, music, etc.

In the Nordic countries, students do not face the pressure of grades. If they do not receive grades until the 8th grade, after this period, they are graded from 1 to 6, 6 representing the maximum grade. Students also participate in three national tests in grades V, VII, IX, to test the basic academic knowledge - Norwegian, mathematics and English. The National Tests were introduced only in 2004 with the aim of providing the authorities at local and national level with information on the general competence of students at the end of the three years of study.[1]

There is a widespread belief among school authorities, teachers and parents that homework is a valuable educational tool, although the empirical literature is ambiguous when it comes to assessing the effect of homework on the primary school pupil.

According to specialized studies, a common definition of homework is: "A task that students must complete at home and not during school hours." Internationally, reference is often made to Harris Cooper's classic 1989 definition that homework is "assigned to students by schoolteachers that are meant to be performed during non-school hours." [2] It should be noted that these definitions exclude "work performed" at school, between teaching or non-teaching hours. Tasks outside the school program such as piano, singing, ballet, etc. are excluded in these definitions.

Norwegian law does not contain legal regulations on homework assignments, although municipalities must provide assistance in carrying them out in primary school (under the after-school - SFO program). In Norway, most schools provide homework in order to achieve better learning outcomes, training the ability to work independently and responsibly, but also involving parents in school life. Most of the weekly homework is for the subjects of Norwegian language, Mathematics and English, and are mostly the same for all students, those with special needs receiving their own plan. In the primary cycle, the topics consist

[1]https://www.udir.no/eksamen-og-prover/eksamen.
[2]H. Cooper, *The Battle Over Homework*: *Common ground for Administrators, Teachers and Parents* (California, USA: Corwin Press, Inc. Thousand Oaks, 2001).

mainly of reproducing information: learning vocabulary, reading, words of the week and practicing handwriting.

A recent study by TIMSS (Trends in International Mathematics and Science Study), in which Norwegian teachers and students participated, shows that all students receive at least one subject in mathematics. In the fourth grade, 40% of students do all their homework in this subject, 34% do half of the lessons and 19% only some of them. In the eighth grade, the volume of homework is higher, and almost 70% of students received homework in each lesson.[1]

5. LEARNING ENVIRONMENT, A FACTOR OF INCREASING SCHOOL PERFORMANCE

As a result of applying for a curriculum, the results are that the degree of accomplishment of the students' tasks is influenced by the way of working acquired in the first years of school. It also favorably influences extracurricular activity. The knowledge gained will be needed later on the labor market, as practice is more important now. The textbooks offer, for example, various activities such as cutting and folding sheets in symmetry lessons in the middle school cycle. Mathematics books reflect a constructive conception of knowledge, with students having to "conceive" their own mathematical knowledge through research and discovery or through instructions and examples.[2]

The objectives of the educational system extend beyond school, in order to achieve a material and spiritual well-being. According to the UNICEF report, on the quality of life of children, Norway ranks at OECD countries at 7th, after Switzerland, Finland, Denmark, Sweden, the Netherlands. In drawing up the report, several aspects of this objective were taken into account, an important place being occupied by education and the school environment. The results of the specialized studies showed that half of the students are "happy" or "very happy" in the company of their classmates, and 40% of them are "quite happy". The study also shows that there is no difference between boys and girls in terms of happiness at school.[3]

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[1]*Homework and pupil achievement in Norway,* Statistics Norway Oslo, Kongsvinger, 7 January 2010.
[2]Reinhardtsen Jorunn, *The introduction of Algebra (*University of Agder, 2012).
[3]Kjetil Digre, *Utdanningsspeilet* (Utdanningsdirektoratet, 2016).

Well-being in the school environment is a essential component for the harmonious development of children. Therefore, close collaboration between students, parents, teachers, as well as administrative and management staff is needed. In a scholarship context, the teacher is the one who "create" the environment in which students have the freedom to choose, to work in groups, as a form of intercollegiate learning, so that they can make decisions about the team's actions. The classroom environment impacts students' performance, and the teacher is responsible for class management.

Also, family is of great importance in terms of children's motivation and satisfaction. The cooperation between the school and the student's family is vital for their evolution. Parents are encouraged by teachers to ask for detailed information about students' behavior, not just their results.

The purpose of education is to make the student perceive and experience the notions obtained, participating in various actions with empathy and success. The Norwegian system teaches students to think for themselves, to be critical, to learn to be happy, respecting others as themselves. Therefore, the learning environment, both in terms of internal and external factors, plays a essential role. Traditionally, children in Norway spend most of their time learning and playing outdoors, which is the case in kindergarten, schools and the local community.

During this program, children have feelings of joy and freedom, exploring the environment in forests, climbing slopes and cliffs, in any weather conditions. These means full of exercise and imagination, offers them a unique perspective on the world, on learning and on playing. Every two weeks, the class goes on a half-day trip. When they are in school there are regular breaks for music or interactive games. Constructive collaboration between students is also encouraged. According to specialized studies, the social needs of students are an important element in education. When these conditions are met, it becomes easier for them to focus on learning and perform better in group tasks.[1]

As part of this educational system, there are several measures that support and promote inclusive education at all levels. Local authorities have a responsibility to fund out-of-school care programs. Known as SFO (skolefritidsordning - after school program), the program provides

[1]Merete Lund Fasting, *Barns utelek (*Universitetsforlaget, 2017).

care and supervision, but also opportunities for playing, cultural and recreational activities, before and after school hours, both for students in grades I-IV and for those with special needs, from grades I-VII.

The fact that their rights and obligations are clearly presented to them also contributes to the well-being of schoolchildren. The education law emphasizes that every student has the right to a good physical and psycho-social environment that promotes learning, so that if students feel that their rights are not properly protected, they or their parents can ask the school management to remedy any violation. legal or general problem. The applicant is entitled to challenge the decision if he or she is dissatisfied with the measures taken by the school and even to notify the local or municipal administrative authorities.

6. INTEGRATION OF YOUNG PEOPLE INTO THE LABOR MARKET

After many years of economic stability and a low unemployment rate, Norway entered 2020 with the same hope for continued development of the labor market. However, with the coronavirus pandemic that hit the whole of Europe in March 2020, the economic situation soon became unstable. Measures to combat infections, introduced in March 2020, led to the sharpest economic downturn in recent time and resulted in the highest unemployment recorded after the period between the two world wars (10.6%). At the beginning of December it reached 3.7%, and GDP per capital rose; education has played an important role in this regard.[1] It has thus been shown that a high-performing education system determines rapid economic development.

The standard of living is improved through many channels:

- increasing work efficiency,
- promoting democracy,
- creating the optimal conditions for good governance.

The government, through the competent institutions, creates the necessary conditions for students to be prepared for the higher level of education, and, at the same time, for the high school education and for the vocational sector.

The state allocates a significant part of the budget for education to

[1]https://www.nav.no/no/samarbeidspartner

facilitate employment, increase activity and economic transition. The authorities believe that in the coming years there will be a great need for skilled workers with education and training in Norwegian enterprises but also in the public sector. According to experts, both private and public sector institutions should actively use the apprenticeship system to cover the recruitment needs of the future skilled workforce. In this regard, since 2015, the government has increased subsidies for vocational education units to NOK 12,500 per contract. The initiative to promote vocational education was continued by increasing apprenticeship scholarships and additional grants for those with special needs. Thus, in the last four years, there has been an increase in applicants by 14%.[1]

All youngsters in Norway are admitted to upper secondary education, with a guarantee of continuity, either in programs to prepare them for further education or in their vocational training.

High school students account for a higher share in Norway than in any other Nordic country. This is because this training system is advantageous for both students and employers and because there are a large number of training locations. The first part of vocational training programs is usually provided by integrated upper secondary schools. This is followed by a period of apprenticeship at a partner company. As in Denmark, vocational training in Norway is based on a partnership between authorities, schools, on the one hand, and employers, on the other. Training costs are mainly covered by national tax revenues, even if the responsibility for practical training lies with the counties. Corporate expenses related to practical training are also partially covered by the government. Companies that are recognized by the regional vocational training committees also receive a grant for practical training from the government. Its purpose is to cover part of the costs during the period in which the apprentices are studying and do not contribute to the production (one year period).

CONCLUSIONS

The Norwegian education and training system has ambitious goals and is essential for the country's development. Although this country has one of the largest budgets for this sector in terms of gross domestic product, student performances are still modest compared to the results of

[1]http://utdanningsspeilet.udir/.

PISA tests. To increase them, the authorities continue to implement the established measures, paying special attention to deficient disciplines such as mathematics or science.

Although Norway is not one of the countries with a high school performance, it is internationally recognized for the environment conducive to the harmonious development of the student. This system has a solid collaboration between students, teachers, family and authorities. The well-being of students is supported by the conditions in the school environment, Norway succeeded through the measures taken, to have a low level of aggression in schools.

The curriculum and related school activities are designed to allow all students to integrate into society. A solid democratic state requires the existence of a high level of education and training for each individual, regardless of the social and cultural environment of which he is a part and his possible special needs.

In Norway, as in other Nordic countries, students do not face the pressure of grades. They participate in three national tests in classes V, VII, IX, where they are tested for basic knowledge such as Norwegian, mathematics and English. National tests were introduced in 2004, as tools needed by the authorities to establish the necessary measures to ensure the quality of education.

Because of the authorities' efforts to provide free education for primary, secondary and lower secondary education, as well as consistent financial support for low-income families or students with special needs, the literacy rate of the population has reached 100%.

The Norwegian state is also involved in ensuring the connection between employers and future employees, providing them with high-quality training in line with labor market requirements. The measures implemented by the government, in education sector, are successful as the number of students who choose the vocational profile is increasing, and their degree of participation in apprenticeship programs is also following an upward trend.

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ASSESSMENTS REGARDING THE IMPACT OF TAXATION ON ECONOMIC AND SOCIAL DEVELOPMENT IN ROMANIA

Cătălin Emanuel CIOBOTA[1]

Abstract:

Fiscal policy is a cornerstone in macroeconomic development. Reforming this system can lead to economic development by increasing the autonomy of public authorities. Thus an appropriate policy contributes to increasing the independence of states from shocks caused by the economic crisis.

Key words: *taxation; social development; impact.*

INTRODUCTION

Fiscal-budgetary policy is a real lever of macroeconomic development. In this sense, the reform of the fiscal-budgetary system can stimulate economic development by increasing the autonomy of public authorities in terms of macroeconomic balance[2]. Public finance policy can contribute to increasing the resilience of states to economic shocks, respectively to absorb the deficits caused by the economic and / or financial crisis in developed countries, by increasing taxes or reducing spending, but in less developed and / or developing countries. , in the neo-Keynesian logic, even in periods of growth, it is not the budget deficit that is the priority issue, but the stimulation of productive activity, which will produce an increasing added value, so as to amplify the fiscal base, thus creating the necessary resources. both for social protection and for intervention in the sectors of the real economy.

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[2] J. Owens and R. Parry, "La fiscalite sert le developpement", *L'Observateur de l'OCDE* no 273, juin 2009, www.observateurocde.org/fiscalite.

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Tax schemes, including the rate system applied to tax bases that are identified under national tax law, have a relatively insignificant impact if the system - not only legal, but especially administrative - of collecting taxpayers' tax obligations does not work properly, such as the case of many less developed and / or less developed and / or less developed and / or developing countries, even in the European Union - the most conclusive example being Greece. Romania is no exception, there is a lack of appetite of taxpayers to respond to tax burdens, as long as, often in a discretionary manner, repeated tax facilities and exemptions apply.

Thus, if through the combined effect of tax and tax policies, of the Keynesian type, respectively to reduce the pressure exerted by them during periods of depression and weak or even unfavorable developments of the real economy, the share of tax revenues is small and the possibility of the authorities Stimulus of economic development and the extension of social protection is limited.

The correlation between macroeconomic development and the tax base of one of the most important sources of public revenue, namely the statistical link between gross value added at national level and gross income of residents can be explained by analyzing other indicators, which provide valuable information on performance. its activity and profitability. In this regard, an important source of information refers to labor productivity and mainly to the average hourly productivity per employee, because it eliminates the influence of the number of working hours, which presents the performance of the activity and, implicitly, the degree of economic development. Following the analyzes in the literature on the intensity of the relationship between gross income per capita and hourly labor productivity, it is observed that in countries where the gross value added of the activity of any economic sector is high, ie countries with high GDP / capita, the correlation it is less important than in countries facing the need to increase the profitability of production and / or distribution, as well as to make more efficient use of resources. This correlation is reflected in the lower level of labor remuneration, expressed in monetary units at purchasing power parity and, implicitly, in a narrower income tax base, even given that the relevant tax regulations provide for less deductions, facilities, etc. than in developed countries. This situation directly affects the volume of public revenues and, through

the function of redistribution of public finances, the sustainability power of socio-cultural programs in that country.

There are also close links between economic growth and improving the income-related poverty dimension. The correlation between the poverty rate and economic development is obviously inverse, but the intensity of this correlation differs from country to country. It is now clear that the citizens of the European Union live on average longer and in better health than previous generations. For several decades, the average health level of the European Union's population has been steadily improving, although this positive development does not prevent significant - and probably growing - health disparities between Member States and even within them. For example, at EU level, the mortality rate decreases with the growth of the national economy, the correlation being above average, but not very strong. Among the events that lead to the increase of life expectancy, in health conditions, of the European population are the standard of living, but also the intensification of research and development in the medical field, favored by financial support and technological advancement due to the penetration of computer technology in medicine.

Despite the considerable progress made in the field of healthcare, unacceptable inequalities can be found between different social groups as well as between different geographical areas of the European Union. In this sense, it is observed that the disparities of states in the field of health entail a very high cost, both economically and socially, for the countries where there is a precarious state of health of the population. Public authorities can reduce the impact of these factors by creating better working and living conditions, which leads to increased life expectancy, while increasing productivity and reducing the need for public spending to improve health. Thus, in order to improve the health of the population, it is necessary to stimulate employment, including a sharp reduction in long-term unemployment and the danger of social exclusion, creating a healthy and safe working environment for all employed people.

At the same time, an adequate and accessible social protection system must be designed and financed, with effective tools to mitigate the repercussions of possible economic and / or financial crises, which can considerably affect the material situation of the population and, implicitly, the state of her health. In the same sense, an amplification of the economic development will determine the decrease of the illiteracy

rate among the population, the fiscal-budgetary policy playing a key role in supporting this positive evolution.

Supporting the public administration reform process must be achieved both through measures to improve economic activity in various fields of activity (energy, construction, research and development, etc.), which are the subject of concrete government programs, by developing and implementing viable programs. financing, which involves the realization of budgets on programs, as well as by rethinking the system of financing public services, which involves reducing the share of resources from the central budget and correspondingly increasing funding from local sources. For example, in less developed and / or developing countries, the tax rate is around 30%, while in the developed countries it is over 40%, which means a tax base. much larger, which ensures a much more consistent volume for the public finances of those states.

Tax revenues play a crucial role in achieving macroeconomic growth policy objectives, which, in the long run, reduces the dependence of government authorities on international financial institutions. Taxation - which includes government actions on taxes and fees, as well as budget expenditures - is closely linked to the process of good governance, as the entire system of taxes and duties is a key element of the relationship between the state and the taxpayer, which is the, at least from the point of view of compliance with the legal tasks of the Fiscal Code, of the community. One of the major problems facing public authorities is the dependence of the provision of local public services on the public resources possible to be collected, in accordance with the legislation in force, in the respective geographical area. This can significantly affect horizontal equity[1] in the country and the access of the population with the same needs to the economic and social services promoted by local public authorities. Macroeconomic stability and sustained growth at the national

[1] Horizontal equity is equity both between regions and between various socio-economic groups within society. Fiscal decentralization can exacerbate the differences in opportunities between local authorities, as some of them have higher own revenues - when the geographical area is better developed economically - and, implicitly, local budget revenues from own fiscal sources are higher. The ability of local governments to provide local public services is thus becoming of major importance, and in order to respect the principle of equal opportunities between citizens of the same country, it is necessary to find mechanisms to compensate - balance - the financing of various geographical areas, without, however, the interests of the population as a whole should be affected.

level determine the need for fiscal consolidation, including public expenditure discipline, at both central and local government level. The tendency of public authorities in many countries is to promote policies of privatization, liberalization, concession or decentralization of public services, on their own initiative or at the recommendation of international bodies. The main objective pursued in the case of the measures taken by the state, through such actions, is the economic efficiency, by ensuring the conditions for the development of a private, competitive business environment. It is clear that the state must have as a permanent concern the development of an efficient institutional, legislative and operational infrastructure, necessary for the development of profitable activities, through the protection granted to the competitiveness in the internal markets.

CONCLUSIONS

The role of local public finances[1] has continuously increased, with the multiplication of needs in the territory, as the economic and social development and as a result of the increase of the attributions of the administrations of the local communities. However, self-financing cannot be achieved in all cases, which requires the intervention of central authorities for local financing in the form of transfers. On the other hand, the central government develops and implements financial policies at the macroeconomic level, which are applied throughout the country, affecting and involving local authorities as well. The technical efficiency of the services provided at decentralized level may be diminished due to budgetary constraints. Thus, the change of institutional responsibilities and responsibilities can negatively affect the efficiency gains in the areas where local services are used (social-educational, communal household, etc.), if too rapid decentralization cannot ensure adequate financing of expenditures related to the provision of these services. At the same time, it should be noted that public service providers are closely linked to public administration, whether central or local, as it is the main financier

[1] Local public finances represent the set of financial resources that finance the expenses of the local community. The system of local public finances includes the budgets of the administrative-territorial units, which have the largest share in total and the budgets of other public bodies, with financial autonomy.

of public services. There are, in this respect, regulations regarding the majority of services performed by operators, other than the administrations themselves, but the different responsibility of management, on the one hand, and of financing, on the other hand, can negatively affect the capacity to provide the public service. . A good example is pre-university education, where education is coordinated by the relevant ministry, so by the central administration, while the current funding of schools is provided from local budgets, which often causes dysfunctions.

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TAXATION IS A DETERMINING FACTOR OF SOCIAL PROGRESS?

Cătălin Emanuel CIOBOTA[1]

Abstract:

One of the key principles underlying the Social Progress Index is the holistic and relevant aspect for all countries in order to create a global measure of social progress, which includes many aspects of the level of health of societies. On the other hand, by excluding economic indicators, one can rigorously and systematically analyze the relationship between economic development (measured for example by GDP per capita) and social development.

Key words: *taxation; progress; social; index.*

INTRODUCTION

The Social Progress Index (SPI)[2] is a composite indicator, developed in 2014 based on extensive discussions with stakeholders around the world on what can be lost when decision-makers focus on GDP, but not on GDP. exclusion of social performance. It measures a full range of aggregated social and environmental performance components in a general framework. In practice, IPS quantifies social progress, at country or regional level, as a complement to traditional measures of economic progress.

One of the key principles underlying the Social Progress Index is the holistic and relevant aspect for all countries in order to create a global measure of social progress, which includes many aspects of the level of health of societies. On the other hand, by excluding economic indicators, one can rigorously and systematically analyze the relationship between

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[2] Social Progress Index (SPI). Sursa: https://www.socialprogress.org/

economic development (measured for example by GDP per capita) and social development. Previous efforts to move "beyond GDP" have combined social and economic indicators, making it difficult to clarify cause and effect;

At the same time, it can be considered a tool that will help leaders and practitioners in government, business and civil society to implement policies and programs that will lead to faster social progress.

Analysis of the correlation between total taxes (without social contributions),% of GDP and SPI

IIS-SPI correlation table

Correlations

		Social Progress Index	Total taxes (excluding compulsory actual social contributions) as % of GDP
Social Progress Index	Pearson Correlation	1	.556**
	Sig. (2-tailed)		.003
	N	26	26
Total taxes (excluding compulsory actual social contributions) as % of GDP	Pearson Correlation	.556**	1
	Sig. (2-tailed)	.003	
	N	26	26

**. Correlation is significant at the 0.01 level (2-tailed).
Sursa: Analiza proprie, folosind SPSS

The connection between the two indicators is a direct one, of medium intensity, the Pearson correlation coefficient registers the value of 0.556.
Analysis of the linear regression between Total taxes and fees (excluding social contributions),% of GDP, and SPI
Total correlation table of taxes and fees in GDP and SPI

Model Summary[b]

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate	Durbin-Watson
1	.556[a]	.309	.280	4.39504	2.116

a. Predictors: (Constant), Total taxes (excluding compulsory actual social contributions) as % of GDP
b. Dependent Variable: Social Progress Index
Sursa: Analiza proprie, folosind SPSS

Linear regression model obtained:
• R = 0.556 - which denotes a link of average intensity between the total taxes (expressed as a percentage of GDP) and the Social Progress Index;

• R2 = 0.309, ~ 31% percentage of the dependent variable variance, SPI is explained by the 31% percentage regression model.

Model
validity

ANOVA[a]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	207.271	1	207.271	10.730	.003[b]
	Residual	463.593	24	19.316		
	Total	670.864	25			

a. Dependent Variable: Social Progress Index
b. Predictors: (Constant), Total taxes (excluding compulsory actual social contributions) as % of GDP
Sursa: Analiza proprie, folosind SPSS

Sig. = 0.03 ≤0.05, therefore the model is generalizable, the constructed regression model is valid for a probability of 95% and can be used to analyze the dependence between the specified variables.

Significance of parameters

Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.	Collinearity Statistics	
		B	Std. Error	Beta			Tolerance	VIF
1	(Constant)	72.721	3.438		21.150	.000		
	Total taxes (excluding compulsory actual social contributions) as % of GDP	.426	.130	.556	3.276	.003	1.000	1.000

a. Dependent Variable: Social Progress Index
Sursa: Analiza proprie, folosind SPSS

Non-standard equation: SPI = 72,721 + 0.426 × Total taxes Standardized equation: SPI = 0.556 × Total taxes - assuming that there is a linear dependence between the two analyzed variables, an increase with a standard deviation of the variable Total taxes corresponds to an increase of 0.556 standard deviations of the SPI variable.

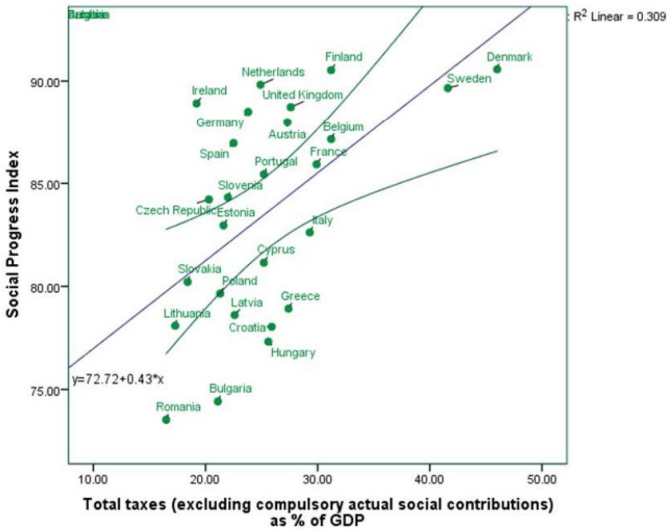

Figure 1 Corelația dintre Taxe totale și SPI

Social progress is the ability of a society to meet the basic human needs of its citizens, establishes policies that allow citizens and the community to improve and sustain their quality of life so as to create conditions for all individuals to reach their full potential.

CONCLUSIONS

Romania is positioned at the base of the graph, respectively the value of the social progress index in relation to the total taxes, as a share in GDP is extremely modest, weaker than that of all EU member states. The fiscal effort made by taxpayers is not justified, respectively the impact of taxation is found in social progress only to a very small extent, the expenses being unsustainable, they do not involve active social inclusion initiatives.

The 54th place in 2019 out of 149 countries analyzed and the last place among the EU member s

tates, raises questions about the performance of the government. If we analyze the values of the component indices, according to the country

file for 2019 we find the expenditure of tax revenues inconsistent with the needs of society and / or low performance of financial efforts, the most sensitive areas being: access to basic education (place 93), access to education quality (94th place), inclusion (72nd place), health system quality 74th place, with 101st place in premature mortality, 84th place after access to quality health services). Therefore, the current tax system does not support social progress, but only maintains a modest status of living conditions and quality of life.

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PECULIARITIES OF FOREST PROTECTION IN AUSTRIA

Ștefania-Diana IONIȚĂ-BURDA[1]

Abstract:

Austria is above the EU average in terms of forest area (approximately. ½ of land area) and occupies a leading position (second) in terms of the share of private ownership of forest land (this being the dominant form of ownership, approximately ⅘ from the surface of forest lands). Among the peculiarities of the main regulation of this sector (Forest Code) are: (a) clarification of the conditions that the forest must meet , (b) spatial planning of forest habitat (forest spatial planning) (c) imposition of prohibitions to preserve the integrity of areas wooded and obligations for the conservation of certain categories of forests and (d) the group into three groups of key violations of this regulation are considered misdemeanors (administrative offenses), and the establishment of penalties quite mild (if not crimes within the jurisdiction of courts and are not sanctioned with more severe punishments or other administrative sanctions)

Key words: *forest protection; peculiarities of the regulation; forest fund regime; forest sanctions; institutional/organizational framework.*

1. SITUATION OF THE AUSTRIAN FOREST FUND

In Austria, it seems to have been fairly well understood that forests are the "green lung" of the Earth[2], so that forested areas have reached, according to some analyzes[3], 3.69 million ha. (1961) at 3.99 million

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[3] Alexandra Freudenschuss and Thomas Gschwanter and Klemens Schaudauer, „The National Forest Inventory in Austria", *Seminar on the Importance of NFI data for Fulfilling obligations under UNFCCC, the Kyoto Protocol and EU legislation* (Zagreb, 01.06.2016), 12.

ha. (2010), which would represent 47.6% of the territory; according to official data[1], by reference to the number of inhabitants, it would mean 0.5 ha./inhabitant.

The National Forest Inventory, from 1960 (when the process of compiling data to allow an assessment of forests began), reported[2] a growth rate, after the period 1961-1970, of up to 300 thousand ha., Followed by a decline in this rate, since 1992, to 7.7 thousand ha. since 2000, to 5.1 thousand ha. and subsequently to 4.3 thousand ha.

The total number of trees in forested areas would have reached, according to official data[3], 3.4 billion (2017); in relation to the number of inhabitants, it would mean 391 trees / inhabitant (2017).

Among the factors that led to this increase in forested areas were specified[4]: (a) reforestation (in part), (b) natural reforestation, (c) conversion of pastures into forested areas.

In Austria, the dominant form of ownership of forested areas is private, accounting for 80% of total forested areas[5].

According to official data[6], 82% of the total forested areas are privately owned by approx. 145,000 owners, which would place Austria in second place in Europe, after Portugal (93%) and ahead of Sweden (80%), France (74%) and Spain (70%).

However, forested areas are considered public domain, and anyone is allowed access to the forest for recreational purposes; access may be

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https://www.mzoip.hr/doc/austrian_research_centre_for_forests_institute_of_forest_inventory_national_forest_inventory_in_austria.pdf.

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restricted only during periods when logging, reforestation or hunting activities are carried out.

2. THE NORMATIVE FRAMEWORK IN THE AUSTRIAN FORESTRY SECTOR

The main regulation in the Austrian forestry sector is the Forestry Act 1975[1].

This regulation comprises 185 articles whose provisions are systematized in 12 sections, namely: "General provisions on forests" (Section I); "Forestry spatial planning" (Section II); "Sustainable conservation of forests and their effects" (Section III); "Protection of forests" (Section IV); "Timber transport" (Section V); "Use of wood" (Section VI); "Protection against torrents and avalanches" (Section VII); "Forestry staff" (Section VIII); "Forestry research, education and training" (Section IX); "Promotion of forestry" (Section X); "Criminal, repealing, transitional and final provisions" (Section XII).

2.1. The importance of the forest

At the level of principle, it is considered that the forest with its effects on human, animal and plant habitat is an essential basis for the ecological, economic and social development of Austria; care, protection and sustainable development are the basis for ensuring its multifunctional effects in terms of use, protection, well-being and recreation[2].

Forest (in the present regulations) include the tree species in the annex (forest vegetation) with a base area of 1000 m^2. and a height of 10 m. on average[3].

The provisions of this regulation also apply to forest vegetation in protected areas, regardless of the type of land used and the structure of the vegetation in that area[4].

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[1] Bundesgesetz vom 3. Juli 1975, mit dem das Forstwesen geregelt wird (Forsgestgesetz 1975), Fassung vom 25.04.2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010371.
[2] Art. 1 para. (1).
[3] Art. 1 para. (2).
[4] Art. 2 para. (1).

2.2. Spatial planning of forest habitat

The spatial planning of the forest habitat (forest spatial planning) aims at the representation and advance planning of the forest conditions of the federal territory or of some parts of it, taking into account[1]:

- the economic effect, including the economically sustainable production of wood as a raw material;
- the protective effect, in particular protection against natural hazards and the adverse effects of the environment, including land reclamation;
- the effect of well-being, ie the influence on the environment, in particular on climate and hydrological balance, on the purification and regeneration of air and water;
- the recreational effect, respectively as a recreation area for visitors.

Spatial planning is achieved through[2]: (a) the forest development plan, (b) the forest plan, (c) the hazardous area plan.

The forest development plan covers the federal territory (general plan) and includes sub-plans, which are established by the governors of the Länder; these sub-plans are divided into two parts, one written (description) and one drawn (presentation)[3].

The forest plan is established by the forest owner, is developed by forestry experts and contains information on the area of interest for the planning agency[4].

The plan of the danger zones is established by the federal minister of agriculture, forests, environment and water management; these plans describe the areas at risk of torrents and avalanches, and their degree of danger, as well as the areas for which a certain type of management is required or their maintenance free for future protection measures[5].

[1] Art. 6 para. (1)-(2).
[2] Art. 8 para. (2).
[3] Art. 9 para. (1).
[4] Art. 10.
[5] Art. 11 para. (1).

2.3. Conservation of forests

Reforestation with propagating material of woody forest plants suitable for the deforested area must be carried out in time, in the protection forests, by the owners, according to art. 22 par. (3)[1].

Reforestation is considered appropriate if the necessary measures for this purpose (sowing or planting) have been implemented by the end of the fifth calendar year following the occurrence of the deforested area[2].

Reforestation can also be achieved by natural regeneration, if there is a natural rejuvenation, by seeds, stems or roots, which would allow the complete restoration of the area[3].

The division of land, at least partially forested, is prohibited if it is carried out in forested land and the division results in areas below the minimum level necessary for the conservation of forests and their proper management[4].

Any degradation of forests is prohibited; this prohibition applies to any person[5].

Forest degradation exists when, through actions or omissions[6]:

- the production capacity of the forest soil has been significantly destroyed or weakened;
- the forest soil is exposed to an apparent danger of slipping or erosion;
- reforestation, in time, is impossible;
- the vegetation is apparently exposed to a threat over a large area, in particular wind, snow, wild animals (except game), faulty fertilization, immissions, of any kind (except those provided for in art. 47) or waste (such as garbage, mud).

It is forbidden to use forest soil for purposes other than forestry[7].

The competent authority may grant a grubbing-up authorization [without prejudice to the provisions of para. (1)], unless there is a conflict of particular public interest in the conservation of that area as a forest[1].

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[1] Art. 13 para. (1).
[2] Art. 13 para. (2).
[3] Art. 13 para. (3).
[4] Art. 15 para. (1).
[5] Art. 16 para. (1).
[6] Art. 16 para. (2).
[7] Art. 17 para. (1).

If a deforestation authorization cannot be granted in accordance with the provisions of par. (2), the competent authority may grant such authorization if the public interest for another use of the area concerned exceeds the public interest in the conservation of that area as a forest[2].

Authorization is not required if[3]:

- the area to be cleared does not exceed 1000 m^2 ;
- the applicant submits a project to the competent authority with the documents provided in art. 19 para. (2);
- the competent authority does not inform the applicant within 6 weeks of receiving the notification that, taking into account the public interest for the conservation of that forest area, deforestation cannot be carried out without the authorization provided by art. 17.

Location protection forests (special location forests) are (for the purposes of this regulation) forests whose locations are endangered by the erosive forces of wind, water or gravity and which require special treatment to protect the soil and vegetation and to ensure reforestation; these are[4]:

- forests in sandy or dusty locations;
- forests in locations prone to cracking or erosion;
- forests in rocky, low or steep locations, if their reforestation is possible in very difficult conditions;
- forests on slopes where there is a risk of dangerous landslides;
- vegetation in the area bordering the forest;
- the belt adjacent to the area adjacent to the forest.

Property protection forests are (for the purposes of this regulation) forests that protect people, human settlements, plants or cultivated land, in particular from natural hazards or harmful environmental influences and which require special treatment to achieve and preserve the protective effect[5].

The owner of a protected forest must treat the forest in accordance with local conditions, in a way that guarantees, as far as possible, its

[1] Art. 17 para. (2).
[2] Art. 17 para. (3).
[3] Art. 18 para. (1).
[4] Art. 21 para. (1).
[5] Art. 21 para. (2).

conservation, adequate growth, a solid internal structure and rapid renewal[1].

In the situation where the conditions for the qualification of a forest as a protection forest are met, in accordance with art. 21, the owner must treat it as a forest of protection, even if this character has not been established by a decision[2].

The competent authority shall decide, at the request of the owner, where there is doubt as to whether a forest or parts thereof are protected forests[3].

This procedure for determining the character of a protection forest is also initiated ex officio, if it appears necessary in order to prevent unfavorable treatment of such a forest[4].

If corrective action is required for the conservation of protected forests, the Governor shall establish a forest development plan specifically designed for that protection area or adapt an existing plan[5].

2.4. Forest control

All forests are subject to official control; it consists in the rights and obligations of the Authority to supervise compliance with the provisions of this Regulation, the regulations issued or other specific rules or requirements.

In carrying out the control activity, the authorities have the following rights[6]:

- enter the forest, use roads and roads outside the forest (provided that they are appropriate for the purpose);
- request information and evidence from the owner, the forestry authority (insofar as they are relevant for forest control);
- to know all the factual and legal circumstances of the forest property (relevant for the implementation of the provisions of the forest legislation) (forest research).

[1] Art. 22 para. (1).
[2] Art. 22 para. (2).
[3] Art. 23 para. (1).
[4] Art. 23 para. (2).
[5] Art. 24 para. (1).
[6] Art. 172 para. (1)-(2).

In exercising the latter right, the bodies of the forest authorities may carry out the necessary research activities (with the information, as far as possible, of the forest owner), such as carrying out measurements, taking test material, etc.

In the event of non-compliance with forest regulations, the authorities may take (without prejudice to a possible initiation of criminal proceedings) the necessary measures, in particular to restore the condition of the forest, in particular[1]:

- adequate and timely reforestation of the area;
- preventing and preventing deforestation;
- disposal of wood and other debris that endangers the conservation of forests and the release of torrents;
- the prevention and (as far as possible) the elimination of damage caused to forest soil by precipitation or landslides.

2.5. Penalties

Violations of the provisions of this regulation are considered contraventions (administrative offenses), are grouped (the main ones) into three main groups, and are sanctioned as follows (unless they constitute offenses within the jurisdiction of the courts and are not punishable by more severe penalties or other administrative sanctions)[2]:

- with a fine of up to 7,270 euros or with imprisonment of up to four weeks, those registered in art. 174 para. (1) lit. a), respectively the violation, under the conditions specified therein, of the provisions of the following articles: art. 13, art. 14 para. (2), art. 16 para. (1), (3) and (4), art. 17 para. (1), art. 17th par. (4), art. 18 para. (1) - (3) and (6), art. 19 para. (8), art. 22 para. (1), (3) and (4), art. 23 para. (2), art. 24 para. (4), art. 25 para. (1) - (3), art. 28 and 29, art. 37 para. (1) and (3), art. 40, art. 41, art. 44 para. (1), (3) and (6), art. 45, art. 46, art. 49 and 50, art. 51 para. (2) and (3), art. 58 para. (3) and (4), art. 60 para. (1), (2) and (3), art. 62 para. (1) - (3), art. 65 para. (2) and (3), art. 80 para. (1), art. 82 para. (1), art. 85 para. (1), art. 100 para. (1) lit. b) and f), art. 101 para. (4), art. 113 para. (1) - (3) and art. 184 points 1, 7, 8 para. (1) and (2), 9 para. (2), 10, 11, 15 and 16;

[1] Art. 172 para. (6).
[2] Art. 174 para. (1).

- with a fine of up to 3,630 euros or with imprisonment of up to two weeks, those registered in art. 174 para. (1) lit. b), respectively the violation, under the conditions specified therein, of the provisions of the following articles: art. 14 para. (1), art. 25 para. (5), art. 32 para. (1), art. 33 para. (4), art. 34 para. (1) - (4), (7), (8) - (10), art. 35 para. (2) and (3), art. 37 para. (2) and (5), art. 38, art. 43 para. (1), art. 52 para. (2), art. 61 para. (1), (2) and (4), art. 62 para. (1) and (4), art. 64 para. (1) and (2), art. 81 para. (5) and (6), art. 86 para. (2), art. 88 para. (3) and (4), art. 90 para. (1), art. 100 para. (2), art. 102 para. (1) lit. b), art. 172 para. (1), (2), (6) and (7) and art. 177 para. (1);

- with a fine of up to 360 euros or with imprisonment of up to one week, those registered in art. 174 para. (1) lit. c), respectively the violation, under the conditions specified therein, of the provisions of the following articles: art. 49 para. (7), art. 58 para. (6), art. 66 para. (4) - (7), art. 73, art. 86 para. (3), art. 89 para. (1), art. 105 para. (2), art. 115 para. (1), art. 116 and art. 172 para. (2a).

3. INSTITUTIONAL / ORGANIZATIONAL FRAMEWORK IN THE AUSTRIAN FORESTRY SECTOR

Relevant institutions / organizations in the Austrian forestry sector include: Directorate-General for Forests and Sustainable Development, the Federal Office for Forests, the Austrian Forest Research Center, the Austrian Chamber of Agriculture and the regional chambers of agriculture.

3.1. Directorate-General for Forests and Sustainable Development

The Directorate-General for Forests and Sustainable Development, the third directorate-general of the Austrian Federal Ministry for Sustainable Development and Tourism (BMNT), is the federal forestry authority[1].

It is organized in the territory, in 9 forest authorities, at provincial level and 76 forest authorities, at district level[2].

[1] Austrian Federal Ministry for Sustainability and Tourism, „Organization Chart of the BMNT“, https://www.bmnt.gv.at/english/ministry/organigramme.html

[2] Ingwald Gschwandtl, „Sustainable forest management in Austria“, 30, http://www.mkgp.gov.si/fileadmin/mkgp.gov.si/pageuploads/Medijsko_sredisce/2015/0

3. 2. Federal Office for Forests

The Federal Office for Forests (BFW) is, within the Austrian Federal Ministry for Sustainable Development and Tourism (BMNT), the "competent authority", the "official body" for the EC and the Member States, and the "nationally designated authority" within the System. OECD for forest seeds and plants[1].

It is responsible for the implementation of the Plant Protection Act (2011), the Forest Reproductive Material Act (2003), the EU Timber Regulation (2010), the EC Regulation (2005) for the application of forest regulations, FLEGT governance and trade, and EC Regulation (2008) laying down detailed measures for the implementation of the FLEGT Regulation.

3. 3. Austrian Forest Research Center

The Austrian Forest Research Center (BFW) is a multidisciplinary federal research and education center within the Austrian Federal Ministry for Sustainable Development and Tourism (BMNT), which has the status of a public law institution[2].

This center consists of six research departments, covering a wide range of topics, from traditional logging issues, to natural risk and geo-risk management research, to landscape development and protection[3].

3. 4. Austrian Chamber of Agriculture and regional chambers of agriculture

The Austrian Chamber of Agriculture (LKO) is an umbrella organization (centrally) of the regional chambers of agriculture; in

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[1] Federal Forest Office, https://bfw.ac.at/rz/bfwcms.web?dok=4826.

[2] Austrian Research Center for Forest, „General information", https://bfw.ac.at/rz/bfwcms.web?dok=9579.

[3] Austrian Research Center for Forest, „The six Departaments of BFW", https://bfw.ac.at/rz/bfwcms.web?dok=9579.

addition, it includes Austrian Raiffeisen Association, the umbrella organization for entire Raiffeisen cooperative[1].

The regional chambers of agriculture, nine in number, are under the jurisdiction of the federal regions and have their main tasks[2].

CONCLUSIONS

Austria is one of the countries with a high forested area; the factors that led to this state of affairs are factors common to other countries.

The Federal Forestry Law is the main regulation in the Austrian forestry sector.

A first feature of the regulation is the clarification of the conditions that the forest must meet.

A second peculiarity of the regulation is the spatial planning of the forest habitat (forest spatial planning).

A third feature of the regulation is the imposition of (a) prohibitions on maintaining the integrity of forested areas and (b) obligations to conserve certain categories of forests.

A fourth feature of the regulation is the grouping into three main groups of the main violations of the provisions of this regulation, considered contraventions (administrative offenses), and the imposition of fairly mild sanctions (if they do not constitute crimes within the jurisdiction of the courts and are not sanctioned). with more severe punishments or other administrative sanctions).

The institutional / organizational framework in the Austrian forestry sector consists (mainly) of: (a) Directorate-General for Forests and Sustainable Development [third Directorate-General for the Austrian Federal Ministry for Sustainable Development and Tourism (BMNT)], (b) Federal Office for Forests (BFW) [within the Austrian Federal Ministry for Sustainable Development and Tourism (BMNT)], (c) Austrian Forest Research Center (BFW), (d) Austrian Chamber of Agriculture (LKO) and Regional Chambers of Agriculture.

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[1] Austrian Chamber of Agriculture, „Organization of Austrian Chamber of Agriculture", https://www.lko.at/organization-of-the-austrian-chamber-of-agriculture+2500+1063413.
[2] Austrian Chamber of Agriculture, „Role of Regional Chambers of Agriculture", https://www.lko.at/role-of-the-regional-chambers-of-agriculture+2500+1063475.

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THE HISTORICAL FUNDAMENTS OF THE ENVIRONMENTAL LAW. FROM THE OLD ROMANIAN LAW TO MODERN AGES

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Abstract:

A good elaboration, understanding and application of any legal norm cannot be achieved without knowing the evolution from the historical perspective of that norm. The importance of identifying the historical foundations of Romanian environmental law cannot be disputed. A legal institution always has deep roots in past institutional forms and their knowledge contributes to the formation of a complete vision of the institution in question.

Starting from these considerations, the current article proposes a foray into the history of environmental protection regulations, starting with the old Romanian law and until the adoption of the reform legislation of Alexandru Ioan Cuza.

Key words: *historic fundaments; environmental law; the law of the natural reservation; old Romanian law; the first forest law.*

INTRODUCTION

The connection between man and the natural environment has existed since ancient times, long before the emergence of the state and law.

Since primitive times, the man has tried to influence and shape nature in order to survive. However, there is an undoubted difference

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between the primitive and modern man regarding the idea of this way of influencing nature.

The difference comes, first of all, from the fact that judgment and primitive culture are based on the intimate, trusting and familiar relationship with animals, plants and the earth, a relationship that has changed radically throughout human evolution[1].

Modern man lives on the basis of a global knowledge, and his relationship with nature is limited to the constant attempt to dominate and exploit the elements of nature which has inevitably led to the ecological crisis today. The unwritten laws of the primitive, for example on hunting and venison protection, sometimes stricter than any current legal regulation, were based on intimate understanding and deep knowledge of the great rhythms of nature[2], rhythms that modern man is not able to decipher them.

1. THE FIRST ENVIRONMENTAL PROTECTION RULES. ABOUT THE INSTITUTION OF THE NATURAL RESERVATION

In the history of law, we find sources that attest to the fact that the protection of nature on Romanian territory begins in the prehistoric period. In the time of the Geto-Dacians, for example, forests were vital for the population both in terms of defense and food. During those periods, the forest "was much larger than today, covering not only the mountains but also the hills and much of the plain"[3].

Although they did not directly pursued the protection of the environment at that time, still in the old Romanian law, ordinary and unwritten, we find a series of rules and institutions that produced beneficial consequences on natural environmental factors, such as forest, water, soil, subsoil, hunting.

A first such institution, considered to have a legal character, is the so-called institution or "law of the natural reserve".

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[1] Ramona Duminică, *Introducere în dreptul mediului* (Bucharest: University Press, 2015), 9.
[2] N. Achimescu, "Another way of living, another culture: nowadays primitive people", *Revista Română de Bioetică*, 1st Volume, no. 3(2003): 10.
[3] Constantin C. Giurescu, *Istoria pădurii româneşti. Din cele mai vechi timpuri până astăzi* (Bucharest: Ceres, 1976), 55.

This is mentioned since the 14th century in a series of royal deeds, specifically belonging to Vlad Vintilă (1533), Ștefan Tomșa (1621) and Matei Basarab (1646).

Academician Constantin C. Giurescu defined the national reserves in his paper "Istoria pădurii românești" as being reserved places in which the activities of cutting down trees, grass, it was forbidden to graze cattle, hunt animals, fish, harvest fruit, without the prior permission of the owner of the place. The persons who violated this rule were punished with either the confiscation of fishing and hunting gear, clothes, the ox cart, or with severe sanctions, such as cutting off the hand and even the gallows[1].

The etymology of the "natural reserve" (branište) is found in the Slavonic, in the verb *braniti* which means "to stop", referring to an ancient notion from the Romano-Slavonic period being found in Muntenia, as well as in Moldavia and Transylvania[2]. This is why the historians consider the institution of the "natural reserve" as being ancient and existing since the Daco-Getae period. "*The law of the natural reserve, mentioned in the time of Matei Basarab, proves that this institution was ancient and part of the custom of the land*"[3].

In Wallachia were identified several natural reserves dating from the 14th century, being considered to be contemporary with the founding of the state. There were at that time princely servants who guarded the natural reserves and applied the sanctions for those who were guilty of violating the rules. Historic documents certify the existence of a first natural reserve in the Ialomița county, in the region of the river with the same name and of the Borcea pond. This is mentioned by Radu III of Wallachia (Radu the Handsome), in his document from January 15th, 1467, which "strengthens the Cozia Monastery, the Danubian ponds from Săpatul to Ialomiţa river given by Mircea the Elder"[4].

The academician Constantin C. Giurescu[5] also reminds that on April 15th, 1533, the voivode Vlad Vintilă (Vlad VII) gave the so-called natural reserve to the Argeș Monastery through a deed by which he established the punishment with the cut of the hand for that person who

[1] Giurescu, *Istoria pădurii româneşti,* 55.
[2] Lucreția Dogaru, *Dreptul Mediului* (Bucharest: Pro Universitaria, 2020), 38.
[3] Giurescu, *Istoria pădurii româneşti,* 55.
[4] Giurescu, *Istoria pădurii româneşti,* 55-56.
[5] Giurescu, *Istoria pădurii româneşti,* 55-56.

will hunt fish or cut down the forest. The voivode Vlad Vintilă stated in a document of December 27th, 1534 more severe sanctions for those violating the law of the natural reserve of the Cozia Monastery, more precisely the gallows for the one who breaks a branch or cuts a tree under his rule.

In 1621, Ștefan Tomșa has issued a law of the natural reserve in Popești to strengthen the Bisericani Monastery in Neamț by which it states the penalty of all assets found upon the person if he is caught cutting down wood or graze the cattle in the forest within the natural reserve.

In his turn, Matei Basarab gave in 1646 the natural reserve from Ciumernicu, by ordering that no person shall harm it, the penalty to be applied for those who cut down the forest or grass on the monastery grounds consisted of confiscating the ox-cart and tools.

Definitely, the purpose of these rules was to preserve the assets from the perspective of the economic interest of the owner, but, certainly, there were positive effects on various environmental factors[1].

This institution is considered as being the starting point for the protection of different species of animals and protection of forests against the abusive and uncontrolled exploitation[2].

2. THE FIRST ROMANIAN FOREST LAWS

A first official regulation of the forest regime on the Carpatho-Danubian territory is considered to be the one from 1781 in Transylvania, followed by the one from Bucovina in 1786, then the one from Moldova in 1792, from Muntenia in 1793 and the one from Dobrogea from the in 1870[3].

Prior to these provisions, historians attest to the existence of attempts at regulation by the Focsani Decision of May 29th, 1706 which provided with the value of a principle, similar to the law of natural

[1] Mircea Duțu, „Dezvoltarea istorică și evoluția legislației românești privind conservarea naturii și protecția mediului", in *Studii și cercetări juridice*, anul 6 (62), no. 1 (2017): 7-35.

[2] Oana-Maria Hanciu, „Aspecte privind evoluția protecției mediului în dreptul românesc", in the volume *Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni şi tendinţe*, Bucharest (2018): 324.

[3] Giurescu, *Istoria pădurii româneşti,* 127.

reserve, that it is forbidden for Muntenians to cut wood from Muntenian forest if there is no prior agreement with the owner.

Regarding the first official regulation, it aims the use and administration of the Transylvanian forests and it is the masterpiece of the Austrian regime during the Emperor Josepf the 2nd. Thus, the first forest code is considered to be "The forest order for Bucovina, the forest order or the forest rule", printed on two columns in German and Romanian (in Cyrillic) issued by the Emperor Joseph the 2nd in 1876. This act contained innovative ideas for forest protection and management, regulating important issues related to the forests in Bucovina that were threatened at that time by frequent looting[1].

"The forest order" consisted of 12 points in which rules were established regarding felling, the importance and usefulness of different types of trees were mentioned, principles of forestry practice, use and regeneration of forests were presented.

Later, two other laws come to complete these beginnings of the history of environmental law in our country. We are talking about the regulations from 1793 in Wallachia and about the document adopted in 1794 by the voivode of Moldavia, Alexander Mourouzis. They protected the right of ownership over the forests and also contained practical rules regarding the clearing of forests, the age of cutting trees, the prohibition of grazing, etc.

After the appearance of these first laws, we appreciate that we move to a new stage in the history of environmental law, the stage of state regulation of people's relations with the forest, laying the legislative foundations of forest exploitation because the extraction of wood from forest it was now restricted by rules aimed at protecting the forest.

In the first decades of the 19th century emerge the first codes of laws, respectively the Caragea Legislation (Wallachia) and the Callimachi Code (Moldova).

The Caragea Legislation was edicted and printed in 1818, from the order of the ruler of Wallachia, Ioan Gheorghe Caragea. The Caragea Legislation entered into force on September 1st, 1818, being a general code comprising 4 specialized codes: civil, criminal, civil procedure and criminal procedure. The legislation is divided into 6 parts which, in their turn, comprise several chapters. The Callimachi Code (Civil Code of Moldavia) was initiated by the lord Scarlat Callimachi. Its main sources

[1] Giurescu, *Istoria pădurii româneşti,* 127.

of law were Romanian customs, Byzantine law, French Civil Code (1804) and Austrian Civil Code (1811)[1]. These two important documents for the history of Romanian law, although they did not expressly provide references on environmental protection, are nevertheless deduced by way of interpretation from their content, rules on the protection of animals and forests.

After the liberalization of trade in cereals by the Treaty of Adrianople in 1829, a period unfavorable for national forests followed as massive deforestation took place so as to increase areas of agricultural land.

In this context, the Organic Regulations from Wallachia and Moldavia (1831-1832) inserted a series of limitations regarding the exploitation of the natural heritage, as well as a series of new measures for its administration and public management. Also, were adopted certain norms (for example, in 1843 in Moldavia and 1847 in Wallachia) which aimed to impose limits on the exploitation of forests that were owned by churches, being a starting point in the adoption of later modern laws[2].

CONCLUSIONS

It is an indisputable fact that most economic or social activities, since ancient times, have affected the environment.

The emergence of the first legal norms which have as object the environmental protection was a necessity and even if initially they do not aimed directly its protection, but other values, for instance the property, represent the base of the subsequent legal norms, because, as M. Serres pointed out, "*Law is perhaps a bad solution for saving the environment, but there is no other*". Therefore, a return to historical foundations can only add to the development and effectiveness of current environmental law rules.

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[1] Daniela Iancu, *Istoria dreptului românesc* (Pitești: Pitești University Press, 2010), 40-47.

[2] Mircea Duțu, "Dezvoltarea istorică și evoluția legislației românești privind conservarea naturii și protecția mediului", in *Studii și cercetări juridice*, Year 6 (62), no. 1 (2017): 7-35.

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THE ROLE OF PUBLIC AUTHORITIES IN THE PERFORMANCE BY THE PUBLIC OF THE RIGHT TO ACCESS ENVIRONMENTAL INFORMATION

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Ancuța-Elena POPESCU [2]

Abstract:

Environmental protection represents one of the fundamental policies of the European Union. Since 1972, the European Council in Paris adopted a communitarian environmental policy to support the economic expansion. The Single European Act (1978), the Maastricht Treaty (1993), the Amsterdam Treaty (1999) and the Lisbon Treaty (2009) show on the one hand that the environment has become an official area of common policy, but also represents the legal foundation for the engagement of the Member States towards the environmental protection.

Despite economic and technological progress, there can be no. question of an increase in the quality of life in the absence of environmental policies. Against this background, under the auspices of the Economic Commission for Europe of the United Nations (UNECE) was adopted the Aarhus Convention in 1998. This Convention, to which the European Union and all its Member States are part, guarantees three categories of rights for the public:

1. *The right of citizens to participate in environmental decision-making;*
2. *The right to access information regarding the environment held by the public authorities;*
3. *The right to access justice for the violation of the above-mentioned two rights.*

This article aims to analyze in relation to the provisions of the Aarhus Convention, the way in which the Romanian legislator understood to regulate the role of public authorities regarding the exercise by the public of the right of access to environmental information.

Key words: *environment; information regarding the environment; right to access; public authorities; citizens; Aarhus Convention; national legislation.*

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INTRODUCTION

The right to health, enshrined in the Universal Declaration of Human Rights[1], today has an extremely complex content, including the protection against environmental factors.

The influence of the physical, chemical and biological environment on individuals and their quality of life[2] led the Community authorities to adopt a common environmental policy in 1972, following the United Nations Conference on the Human Environment (Stockholm 1972). The development of modern society, especially through economic expansion, could no.t be achieved in the absence of coherent measures regarding the environment.

In this context it emerged the concept of durable development, being defined as "the development that satisfies the needs of the present without affecting the capacity of future generations to satisfy their own needs" (The Report of the Brundtland Commission, of the World Commission on Environment and Development titled "Our Common Future", 1987).

Starting with 1973, the environmental policies shall constantly be on the agenda of the European Union as follows:

- The Single European Act (SEA) which in 1987 introduces a new chapter "Environment" (Title 7) in the Treaty of the European Community[3];
- The Maastricht Treaty (TUE)[4] which entered into force in 1993. Regarding the environment, it grants a bigger role to the European

[1] Art 25 of the Universal Declaration on Human Rights, available at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, accessed on 2 April 2021 states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services".

[2] See more about the concept of life quality in the paper Maria Hămuraru and Olesea Ţurcanu "Abordări conceptuale ale calităţii vieţii în contextul societăţii postindustriale" *Studia universitatis – Revista Științifică a Universității de Stat din Moldova*, no.2(22) (2009): 50-54 și Ioan Mărgineanu "Calitatea vieţii în România: prezent și perspective" *Calitatea Vieţii*, XXI, no. 3–4 (2010): 231–237.

[3] Single European Act (1986), published in the Official Journal L 169 of 29 June 1987; available at https://eur-lex.europa.eu/homepage.html, accessed on 4 April 2021

[4] Treaty on the European Union (1992) published in the Official Journal C 191 of 29 July 1992; available at https://eur-lex.europa.eu/homepage.html, accessed on 4 April 2021

Parliament, introducing the procedure of co-decision. This Treaty states that the regulations on environmental protection shall be integrated within the communitarian policies, being a *sine qua no.n* condition regarding the environmental durable development;

- The Amsterdam Treaty[1], signed in 1997 (entered into force in 1999), which states that the environmental policy becomes a horizontal policy of the European Union, the Treaty consolidating the principle of integrating the environmental dimension into other Community policies;

1. The Lisbon Treaty[2] – 2009, stating that the environmental protection continues to represent an area of competence divided between the Union and its Member States. The intervention of the Union in this area shall aim clear objectives, such as the preservation, protection and improvement of environmental quality, health protection, the promotion of the rational use of resources and the promotion of the measures for combating environmental issues.

1. AARHUS CONVENTION

The importance of environmental protection for the entire European society has determined the adoption in 1998 of the Aarhus Convention[3]. The premises taken into consideration in the adoption of this document referred to "the adequate environmental protection is essential for the well-being of people and for the enjoyment of fundamental human rights, including the right to life and the right of everyone to live in an environment conducive to his or her health and

[1] The Amsterdam Treaty published in the Official Journal C 340 of 10 November 1997; available at https://eur-lex.europa.eu/homepage.html, accessed on 4 April 2021

[2] The Lisbon Treaty modifying the Treaty of the European Union and the Treaty establishing the European Community, 13 December 2007, published in the Official Journal C 306 of 17 December 2007, Lisbon; available at https://eur-lex.europa.eu/homepage.html, accessed on 4 April 2021

[3] Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matter, published in the Official Journal of the European Union L 124/4 available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22005A0517(01)&from=EN, accessed on 4 April 2021. The Convention has been modified by the Amendment of 27 May 2005 published in the Official Journal of the European Union L 386/46 available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13-b&chapter=27&clang=_en, accessed on 10 April 2021

well-being. as well as collectively, to protect and improve the environment for the benefit of present and future generations".

In this context, the signatory states have shown that environmental awareness can only be achieved if there is improved access to information and increased public participation in decision-making increase the quality and improve the implementation of decisions.

The Convention, entered into force in 2001, has stated three large categories of rights for the public:

- Access to information;
- Public participation in decision-making;
- Access to justice for environmental matters.

1.1. Aarhus Convention – access to environmental information – definitions

Access to information is regulated in Art 4 and within the meaning of the Convention is a right of the public and consequently an obligation of public authorities to make available to the public the environmental information required under national law, including on request and subject to (b) below, copies of the original documentation containing such information.

According to Art 2 Pct 3 "environmental information means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these

elements, by the factors, activities or measures referred to in subparagraph (b) above".

Regarding the notion of public authority, the Convention considers the following categories, according to Art 2 Pct 2:
(a) Government at national, regional and other level;
(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

1.2. Aarhus Convention – access to environmental information – procedure

The procedure for communication of environmental information is stated by Art 4 Para 2, 5-8 and refers to the following steps:

1. The person who aims to obtain an environmental information of the ones stated by Art 2 shall submit a written request to which the authorities may add a fee, in a "reasonable" quantum;
2. The environmental information shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it;
3. If the public authority which received the request does no.t have the requested environmental information, that public authority shall immediately inform the applicant of the public authority to which it considers that such information may be requested or transfer the request to that authority and inform the applicant accordingly;
4. Where a public authority does no.t hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes

it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly;

5. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with Art 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

Regarding the refusal to provide environmental information, it is stated by Art 4 Para 3-4 which details all situations which may justify this refusal.

2. DIRECTIVE 2003/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 28 JANUARY 2003 ON PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION[1] AND REPEALING COUNCIL DIRECTIVE 90/313/EEC

The importance of environmental information and the diversity of domestic legislations of Member States in the application of the Aarhus Convention has determined the communitarian legislator to adopt in 2003 the Directive 2003/4/EC.

Unlike the Convention, the Directive 2003/4/EC has expanded the area of public authorities, thus comprising: the government or national, regional or local public administrations, regardless if they have or no.t specific responsibilities related to environment, other persons or bodies occupying administrative public positions in environmental area in accordance with the domestic legislation, as well as other persons or bodies acting under their control and who have responsibilities or public positions related to environment.

According to the Directive, environmental information should be placed at the disposal of the public as soon as possible and within a reasonable time, taking into consideration any possible terms stated by the applicant. As regards the means of making available, the Directive

[1] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, published in Official Journal of the European Union L 41/26 of 14 February 2003

does no.t impose a particular form but leaves the scope of practical arrangements open to public authorities, stating that these arrangements must "ensure that information can be accessed easily and efficiently and that it is made available progressively to the public through public telecommunications networks, including publicly accessible lists of public authorities and registers or lists of environmental information held by or on behalf of public authorities".

There is also an obligation for public authorities to make efforts to ensure that environmental information collected by or on their behalf is intelligible, accurate and comparable.

The general rule is that the authorities to disclosure environmental information, while the refusal shall represent an exception, the reasons that generate it will be interpreted restrictively.

3. ROMANIA – THE LEGISLATIVE FRAMEWORK ON THE PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

3.1. ***Law No. 544/2001 on free access to information of public interest***[1] states the obligation of public authorities to issue any information regarding the activities or resulting from the activities of a public authority or public institution, regardless of the support, form or means of expression of the information.

According to this normative act – Art 2 the area of public authorities responsible for these obligations is wide, by public authority or institution is meant any public authority or institution which uses or manages public financial resources, any autonomous company governed by the Company Law no. 31/1990, republished, as subsequently amended and supplemented, under the authority or, as the case may be, in the coordination or subordination of a central or local public authority and to which the Romanian state or, as the case may be, a territorial-administrative unit is a sole shareholder as well as any regional operator or operator as defined in the Community Public Utilities Act no. 51/2006, republished, as subsequently amended and supplemented. The political parties, sports federations and nongovernmental public utility

[1] Law No. 544/2001 on free access to information of public interest, published in the Official Gazette no. 663/23 October 2001 modified by the Law no. 144/2016, published in the Official Gazette no. 528/14 July 2016

organizations that benefit from public funds are also subject to the provisions of this law.

The procedure for requesting the information involves making a request, in writing or orally, indicating the type of information requested. If the requested information is no.t immediately available, the person is instructed to request it in writing. Requesting and obtaining information of public interest may be carried out, if the necessary technical conditions are met, also in electronic format.

According to Art 7 of the law, "(1) The public authorities and institutions have the obligation to respond in writing to the request of the public interest information within 10 days or, as the case may be, within 30 days from the registration of the request, depending on the difficulty, the complexity, the volume of documentary work and the urgency of the request. If the time required to identify and disseminate the requested information exceeds 10 days, the response shall be communicated to the applicant within 30 days, provided written notice thereof is given within 10 days. (2) The refusal to communicate the requested information shall be motivated and communicated within 5 days of receipt of the petitions".

3.2. **Government Decision No. 878/2005 on public access to environmental information**[1]

This normative act was issued in order to ensure the right of access to environmental information held by or for public authorities and established the conditions, basic terms and modalities of exercising this right, representing the seat of the matter in the field.

By Art 2 Para 2 the Romanian legislator establishes the area of public authorities with attributions in this area, as following:

a) The Government, other public administration bodies, including their advisory public organisms, established at a national, regional or local level;

b) Any natural or legal person holding public administrative positions according to the national legislation, including responsibilities, activities or services in relation to environment;

c) Any natural or legal person who fulfils responsibilities or positions or supplies public services in relation to environment and is

[1] Government Decision No. 878/2005 on public access to environmental information, published in the Official Gazette no. 760/22 August 2005

under the control of an organism or person mentioned by (a) or (b) above.

Institutions or bodies are exempted from this scope when they act as a judicial or legislative body.

The concrete exercise of the right of access to environmental information required the implementation at the level of the designated public authorities of concrete organizational measures, as follows:

a) designating the persons responsible for providing information, within the specialized departments of information and public relations;

b) setting up and maintaining spaces and other facilities for examining the requested information;

c) making registers or lists containing the environmental information held by them available to the public or setting up information points where precise indications can be found on the place where environmental information held by public authorities can be found.

The public's right of access to information imposes on public authorities a number of obligations such as:

- Guiding the public, through their own representatives in the specialized departments of information and public relations, in exercising the right of access to environmental information. The purpose of this obligation is the one of avoiding the situations such as those in which a request is clearly unreasonable or too general and which could lead to a refusal to respond by the authorities;
- Public access to lists of public authorities;
- Receiving requests for environmental information and providing answers, regardless of whether the environmental information is held by or for them, without justifying the purpose for which this information was requested.

Regarding the established procedure, the Romanian legislator has stated in Art 3 Para 1 that the request and provision of environmental information is made in accordance with the provisions of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus on 25 June 1998, ratified by Law no. 86/2000[1]. In this meaning, the request may be written or oral. Regarding the establishment of a national fee for

[1] Law no. 86/2000, published in the Official Gazette of Romania, Part I, no. 224/22 May 2000

receiving environmental information, the tariffs are stated by Annex G of the Order no. 1182/2002 for the approval of the Methodology for management and communication of environmental information held by the public authorities for environment protection[1]. Access to public lists and registers made available to the public and on-the-spot examination of the requested information shall be free of charge. The costs incurred cover only copying or processing fees and are borne by the applicant.

Two exceptions have been established from the obligation of the authorities to provide the information even in the form requested by the public:

- the information is already made available to the public in another form or format easily accessible to the applicant;
- it is convenient for the public authority to make it available to the public in another form or format, in which case it motivates the provision of information in the available form or format.

If the requested public authority does not have the requested information, it has two possibilities under the law, either to inform the applicant as soon as possible of the public authority that may hold that information or to transfer it, as soon as possible, the request of that authority, while informing the applicant thereof. The term stated to notify the applicant about the impossibility to provide the information is of 15 days, which is calculated from the date of receipt of the request.

Another case of refusal is generated by the fact that the application concerns unfinished materials, documents or data. This legal practice, unlike the Aarhus Convention which does not define the concept of "unfinished documents", has stated that this notion refers "to the process of elaboration of an information or document, and not to the entire working process"[2].

Art 12 of the Government Decision no. 878/2015 states the right of public authorities to refuse a request for the communication of environmental information related to the effects that the access request

[1] Order no. 1182/2002 for approving the Methodology of processing and dissemination of environmental information, held by public authority for environmental protection, published in the Official Gazette, no. 331/15 May 2003.

[2] See the case of the Compliance Committee with regard to communication ACCC/C/2010/51 concerning compliance by Romania, available at http://mmediu.ro/app/webroot/uploads/files/7_ece_mp.pp_c.1_2014_12_e.pdf, accessed on 10 May 2021.

may have, of which we mention: the confidentiality of the procedures of public authorities is affected, when this is provided for by the legislation in force; international relations, public security or national defense; the course of justice, the possibility of any person to be the subject of a fair trial or the possibility of a public authority to conduct a criminal or disciplinary investigation, etc.

As it is mentioned by the Convention, the Romanian legislator has stated that all these situations which may generate refusals must be interpreted in the restrictive meaning, the purpose of the regulation being that of satisfying the public interest, thus allowing it to perform another right, such as the one of participating in decision-making.

Any situation which may give rise to a refusal of access to information imposes on the public authority the obligation to communicate this matter in writing to the applicant as soon as possible, but not later than one month from the date of submission of the application.

CONCLUSIONS

The right of every human being to live in an environment suitable for his or her health and well-being can only be guaranteed if all the factors involved – public authorities and citizens – support environmental policies.

Citizen' participation in environmental decision-making, which will affect not only the present generation, but also the future ones can be achieved objectively only through effective access to information.

In this context, the European Union and the Member States considered it imperative that the right to public access to environmental information be substantiated, in conjunction with the imposition of obligations on public authorities.

The Aarhus Convention represented the pillar around which the Member States, through their own national law, ensured the content of this right, which is now considered to be a fundamental right by Community judicial practice.

In this context, the Romanian legislator which stated since 2001 the access to public information has adopted all normative acts necessary for the application of the Aarhus Convention and of the Directive 2003/4/EC of the European Parliament and of the Council of 28 January

2003 on public access to environmental information, thus creating a legislative framework coherent for all parties involved in this process, public authorities and citizens, based on the principles of responsibility and transparency, to exercise their rights and obligations.

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ASPECTS OF COMPARATIVE LAW REGARDING THE REGULATION OF RELAPSE AND ATTEMPT

Cătălin BUCUR[1]

Abstract:

In the European law, lato sensu, we distinguish between two great legal systems, namely the Romano-Germanic legal system and the Anglo-Saxon one, the main difference between them consisting in the way in which the judicial truth is approached. Thus, if within the Roman-German legal system the approach is, in principle, of the inquisitorial type, in the Anglo-Saxon system it is of the adversarial type.

The difference resides in the fact that within the inquisitorial type, the legal truth must be identical with the real, objective truth, namely the courts cannot retain anything other than what actually happened, while the adversarial system proposes a reconstituted judicial truth, resulting from the administration of evidence, truth that may differ from objective one.

The Anglo-Saxon legal system is mostly an unwritten one, having as source of law the legal precedent.

Criminal law in most states where the Romano-German legal system is applicable has its main source in the Criminal Code. Countries such as Romania, France, Spain or Germany have developed criminal legislation in the form of codes containing rules and institutions of law.

Among the fundamental institutions of the criminal code, our brief analysis aims the relapse and attempt.

Key words: *European law; relapse; attempt; Romano-Germanic; Anglo-Saxon.*

INTRODUCTION

Starting from the conceptual acceptance, it has been ascertained that, etymologically, the notion of "relapse" originates from the Latin word "recidivus" or from the Latin verb "redicere", which in translation means "relapse" and namely, "who falls in the same mistake" or "who

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makes a mistake once again". In the broadest sense, "recidivism" means "the repetition of the phenomenon after its apparent disappearance", i.e. "the repetition of crimes".

From a conceptual perspective, etymologically, the notion of attempt originates from the Latin "tentamen", which means "to try".

In the progressive evolution of the criminal process, the attempt falls between the preparatory phase and the consumption phase, representing that segment of criminal activity that corresponds to the generic meaning of "unsuccessful attempt" to commit the crime, because, although it starts from the beginning of crime (the lower stage of the attempt), its terminus point is either at the interruption of the execution, or the non-production of the illicit result (the upper stage of the attempt).

1. BRIEF CONSIDERATIONS ON THE REGULATION OF RELAPSE IN FRANCE, ITALY, BELGIUM, GERMANY AND SPAIN

Art. 132-8 of the French Criminal Code defines the relapse as being "the commission of a new offence after a definitive conviction, even if it has not been executed". According to French criminal law, relapse is a general aggravating circumstance. Unlike the regulation of the Roman criminal code, the French criminal law does not distinguish between the post-conviction relapse and the post-enforceable one, the criminal treatment for relapse being identical.

The French criminal law states both the general relapse, as well the special one. Also, it is stated both the perpetual relapse, as well as the temporary one. General and perpetual relapse is destined for the most serious offences, and the special and temporary relapse for other offences.

Based on the legal statement, the French doctrine distinguishes between the legal relapse when a person commits, after a definitive conviction, a new offence under the conditions stated by the law for the existence of relapse (Art. 132-8, 9, 10 of the French criminal code) and reiteration, namely the commission of a new offence after a definitive conviction, when the legal conditions of relapse are not met[1].

[1] I. Pascu et al., *Noul Cod penal comentat. Parte generală*, 2nd Volume (Bucharest: Universul Juridic, 2014), 300-301.

In the Italian criminal law, "relapse" which means "recurrence" individualizes the personal condition of the one who, after he has been convicted for an offence, commits another one and is declared as recidivist by the judge. In order for the relapse to take place, it is not enough for the person to have committed a previous crime, but it must already be definitively convicted by a sentence (even foreign, recognized as an international relapse)[1].

Art. 99 of the Italian criminal law states three types of relapse, namely: simple relapse, aggravated relapse and repeated relapse. In the meaning of the Italian criminal law, the relapse is repeated when a new offence is committed by a person who was already a recidivist. The relapse in the meaning of the Italian legislator represents, as in the meaning of the previous Roman criminal code, an optional cause of aggravation of the punishment. The Italian legislation states the perpetual relapse[2].

There is recurrence when a person, already a recidivist, commits another intentional offence. The increase of the punishment is half of the punishment applied for the new intentional crime, if the perpetrator is in a state of simple relapse, and of two thirds if the perpetrator is in a state of aggravated relapse. This type of relapse is excluded in case of misdemeanors and culpable offenses[3].

According to German legislator, the effect of special prevention of aggravation of the punishment for relapse is considered doubtful, considering that the existing levers in the criminal legislation on sanctions offer the possibility of aggravation of punishment in case of relapse. However, the relapse is taken into consideration by the legislator among the general causes for aggravation stated by Para 46 II, following the individualization of the punishment to take into account the circumstances that aggravate or mitigate the responsibility of the perpetrator[4].

The Belgian criminal law defines the relapse similar to the French law (it is not interested if the convicted has or has not served his

[1]http://www.utgjiu.ro/revista/jur/pdf/2012-1/5_ELENA_GIORGIANA_SIMIONESCU.pdf, accessed on 4 June 2019
[2] Pascu et al., *Noul Cod penal comentat. Parte generală*, 301
[3] G. Antoniu and al., *Explicaţii preliminare ale noului Cod penal*, 1st Volume (Bucharest: Universul Juridic, 2010), 433
[4] Pascu, *Noul Cod penal comentat. Parte generală*, 301

sentence). As in the Romanian criminal law, the Belgian law does not consider, as the first term of the relapse, the convictions that benefited from amnesty or rehabilitation. The aggravation of the penalty for relapse is left by the Belgian criminal law at the discretion of the court[1].

In the Spanish criminal law, the relapse represents an aggravated circumstance of criminal liability being stated in Chapter V, Art 22 Para 8 of the Criminal Code, according to which there is relapse when, at the moment of committing the criminal act, the accused was convicted with the execution of the punishment for a crime included in the same title of the present Code, when the nature of the crime is the same. Relapse is therefore an aggravating circumstance[2].

According to the Spanish Criminal Code, the circumstance of relapse is personal and shall not be reflected upon the co-authors or other participates.

2. BRIEF CONSIDERATIONS ON THE REGULATION OF ATTEMPT IN FRANCE, SPAIN, ITALY, BELGIUM AND GERMANY

From the comparative analysis of Art 33 of the Romanian Criminal Code, which states the penalty for attempt and the ones stated by other foreign criminal codes in the same matter, it can be noted that there are similarities of solutions, especially with regard to the differentiated system of punishment of the attempt in relation to the crime committed and the non-punishment of the absolutely inappropriate attempt, taking into account some particularities[3].

The French Criminal Code in Art 121-5 states that "The attempt takes place from the moment when, manifested by a beginning of execution, it was interrupted or did not produce the effect, due to circumstances independent of the author's will. This code always criminalizes the attempt when it comes to murder and sometimes, in limited cases where the criminalization rule provides that the attempt is

[1] Pascu, *Noul Cod penal comentat. Parte generală*, 301
[2]https://www.utgjiu.ro/revista/jur/pdf/2012-1/5_ELENA_GIORGIANA_SIMIONESCU.pdf
[3] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *Noul Cod Penal comentat. Partea generală*, 1st Volume (Bucharest: Universul Juridic, 2012), 257-258

punishable. Art 433-4 Para 1 states that the act of destruction and misappropriation of goods from a public warehouse is incriminated, and Para 2 provides that the attempted crime described in Para 1 shall be punished with the same penalty[1].

The Spanish Criminal Code describes the attempt in Art 16 Para 1: "There is attempt when the author begins to perform the offence directly, through external actions, performing all or part of the acts which, objectively, should produce the result, but this does not take place due to causes beyond the control of the author". This criminal codes states in Art 64 the penalty for the attempt. Based on this text, the author of the attempt to an offence shall receive a penalty with one or two degrees smaller than the one stated by the law for the offence commissioned, in the appropriate size, taking into account the inherent danger of the intention and the degree of execution of the action. These provisions shall not apply if a special law states a different penalty for the attempt of a certain offence[2].

The Italian Criminal Code states in Art 56 Para 2 that "Whoever acts with the undoubtable purpose of committing an offence shall be liable for the attempt, if the action was interrupted or its result did not occur". According to this article, the perpetrator of attempted crime is punishable by imprisonment of not less than 12 years if the punishment is life imprisonment provided by law for that crime and, in other cases, with the penalty provided for the offense reduced from one third to two thirds.

Art 49 with the marginal title "offence presumed wrong and impossible offence" established the rule that the person committing an action not representing an offence cannot be punished under the wrong assumption that it represents an offence. Punishment is also excluded when, due to the unfitness of the action or the absence of the object, it is impossible to produce a harmful or dangerous result[3].

The Belgian Criminal Code states the attempt in Art 51, according to which "There is an attempt to be punished when the decision to commit a crime or offense has been manifested by external acts or forms

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[1] Pascu, Dima, Păun, Gorunescu, Dobrinoiu, Hotca, Chiș and Dobrinoiu, *Noul Cod Penal comentat. Partea generală*, 243

[2] Pascu, Dima, Păun, Gorunescu, Dobrinoiu, Hotca, Chiș and Dobrinoiu, *Noul Cod Penal comentat. Partea generală*, 243

[3] Pascu, Dima, Păun, Gorunescu, Dobrinoiu, Hotca, Chiș and Dobrinoiu, *Noul Cod Penal comentat. Partea generală*, 243

the beginning of the execution of this crime or offense and which have been interrupted or not carried out due to circumstances beyond the control of the author's will". Thus, according to this article, the attempted murder is punished with the punishment immediately inferior to the actual crime, while Art 80 and 81 regulate the reduction or modification of punishments in case of mitigating circumstances and which also apply in the punishment of the attempt[1].

The German Criminal Code describes the attempt in Art 22 as: "An attempt is committed by a person who starts committing an offense directly, in accordance with his decision to commit that offense, without having committed it". Art 23 Para 1 states that the attempt of committing a crime shall be always punished, and the attempt to commit an offence shall be punished only when the law expressly states it. Para 2 of the same article states that the penalty for attempt can be smaller than the one for the commission of the offence as consumed.

In case of attempt, the reduction of the penalty shall be made according to Art 49 which states the effects of the mitigating circumstances and according to which, the penalty of life imprisonment is replaced with the penalty of imprisonment for maximum 3 years, and in case of the penalty with imprisonment a maximum sentence of three quarters of the maximum sentence shall be imposed.

In the case of a fine, the same principle applies to the maximum number of daily installments.

When the court needs to reduce, according to a law referring to the above provisions, from its own appreciation, it can reduce the penalty to the legal minimum provided by the law or may replace the penalty of imprisonment by fine.

If the perpetrator did not know from the simple incompetence that the commission of the crime would not be possible due to the particularities of the object or the means used, the court may waive the sentence or reduce the sentence according to its own assessment according to Art 23 Para 3[2].

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[1] Pascu, Dima, Păun, Gorunescu, Dobrinoiu, Hotca, Chiș and Dobrinoiu, *Noul Cod Penal comentat. Partea generală*, 243

[2] Pascu, Dima, Păun, Gorunescu, Dobrinoiu, Hotca, Chiș and Dobrinoiu, *Noul Cod Penal comentat. Partea generală*, 243

CONCLUSIONS

Being about legislations registered in the Romano-Germanic legal system, the analyzed institutions present numerous similarities, the differences being more of form than of substance.

For the relapse are known many classifications, but the most important one is that which divides the relapse in two categories: the post-conviction relapse and the post-execution relapse.

Unlike the post-conviction relapse, the post-execution one presents an enhanced seriousness, being considered far more dangerous, because it consists in the commission of a new offence after the execution of the punishment or the extinguishment of the penalty, ruled for the previous offence, while the post-conviction relapse refers to the commission of a new offence after the decision of conviction has remained definitive for the previous offence, without the penalty decided for that offence to have been executed or considered as entirely executed.

A new classification, which we consider important depends on the nature of the offences forming the relapse: the general relapse (offences committed may be of a different nature or of the same nature) and the special relapse (offences of the same nature or similarities between offences representing the terms of relapse).

Regarding the compared law and considering this classification, according to the French criminal law, the relapse represents a general aggravating circumstance.

Unlike the regulation from the Romanian criminal code, the French criminal law does not differentiate between the post-conviction relapse and the post-executory relapse, the criminal treatment for relapse being identical.

The research of the regulation of relapse and the means in which is sanctioned must be carried out in close connection with the judicial practice, respectively with the application of the special criminal norms by the competent judicial bodies, being necessary to be carried out in accordance with the legislator's will.

Therefore, both in our legislation, as well as in that of other states, the main reason for the emergence of relapse is represented by the criminal perseverance of the perpetrator, the danger of recidivism arising from the commission of a new crime, although the person who violated

the criminal law had been convicted by a final decision or had already served a full sentence, the penalty established by a final conviction.

The attempt, basically, is an autonomous offence comprising: the same legal object with the one of the consumed offence, in some cases a material object, an active subject (the person who has applied the intent to commit an offence), the objective side (the material element consisting in just one action and not inaction, the immediate effect consisting in a state of danger) and the subjective side (the same with that of the consumed offence: with direct or indirect intent).

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TOTALITARIAN TENDENCIES IN ROMANIAN LAW

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Abstract:

The present study aims, starting from the more general theme of dealing with aspects related to the Romanian normative system, taking into account its recent history, to contribute to a clearer outline of the place that Romania occupies in this corollary of the states that it forms the great European family, in the light of the legislative picture, of the models and forms of regulation adopted by our country.

Regarding the research hypothesis, we start from the premise that the analysis of the Romanian legislative system cannot ignore the recent communist past, the discussion being on the wider field of totalitarianism analysis, as well as its present and past ramifications. Therefore, when trying to analyze a normative system or a part of such a system, meant to highlight the legislator's vision of some legal institutions, the aspects related to the theoretical substantiation of a certain type of vision should not be omitted, in relation to which can also be understood as the need for regulation and its purpose.

We notice that the elaborated study has as objective the identification and analysis of some totalitarian aspects present in the legislative system with special inclination on the matter of property.

Regarding the research results, it was concluded that the law in force has a tendency towards totalitarianism, exemplifying some of the features identified and their implications for property.

Regarding the theoretical and practical implications of the study, they consist in understanding the reality of the Romanian legislative system, the difficulties faced by both practitioners and doctrine, as well as creating a bridge between history and law, in terms of how the former influences a certain type of vision of the legislator, being able to outline regulatory models based on two different ways of understanding the relationship between individual and state, namely totalitarianism and liberalism, an aspect to which it is observed that Romania's place in the family of the states that make up the European Union is indisputably that of a former totalitarian state.

Keywords*: totalitarianism; private property; normative inflation; law; state property.*

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INTRODUCTION

The present study aims, starting from the more general theme of dealing with aspects related to history, culture and citizenship within the European Union, to contribute to a clearer outline of the place that Romania can occupy in this corollary of the states that form the European family, in terms of the legislative picture, the models and forms of regulation adopted by our country. This scientific approach will not focus on addressing issues of legislative technique (this path will be left to the discretion of other legal experts), but will address issues related to the sustained effort that our legislative system makes in the years to come after the fall of the communist regime in an attempt to establish democracy.

Although the recent legal doctrine focuses mainly on the study of aspects of practice, in the sense of in-depth analysis of the current legislative context and the necessary reforms in this regard, we consider it necessary to emphasize that our national identity, from which derives the spirit of the rules by the Romanian legislator, he cannot ignore the recent communist past.

In essence, as the saying goes, "A revolution is never half done; it must be total, otherwise it will fail. All the revolutions whose memory has been preserved by history, as well as those made in our times, failed because people wanted to reconcile the new laws with the old customs and to run new institutions with old people"[1]. It is easy to see that transformation cannot be easy, given that political regimes are not independent entities but are always based on a social reality, being created and supported by it, because as has been pointed out in the doctrine" order and justice are for the collective mind as space and time are for individual thought: indispensable formal frameworks"[2].

If we accept as a starting point regarding the analysis of aspects related to Romania's place in the system represented by the European Union, the fact that we cannot ignore our communist past, then the discussion is on the wider field of totalitarianism analysis, as well as of

[1] Marat-Mouger, cited in *Hunt, Politics, 27, apud*. David Priestland, *Steagul Roșu, O istorie a comunismului* (Bucharest: Ed. Litera, 2012), 34.

[2] D. C. Dănișor, *Teoria Generală a Dreptului*, material in progress, the part entitled Constituționalismul liberal – footnote will be modified after the publication of the paper by the author.

its present and past ramifications. In this context, we emphasize once again that when trying to analyze a normative system, or part of such a system, designed to highlight the view of the legislator on legal institutions, *should not be omitted aspects related to the theoretical basis of a particular type of vision*, in relation to which *the need* for regulation and *its purpose* can also be understood.

Thus, insofar as the discussion focuses on totalitarian political regimes - *which must be remembered since we want to emphasize that Romanian law has a tendency towards totalitarianism* - and on political changes that have led to real revolutions in Europe, we can essentially say that the studies generated by these phenomena are extensive but certainly all the analyzes have as a point of reference the collapse of the absolutist monarchies from the XVIII-XIX centuries. It should be noted that even to the extent that some monarchical systems survived, the powers of the sovereign were obviously and unquestionably restricted to the social discontent generated by centuries of privileges. Thus, as a reference period in the analysis of the evolution of political ideologies in the period from the end of the 18th century to the beginning of the 19th century remains the French Revolution, which by its magnitude and importance produced significant consequences for political regimes throughout Europe.

In fact, recent doctrine[1] has shown that the ramifications of these phenomena extended to the 20th century, given the fact that "the last century was marked by the confrontation, sometimes, unfortunately, violently, of two ways of understanding the relations between the individual and the state: totalitarianism and liberalism". In this respect, we can say that the place occupied by Romania in the family of the states that still make up the European Union is indisputably that of a former totalitarian state.

I. THE FEATURES OF TOTALITARIAN SYSTEMS

The ideas of the French revolutionary movement were taken over and incorporated by Marx and Engels, and represented the hallmarks of the system they created, which sought to reveal how a system such as the one proposed by the Communists could be reconciled with the idea of

[1] Dănișor, *Teoria Generală a Dreptului*, footnote will be modified after the publication of the paper by the author.

economic prosperity. "Communists, *wrote Marx and Engels* in the *Communist Manifesto*, can summarize their theory in the formula for the abolition of ***private property***. Their Bolshevik disciples who took power and founded the Soviet Union followed this theory entirely, confiscating much of the country's wealth by various means and using it to establish a new regime of property: socialist property. What was replaced was not entirely *private property*, as at that time, in rural areas of Russia, joint ownership of the land prevailed"[1]. Next, the quoted authors note[2] that "the dissolution of previous forms of ownership did not last long" - *mutatis mutandis* the remark also applies to Romania - "several decrees of nationalization, several years of permanent attacks on the peasantry, and people gave up their prerogatives of owners. The one hundred and twenty-five million peasants of the Soviet Union were largely collectivized over four years (1929-1933); they were followed, from 1948, by those from Eastern Europe, in a period of 10 to 14 years (1948-1962). Although the feeling of private property may have persisted, the associated *rights* have been transferred to the planning ministries and bureaucratic apparatus of Soviet-style communism".

In fact, as shown[3], "Marx grew up in a region on a historical and political rift: between revolutionary France, with its principles of equality of all citizens before the law, and noble Prussia, based on autocracy, hierarchy and aristocratic privileges".

Consequently, and compared to those shown in the previous paragraphs, when we discuss totalitarian regimes it can be stated that in principle two political regimes in Europe can be considered as fully totalitarian, Nazi Germany and Soviet Russia.

J. Friedrich and Zbigniew Brzezinski were the ones who tried to propose an analytical model for the study of totalitarian regimes, based on their common elements, but also of the differences between them and traditional autocratic regimes. The two pointed out that there are *six main*

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[1] K. Marx and F. Engels, in *Manifestul Comunist, ediție îngrijită de Cristian Preda, comentarii de Cătălin Avramescu, Radu Cosașu, Ion Ianoși* (Bucharest: Nemira, 1998), 25 *apud*. Gail Kligman and Katherine Verdery, *Țăranii sub asediu. Colectivizarea agriculturii în România 1949 – 1962* (Iași: Polirom, 2015), 22.

[2] Marx and Engels, in *Manifestul Comunist, ediție îngrijită de Cristian Preda,* 25 *apud*. Kligman and Verdery, *Țăranii sub asediu. Colectivizarea agriculturii în România 1949 – 1962*, 22.

[3] Priestland, *Steagul Roșu – O istorie a comunismului*, 57.

features of totalitarian regimes, which they identified as[1]: an official ideology, consisting of a body of doctrine covering all vital aspects of human existence to which everyone living in society must adhere at least passively; a single mass party, consisting of a relatively small share of adherents among the population (up to 10 percent), organized in a strictly hierarchical, oligarchic way, usually under a single leader; an almost complete, technologically conditioned monopoly of all effective means of armed struggle; an almost complete and technologically conditioned monopoly on effective means of mass communication; a system of police-terrorist control usually directed not only against the obvious enemies of the regime, but against arbitrarily elected classes of the population; a centrally governed economy.

Since the present material aims to identify the *totalitarian tendencies* in the current Romanian private law, we would say with a more special look at the matter of *property*, we must first identify what allows in the age we are going through that the law is sometimes dominated by totalitarian tendencies, given that the experience of such regimes remains a sad memory and a failure of modern history.

We agree with the opinion expressed, in relation to which "the social man naturally tends towards regulation. His natural tendency is to demand that all behaviors be carried out in order and that the violation of order trigger a mechanism for its restoration. The need for order and justice makes the social man oriented towards the permanent extension of the scope of law. Law seems to have to regulate everything, for order to be perfect and justice to be satisfied. Society seems naturally oriented towards totalitarianism"[2].

The growing trend of today's society is that most individuals are not given by those who have a real education in the sense of assuming decisions and conduct, preferring that someone, in this case *the state*, tell them what conduct should be followed in a certain situation. At the same time, although according to the legislation in force in Romania, the exercise of any right is supposed to be in accordance with its purpose and the requirements of good faith, in reality individuals are not inclined to

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[1] C. Iordachi, *Fascismul european (1918-1945), Ideologie, experimente totalitare și religii politice* (Cluj-Napoca: Institutul pentru Studierea Problemelor Minorităților naționale, 2014), 45.

[2] Dănișor, *Teoria Generală a Dreptului*, footnote will be modified after the publication of the paper by the author.

such behavior, so the tendency of the legislator is to regulate all possible aspects of daily life, so as not to distort the rules of finality which have been taken into account by the abusive exercise of certain rights.

We also note that in Romania's case it is not possible to discuss the completion of the transition process - in itself this process is a long lasting one - so that the traces left by the old regime still make their presence felt, the recipients of legal norms are still insufficiently experienced to oppose resistance to that part of the law which represents an unjustified interference in the sphere of individual rights and freedoms. Moreover, even the identification of those situations in which the legislature goes beyond the scope in which it should operate from a regulatory point of view is not necessarily easy to identify. We can say without mistaking that currently Romanian law, seen as a set of rules, is difficult to correlate and apply even by legal professionals who are put in the situation of working with texts from different matters, which must be interpreted in conjunction, in order to ensure their effectiveness.

In order to exemplify the difficulties encountered by the Romanian practitioner, we aim to show that *one of the facets of totalitarian law* - namely the tendency to over-regulate - can be identified by analyzing all the rules adopted after 1990 on *property matter*. In this respect, it is important to specify that the Romanian legislative system is characterized not only by a codification of the norms incident in certain matters, but also by the existence of a related legislation important in terms of volume. We also show that in general it is difficult to identify an area that is regulated by a single normative act, comprehensive in all aspects, the current law being characterized by a set of rules that need to be correctly identified by the practitioner (constituting thus the law applicable to a given situation), applied in conjunction with the principles governing the application of the law over time.

II. THE REFLECTION OF THE TOTALITARIAN TENDENCIES OF THE LAW IN THE MATTER OF THE PROPERTY

Continuing the reasoning set forth, regarding the legal regime of property, we will exemplify taking into account their category, namely construction law and land law.

As shown in the recent doctrine[1], "due to their importance, as well as by taking into account general and social interests, the exercise of the right of private property over certain categories of property may be subject to special rules by the legislator." In this respect, we emphasize that what we intend to show is not the fact that Romanian law is a totalitarian one - *the emphasis being important not to lead to a misunderstanding of this study* - but that Romanian law has totalitarian tendencies, in our opinion the trend is one amplified by Romania's recent communist legacy.

With regard to the legal regime of constructions, it was pointed out that "the general legal framework of spatial planning and the execution, transformation and demolition of constructions is of particular interest, because, from the point of view of their circulation, they are in the general civil circuit"[2].

In this matter, the general principles are enacted by the provisions of Law no. 350/2001, on landscaping and urbanism[3], as well as the provisions of Law no. 50/1991, regarding the authorization of construction works[4].

In order to regulate the situation of real estate or to give individuals the opportunity to acquire in personal property inhabited real estate or even of another destination, either by buying from the state or by housing construction[5], several normative acts have been developed, as it follows:

1) Decree-law no. 61/1991, regarding the sale of houses built from state funds to the population;

2) Law no. 85/1992, regarding the sale of dwellings and spaces with another destination, built from state funds and from the funds of state economic or budgetary units;

3) Law no. 112/1995, regarding the regulation of the situation of some buildings with the destination of dwellings, passed into state ownership

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[1] C. Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil* (Bucharest: Hamangiu, 2017), 102.

[2] Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil*, 102.

[3] Published in the Official Gazette Nr. 373 / 10.07.2001.

[4] For the amendments and completions suffered by Law no. 50/1991, Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil*, 103.

[5] Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil*, 106.

4) Law no. 114/1996, of the dwelling.

Without analyzing in detail the provisions of Law no. 61/1991 and of Law no. 85/1992, we will limit ourselves to stating that they were conceived as social protection laws, taking into account certain facilities that they granted to the buyers[1].

At the same time, regarding the legal situation of the land on which the dwellings acquired in accordance with the legal provisions shown above are located, it is noted that according to art. 3 (2) of the Decree-law no. 61/1990, together with the house, the *right of use* over the related land is transmitted to the buyer, during the existence of the construction.

Another regulation is found in the provisions of art. 36 (2) of Law no. 18/1991, text in relation to which the state-owned lands, located within the built-up areas of the localities, assigned according to the law in eternal use or during the existence of dwellings for the construction of personal property houses or on the occasion of state purchase of such dwellings pass, at the request of the current owners of the dwellings, in their ownership, in full or as the case may be in proportion to the share held in the construction.

Similarly, art. 10 of Law no. 85/1992 stipulates that if in a building are several dwellings or spaces with another destination that are for sale, together with the property right over them, the property right over the land afferent to the building is acquired, as determined by the authorization construction or through the technical data sheets of the land related to the building.

Regarding Law no. 112/1995 *for the regulation of the legal situation of some real estate for residential use, passed into state ownership*, it regulates some reparative measures for former owners of real estate for residential use transferred to state ownership or other legal entities, after March 6, 1945, with title, and which were in the possession of the holder or other legal persons on 22nd December 1989.

In order to apply the normative provisions of Law no. 112/1995 it is necessary that the transfer of the house into state ownership was made on the basis of a *valid title* for the state or another acquirer, following that the validity of the title is analyzed in relation to the legal provisions in force on the date it operated.

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[1] For more details see Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil*, 107, E. Chelaru, *Drept Civil. Drepturile reale principale, ediția a 5-a* (Bucharest: C.H. Beck, 2019), 233.

It was shown[1] that the application of the remedial measures provided by Law no. 112/1995 does not represent a way of acquiring the property right by the beneficiaries, but a re-acquisition of a right that the holder previously had in his patrimony. It is true that he lost it as a result of the application of abusive measures for a period of time, when his holder was the state or another subject of law who received the property in question. Also, on the basis of the perpetuation of the property right, the holder of the reparative measure will regain the the right temporarily lost.

Regarding the provisions of Law no. 114/1996 - the law on housing, it defines the notion of housing as the construction consisting of one or more living rooms, with the necessary outbuildings, facilities and utilities, which meets the living requirements of a person or a family (art. 2 let. a). This law was completed by the provisions of GEO no. 210/2008, which added in addition to the definition of actual housing - other categories of housing.

With regard to the interference of the legislator in the property right concerning constructions, it is noted that even in the period before 1990 they were in the general civil circuit, with the mention that the legal acts having as object the transfer of the property right regarding the constructions, respectively the establishment of real rights over them were conditioned by administrative authorizations and by the conclusion of the act in authentic form under the sanction of absolute nullity.

Regarding the period after 1990 and until the adoption of the New Civil Code, the specialized doctrine was of the opinion that there was no special formal condition regarding legal acts having as object the transfer or establishment of real rights regarding constructions[2].

Currently, the legal regime of constructions is regulated by the provisions of art. 885 of the Civil Code, in relation to which the real rights over the real estates included in the Land Registry are acquired, both between the parties and towards third parties, only by their registration in the Land Registry, based on the legal act or fact in a restricted sense that justified registration.

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[1] Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil*, 109.

[2] Bîrsan, *Drept civil. Drepturile reale principale în reglementarea noului Cod Civil*, 113.

At the same time, in accordance with the provisions of art. 888 of the Civil Code, the registration in the Land Registry of real rights (thus including the real rights over constructions), is made on the basis of the authentic notarial deed, the final court decision, the heir certificate or another document issued by the authorities administrative, in cases where the law provides for it.

Also, in accordance with the provisions of art. 886 of the Civil Code, the modification of a real estate right is made according to the rules applicable to the acquisition or extinction of the real rights, unless otherwise provided by law.

We note, however, that in accordance with the provisions of art. 56 para. 1 of Law no. 71/2011, regarding the implementation of the provisions of the New Civil Code, the provisions of art. 885 para. 1 Cpc it is applied only after the completion of the cadastral works for each territorial administrative unit and the opening, upon request or ex officio, of the land books.

Thus, at this time, until the date on which the cadastral works will be completed, the registration in the land book (Land Registry) of the property right and other real rights based on the legal acts by which they were transmitted, constituted or validly modified is made only for the purpose of opposability to third parties, between the parties the transmission operating at the time of completion of the act in authentic form, in accordance with the provisions of art. 1244 of the Civil Code.

Regarding the legal regime of land buildings, the provisions of Law no. 18/1991 are particularly noteworthy. As it was observed in the doctrine[1], "the return of the Romanian society to the system of values based on the respect of private property imposed the necessity of adopting reparative measures for those who lost the ownership of the lands (...). The basic normative act in this matter is the Land Fund Law, no. 18/1991, which uses the reconstitution procedure, respectively the incorporation procedure in order to establish the property right over the lands.

In accordance with this normative act, namely according to art. 1, the lands of any kind, regardless of the destination, of the title on the basis of which they are owned or of the public or private domain of which they are part, constitute the land fund of Romania.

[1] Chelaru, *Drept Civil. Drepturile reale principale, ediția a 5-a,* 149.

According to art. 2 of Law 18/1991, depending on the destination, the lands are classified in:

a) lands with agricultural destination;

b) lands with forest destination;

c) lands permanently under water;

d) urban lands, afferent to urban and rural localities;

e) lands with special destinations.

According to art. 3 of the same normative act, by landowners is meant the holders of the property right, of other real rights over them or those who, according to the civil law, have the quality of precarious possessors or holders. According to art. 74 and art. 75 of Law no. 18/1991, the owners of agricultural lands are obliged to ensure their cultivation and soil protection, otherwise they may be sanctioned for minor offenses. At the same time, the change of the category of use of the arable lands of the legal persons can be made only with the approval of the county specialized bodies, in accordance with the law (art. 77).

With regard to individuals, they are free to change the category of use of agricultural land they own, with the obligation to announce the change within 30 days from the date when it occurred, at the county agricultural and of the organization of the agricultural territory cadaster office.

We mention that in accordance with the provisions of art. 82 and 83 of Law no. 18/1991, the owners of agricultural lands are obliged to execute, through specialized units, the works necessary for the protection and improvement of the soil, established by the competent bodies. In the case of degraded and polluted lands that have lost their agricultural or forestry production capacity, they will be constituted as improvement perimeters.

According to art. 91 of Law no. 18/1991, the location of constructions of any kind is made within the built-up areas of the localities, except for those that by their nature can generate polluting effects on environmental factors.

Without analyzing all the obligations of landowners under Law no. 18/1991, we will limit ourselves to stating that both the high economic value and the limited character of the land fund imply that its legal regime is a special one, likely to limit some of the attributes of the property right, but *nevertheless it is observed that the tendency of the legislator has been to over-regulate in a subject where matters of clarity,*

predictability and accessibility should be given priority. It should also be noted that the legal texts referred to raise issues of applicability over time, given that they have been subject to successive amendments and completions.

As we noted in the previous paragraphs, totalitarian law is unquestionably an ideologized law. Compared to this statement, we notice a confusion at the level of the Romanian legal system between what a good society means, what are the principles that should substantiate it, in accordance with the vision of the masses on it, and a certain moral order, confusion that persists including how some legal practitioners understand to interpret and apply legal rules.

Equally, with regard to the restitution of property abusively confiscated by the state during the communist period (in any of its forms), we note that this confusion between the principles underlying a just society and the moral order leads to decisions in the form of Decision no. 42/2016[1], regarding the examination of the notification formulated by the Galați Tribunal - Civil Section I, in order to pronounce a preliminary decision regarding the interpretation and application of the provisions of art. 1 para. (3) and art. 4 thesis I of Law no. 165/2013 regarding the measures for finalizing the process of restitution, in kind or by equivalent, of the buildings abusively taken over during the communist regime in Romania, with the subsequent modifications and completions, by reference to the provisions of art. 1 para. (1) and art. 3 point 6 of the same normative act, art. 27 para. (1) of the Land Fund Law no. 18/1991, republished, with subsequent amendments and completions, and art. 1 of Protocol no. 1 in addition to the Convention for the Protection of Human Rights and Fundamental Freedoms, a decision which stated that "if the holder has alienated his rights due to him under the laws on restitution of property, and the request for reconstitution formulated under the laws of the land fund was not resolved by issuing the title of property or compensation for the benefit of the original owner, his heirs or the third party acquirer until the date of entry into force of Law no. 165/2013, the assignee, as a person entitled to reparative measures, has the exclusive right to the reparative measure provided by the new reparation law consisting in the compensation by points according to art. 24 para. (2) - (4) of Law no. 165/2013, with subsequent amendments and completions".

[1] Official Gazette, P. I, no. 105 / 07.02.2017.

It was pointed out that "the reason for establishing a different regulation on the way of compensation in relation to the beneficiaries of the law is the fact that the entire reparatory legislation targeted exclusively the right holder or his heirs, because the abusive nature of taking over real estate affected the person, so the situation of the acquirers of rights arising from the restitution laws knows, in the conception of the new law, a special regulation regarding the granting of reparative measures, the Romanian legislator placing, in accordance with the requirements established by the European Court of Human Rights, by the Pilot Decision, pronounced in the Case of Maria Atanasiu and others against Romania, within the margin of appreciation of the manner of configuration and execution of the state receivables in the matter of restitution of real estates. Moreover, the Constitutional Court of Romania, highlighting the purpose pursued by the legislator when establishing different regulations on how to compensate in relation to the beneficiaries of the law, stressed that the legislator's option to exclude from the remedial measure of restitution in kind, as well as that of full compensation by points, the persons in whose patrimony the right to obtain remedial measures was transferred, through onerous contracts, appears to be objectively and reasonably justified, directly or indirectly overturning the abusive takeover measures"[1]. In the interpretative decision cited, it was mentioned "regarding the new restitution mechanisms, (...) that the European contentious court, in the Pilot Judgment Maria Atanasiu and others against Romania (paragraph 135) underlined the fact that the former communist states have no obligation to return the goods that were confiscated before the ratification of the Convention and that it is the option of each state to assess the method of restitution, having the possibility to adopt any regulation in this regard, and in the Judgment of April 29, 2014, in the Preda and others Case against Romania, the European Court of Human Rights did not criticize Law no. 165/2013, as subsequently amended and supplemented, but found that, in principle, the law does not in itself infringe the right to property, constituting an effective remedy, which must be covered, and regarding the method of calculation and award of compensation considered that the choice of solutions falls within the margin of appreciation of the state".

[1] See the decision in detail.

When we talk about the ideology of the general good, it is easy to prioritize the general interest over individual rights, because "in the name of the general interest, the individual is called to fully comply with the demands of society"[1].

At the same time, we note that currently any norm developed in a certain field is seen and presented by the legislature as a form of progress, for the stated purpose of building a better society.

From this point of view, we should not ignore the fact that an essential characteristic feature of totalitarian regimes was related to the construction of the *new man*, in the sense that during the communist period the Propaganda Minister Leonte Răutu stated that "It is no secret, our peasants are very backward culturally and in terms of how the earth should be worked scientifically (...). That is why we need not to make an abstract agitation but to spread progressive methods of processing the land and raising cattle"[2].

Although we might consider the above statements obsolete in the current context, it is important to understand that the claim to be able to build a better society and a new man, superior, moral and perfectly adapted to the times he lives can lead to such a vision in any area of life.

We further note that, in principle, totalitarian states are distinguished by the existence of a single mass party, or rather by the non-existence of political pluralism. We thus wonder if in the socio-political context of contemporary Romania there is a real and effective difference from a doctrinal point of view regarding the parties that make the policies that should be implemented. In this respect - in order to motivate such a statement in the context of an analysis that is still predominantly about law, we allow ourselves to say that although most opinions in today's society are in the sense of clear separation of political analysis from legal, by reference to the principle of separation of powers, this idea should not be taken to the extreme and distorted from the original intended purpose. Thus, the fact that the judiciary is separate from the political power should be understood only in the sense of the independence of magistrates in giving judgments and not in transforming

[1] Dănișor, *Teoria Generală a Dreptului*, footnote will be modified after the publication of the paper by the author.

[2] Kligman and Verdery, *Țăranii sub asediu. Colectivizarea agriculturii în România 1949 – 1962*, 217.

the science of law into something different and separate from the political sciences, as such a separation would be deeply unrealistic.

The fact that legal professionals do not benefit from an institutionalized training in the field of political science is unfortunately a vulnerability of the system, impossible to cover by teaching the subject of Constitutional Law in law schools in Romania, a vulnerability that makes magistrates relatively simple to transformed into simple instruments of law enforcement dictated by the legislature, an aspect to which "justice no longer ensures a balance between diverse conceptions, interests, groups but imposes some of them. Law, thus, becomes a means of reconfiguring perfectionist values. He ensures the creation of the new man, who fully integrates into the "wonderful new world"[1].

In contemporary society we talk more often about institutions and how they are or can become effective, but almost not at all about the individual rights whose exercise should be facilitated by these institutions. In this respect, the tendency of the so-called education of the citizen in the idea of hatred towards certain social categories, as well as the idea of his education in the sense that he would have to accept unconditionally the legal realities imposed by the party, has been preserved since the communist totalitarian regime.

Regarding the period of the totalitarian regime, it is noted that "since the communist power was imposed in Romania from outside, and not as a result of an internal revolutionary process, the party had to deal with a population very unresponsive to its ideas. He had to build a revolutionary society, and at the same time raise the level of consciousness of the people, transforming its class structures even as he taught his citizens what were the new forms of expression and the new conceptual categories through which it was necessary to think"[2].

Regarding the hatred towards certain social categories, it is noted in Romanian law that, even if not directly *de jure*, at least *de facto*, in recent years there has been an undeniable tendency to protect certain disadvantaged categories, inducing the idea that other categories benefit from undeserved rights. Although the Romanian state protects the lawfully acquired wealth, an aspect that should encourage both the

[1] Dănișor, *Teoria Generală a Dreptului*, footnote will be modified after the publication of the paper by the author.

[2] Kligman and Verdery, *Țăranii sub asediu. Colectivizarea agriculturii în România 1949 – 1962*, 218.

business environment and certain categories of public servants who should be guaranteed above average income in terms of activity, in concretely, we are witnessing a demonization of them that reminds of the communist period through the light of the class struggle. It was thus remarked that the main component of the class struggle was "the demonization of the rich peasants by words and deeds." "The social struggle was meant to generate social conflicts and in addition to offer the former rich peasants unprecedented opportunities"[1].

Last but not least, we are witnessing the untimely change of the legal framework regarding the regulation of some essential areas of state functioning, such as taxation, labor law, issues related to the organization and functioning of the justice system, regulation of essential areas in the functioning of a democratic state, such as the property regime, with all its implications.

The doctrine noted that "the arbitrary change of the legal order is another defining feature of totalitarian law. The security of persons never really includes their legal security, ie that guaranteed against the untimely and arbitrary change of legal rule."[2]

We recently pointed out[3] that "in a society focused on the protection of individual rights, the phenomenon of normative inflation is likely to lead to the regression of this protection." Moreover, the doctrine unanimously accepts that legislative inflation is an indicator of the evolution of a legal system towards totalitarianism.

We will choose again to exemplify the above ideas through the way of regulating the aspects related to the property right and their evolution in the recent past of Romania. Thus, under the rule of the Civil Code of 1864 there were no special provisions regarding the legal regime of land, the general principles will be applied, as they resulted from the whole regulation.

By way of example, we show that according to art. 475 Civil Code of 1864, anyone can freely dispose of the goods that belong to him, and according to art. 971 Civil Code of 1864 in contracts having as object the

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[1] Kligman and Verdery, *Țăranii sub asediu. Colectivizarea agriculturii în România 1949 – 1962*, 317.

[2] Dănișor, *Teoria Generală a Dreptului*, footnote will be modified after the publication of the paper by the author.

[3] A. M. Crînguș-Echert, „Impactul inflației normative în materia dreptului de proprietate", National Conference of PhD Students Craiova, in *Dreptul* (6-7 dec. 2019).

translation of property or another real right, the property or right is transmitted by the effect of the consent of the parties.

From the corroborated interpretation of the texts of the Civil Code of 1864, it was concluded that the principle of consensualism of legal acts also applied to land transactions.

Between 1947 and 1989, under the communist regime, a prior administrative control of alienations of all categories of land was established and the condition of the authentic form of the alienation act was imposed.

Regarding the measures taken immediately after the establishment of the communist regime, it should be noted that a few months after the establishment, 1050 industrial, banking or insurance enterprises passed into the hands of the state, in accordance with the provisions of Law no. 119/1948 - of nationalization.

At the same time, on March 2, 1949, by Decree no. 84 began the collectivization, by expropriating the properties larger than 50 ha, until 1962 passing into state ownership most of the agricultural properties.

Subsequently, in 1950, the buildings followed, being transferred to state ownership, without any compensation and free of any real burdens or rights of any kind, the buildings belonging to former industrialists, landowners, bankers and large merchants.

In 1974, the Laws no. 58 on the systematization of the territory and of urban and rural localities and no. 59 regarding the land fund were adopted, through which the lands were removed from the general civil circuit, the only recognized way of acquisition being the legal inheritance.

At the same time, in case of sale of the construction, the land afferent to it passed *ope legis* in the state property, the acquirer of the construction acquiring in use the land on which it was located, this being the reason why at present art. 36 para. 3 of Law no. 18/1991 stipulates that the lands assigned for use, during the existence of the constructions of their acquirers, as an effect of the takeover of the lands afferent to the constructions, under the conditions of art. 30 of Law no. 58/1974, regarding the systematization of the territory and of the urban and rural localities, become the property of the current holders of the right to use the land, homeowners.

Immediately after the 1989 Revolution, restrictive normative acts were repealed, and a series of normative acts were drafted, which in turn

were repealed by each other and produced legal effects by reference to the principle of *tempus regit actum*.

With the entry into force of the New Civil Code, a unitary legal regime of real estate was established, whether we are talking about land or construction, which is broadly represented by the provisions of art. 885 C.civ, art. 886 C.civ. and art. 888 C.civ.

In essence, subject to contrary legal provisions, the real rights over the real estate registered in the land book are acquired, both between the parties and against third parties, only by registration in the land book, based on the legal act or legal fact in a narrow sense that justified registration; the modification of a real estate right is made according to the rules applicable to the acquisition or extinguishment of real rights, unless otherwise provided by law; the registration in the land book of the real rights over all categories of real estate is made based on the authentic notarial deed, a final court decision, the certificate of heir, based on an act issued by the administrative authorities, in cases provided by law.

In accordance with the provisions of art. 1244 of the Civil Code, the constitutive or translational conventions of real rights to be registered in the land book must be concluded by an authentic document, under the sanction of the absolute nullity of the act by which these legal operations are performed.

The reason for limiting the exercise of the right of private property over land is related to the need for systematization and landscaping, as well as the needs of modern urbanism. The territory is an indispensable element of each state, thus explaining its regulation by norms of public law.

All of the above, in addition to other restrictions and limitations by which the legislator manages the matter of property, such as those related to the acquisition of ownership of land by foreigners or stateless persons, as well as by foreign legal entities, those affecting the legal status of assets in the national cultural heritage or the legal status of movable archaeological assets discovered by chance or through systematic research, are in fact legal permitted interference, by virtue of which the right of ownership is altered as to its absolute character, while affecting the right of the holder to dispose of in connection with the good.

In essence, the liberal state and its constitutional law prioritize freedom, but contemporary society has not yet reached this level of perception and awareness of the values of democracy. When we analyze

totalitarian regimes, we usually refer to them as belonging to the past, or at most as disappearing anomalies of the modern age. However, from a historical and sociological point of view, it cannot be said that the danger of the reappearance of totalitarian phenomena has disappeared, and some of them are well masked by the appearance of democracy.

CONCLUSIONS

Law cannot be viewed in isolation from a certain historical context, from the evolution of thought and ideas in a society at a given time. On the contrary, law is a social product, likely to reflect the degree of maturity of the individuals who make up a given society, as well as the way in which individuals understand to design the society in which they choose to live. That is why we cannot say that from the point of view of property research, it should ignore the historical and social phenomenon and focus only on the analysis of the norms adopted over time and incidents in the subject under analysis. The general picture of deprivation of property is analyzed in close connection with the phenomenon of communism, its birth and spread in Europe, which is why the present study cannot ignore the use of historical and sociological approaches, even if in the context of current doctrine, they do not are always considered by law researchers. It is thus tried to remove the present analysis from a purely dogmatic, and sometimes redundant, approach.

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GUARANTEEING THE RIGHT TO PROPERTY BY THE JUDICIAL AUTHORITY IN THE REPUBLIC OF MOLDOVA FROM THE PERSPECTIVE OF EUROPEAN STANDARDS

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Abstract:

In this scientific approach, a review of the means of defending the right to property by the courts is made and some jurisprudential divergences are highlighted, which in the light of the European judge could lead to a violation of art. 1 Protocol no. 1 to the Convention. At the same time, this scientific essay analyzes the responsibility of the judicial authority in cases of conviction of the Republic of Moldova for violating the right to respect for property in cases referred to the Court of Strasbourg.

Finally, the mechanism of accountability of judges through the state's right of recourse for convictions at the ECHR is evaluated and some solutions are proposed that would help to eradicate such convictions.

Key words: *property right; judicial authority; means of defending the right to property; non-execution or late execution of judgments; irregular quashing of judgments; accountability of judges.*

INTRODUCTION

Currently, justice is one of the central pillars on which a contemporary State law is based. Although the state mechanism for guaranteeing fundamental rights involves the effort of the three state powers, the cornerstone is the judicial authority, in the context in which it has a decisive role. During the period of strengthening the social function of property, the role of the judicial authority, especially the judge is essential, and the search for the best solution in property disputes is

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constrained only by law and maintaining a balance between the interests involved in the conflict[1].

Although the Republic of Moldova tends to integrate into the club of European democracies, and has shown particular concern for human rights, and especially for the right to property, the pace of adaptation to the rigors of the Convention for the Protection of Human Rights and Fundamental Freedoms is a slow one, with many syncopes. Or, we cannot ignore the condemnation of our state by the European court repeatedly for violating art.1 Protocol no. 1 al. In particular, for 2020[2], out of 32 judgments condemning the Republic of Moldova, in 11 judgments (art. 6 in conjunction with art. 1, Protocol no. 1 to the Convention) and respectively in four judgments (art. 1, Protocol no. 1 with the exception of art.6 ECHR), the European Court of Human Rights found a violation of the right to respect for property. Starting from this track, in this scientific approach we will try to identify the cause of such unfortunate statistical indicators and to come up with some solutions for improvement.

I. MEANS OF DEFENSE OF THE RIGHT TO PROPERTY BY THE COURTS.

The mission of the judiciary to defend the right to property can be achieved through several means, which aim to eliminate the violations that can be brought or to ensure the normal exercise of that right. Although there is no branch of law that does not contribute to the defense of the right to property[3], if the infringement of the right to property has as its source the actions of another person, the owner may request the assistance of the court in the order of civil procedure to defend his right. If the property right has been violated by acts or omissions of the state authorities, there is a way to take action in the order of administrative litigation or, if the violation of the right takes the form of a crime or misdemeanor, he can file a criminal complaint. Starting from these

[1] Benoît Frydman, *Les transformations du droit moderne*. Rapport réalisé à la demande de la Fondation Roi Baudouin dans le cadre de la réflexion prospective "Citoyen, Droit & Société" (Bruxeles, 1998), 43.

[2] Center for Legal Resources of Moldova, *Republic of Moldova at the European Court of Human Rights in 2020*, Analytical Note (Chisinau, 2020) https://crjm.org/wp-content/uploads/2020/01/Nota-analitica-CtEDO-2019.pdf

[3] Dumitru Lupulescu, *Drept civil. Drepturile reale principale* (Bucharest: Lumina Lex, 1997), 111.

statements, the means of defending the right to property are classified into: 1) civil procedure, 2) administrative litigation, 3) criminal procedure.

1. *Civil procedure*. The means of defending the property right, depending on the nature of the violation, can be: a) *real means*, b) *obligatory means* and c) *means that cannot be related neither to real nor to obligatory ones*.

a) *The real means* of defending the property right are actions that are based directly on the property right. The most important real actions are the action in claim and the negative action, but, in addition to these, the action in border, the confessional action, the petition of inheritance, are also real means of defending the right to property.

Limitation periods in the light of the European judge are a key element of the right to a fair trial. Regarding this mention, we find some jurisprudential divergences regarding the prescriptibility of the action in claim and the negative action. It has been argued in the literature[1] that the action in the claim is imprescriptible. At the same time, this opinion was also supported by the judges of the Supreme Court of Justice in some cases[2], stating that "the limitation period regarding the recognition of the property right cannot be invoked in this case, because it is imprescriptible, by virtue of the perpetual nature of the right to property". The same logic was followed on another occasion[3].

However, in another jurisprudential orientation[4], the judges concluded that the action in claim is prescriptive, invoking that "the claim of the portion of land from the illegal possession of another person by demolishing the constructions located on this land, was filed with the omission of the limitation period. extinctive ". It is difficult to agree with

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[1] Leonid Chirtoacă, "Acțiunea în revendicare – mijlocul juridic de protecție a dreptului de proprietate", *Revista Moldovenească de Drept Internaţional şi Relaţii Internaţionale,* nr. 2 (2013): 30.

[2] Supreme Court of Justice of the Republic of Moldova, *Decision in the case 2ra-81/14 of March 19, 2014.* http://cauta.csj.md/legy/document/view/ff5af5d48a3d1916d3a3367df7a5db

[3] Supreme Court of Justice of the Republic of Moldova, *Decision in case no. 2ra-1925/10 of December 1, 2010* http://jurisprudenta.csj.md/archive_courts/cauta/info_detailed_pdf.php?hash=f2a3a2aaef3f27ff8b0277892dda330e1484683412

[4] Supreme Court of Justice of the Republic of Moldova, *Decision in case no. 2ra-2885/14 of 12 November 2014* http://jurisprudenta.csj.md/search_col_civil.php?id=14541

the argument profiled by the specialized literature and the supreme court, regarding the imprescriptibility of the action in claim, in the conditions in which art. 405 the Civil Code of the Republic of Moldova expressly and exhaustively lists the extinct imprescriptible actions, and the perpetual character of the property right presupposes other legal consequences. Therefore, such an extensive interpretation of the legal provisions does not fit *ope legis*.

The specialized doctrine[1] also gave the negative action the character of imprescriptible action. Such an approach was also shared by the magistrates of the Supreme Court of Justice[2]. Although the first instance and the appellate court rejected the action regarding the eviction from the building, without granting the living space, as late, the supreme court ordered the retrial of the case in order of appeal, invoking that, by the nature of the claims, the action is negative and imprescriptible. We reiterate that such an approach has no legal basis, given that the legislator has expressly listed the imprescriptible actions.

Therefore, despite the fact that the Supreme Court of Justice, as the supreme court, has the noble mission of ensuring the uniform interpretation and application of the law by other courts, and in the matter of the right to property it has issued several decisions of the Plenary and Opinions advisory (recommendations), the jurisprudential exercise executed above allows us to conclude that some aspects of the right to property have been resolved differently, namely by the supreme court, being offered antagonistic solutions. These jurisprudential inconsistencies could lead to a violation of art. 1, Protocol no. 1, the differences not being of nuance, but of essence, which in the end stems from the role of the judge of guardian of the property right. Uneven judicial practice was also taken into account in the draft Strategy for ensuring the independence and integrity of the justice sector for the years 2021-2024[3].

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[1] Chirtoacă, "Acţiunea în revendicare – mijlocul juridic de protecţie a dreptului de proprietate", 30.

[2] Supreme Court of Justice of the Republic of Moldova, *Decision in case no. 2ra-348/16 of March 30, 2016* http://jurisprudenta.csj.md/search_col_civil.php?id=26979

[3] Draft Strategy for ensuring the independence and integrity of the justice sector for the years 2021-2024 http://www.justice.gov.md/public/files/directia_analiza_monitorizare_si_evaluare_a_politicilor/Proiectul_Strategiei_pentru_asigurarea_independenei_i_integritii_in_sectorul_justiiei_pentru_anii_2021-2024.pdf

Although, from the ECHR perspective, it seems that the Convention does not guarantee a right to consistent case law, as the lack of a dynamic and evolving approach stops any change or improvement. In its *Santos Pinto v. Portugal* judgment[1], the ECtHR ruled that the possibility of non-unitary judgments is an inherent feature of any legal system, and such differences may arise in the same court. However, in this segment, the courts should not "relax", or we should not neglect the fact that the ECtHR condemned the Romanian state for violating art. 6, art. 1, Protocol no. 1 and art. 14, in the *Beian* case[2], in which the applicant complained about the authorities' refusal to grant him rights to forced labor during military service as a result of differences in case-law, which led to the Supreme Court itself. So we can conclude that it is necessary to learn from the mistakes of others. We are aware that these differences in case law cannot be overcome in a relatively short period of time, but they cannot be tolerated either.

b) *Obligatory means* are the indirect legal means that are based on debt rights and through which the right to property is indirectly defended and which is based on the obligatory relationship between the owner and a third party[3]. This class includes: unjustified enrichment, tortious liability, nullity of the legal act.

c) *Means that cannot be related neither to the real ones nor to the obligatory ones*[4] are provided by some institutions of the civil law. For example, here we could catalog the situation in which the right to property is defended in case of the appearance of the person declared missing without traces or declared dead[5]. In this regard, we exemplify

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[1] European Court of Human Rights, *Judgment in Santos Pinto v. Portugal of 20 May 2008* (application no. 39005/04) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86401%22]}

[2] European Court of Human Rights, *Judgment in the Beian case against Romania of December 6, 2007* (application no. 30658/05) https://hudoc.echr.coe.int/fre#{%22display%22:[%220%22],%22languageisocode%22:[%22RUM%22],%22appno%22:[%2230658/05%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-119552%22]}

[3] Veronica Gîscă, *Drept civil. Drepturile reale. Curs de lecţii*, Ed. a II-a, revăzută şi completată (Chişinău: 2009), 142.

[4] Sergiu Baieş and Nicolae Roşca, *Drept civil. Drepturile reale principale* (Chişinău: Universitatea de stat din Moldova, F. E.-P.,,Tipografia Centrală", 2005), 182.

[5] Baieş, *Drept civil. Drepturile reale principale*, 182.

that, in one of the cases[1], the petitioners requested that their son be declared missing without a trace, claiming that in early 2005 he left for Moscow, and in 2007 they last spoke with him. As the applicants wanted to complete the documents concerning the apartment in which their son was also registered and, without his consent, certain actions were impossible, they submitted such a request.

However, the list of means of defending the right to property in civil proceedings is not exhaustive and is not limited to those analyzed above, taking into account the fact that each branch of law contains rules by which the defense of property rights takes place in a direct form or indirect.

2. *Administrative litigation* is a means of guaranteeing the right to property, as it aims to verify by the court the legality of administrative acts issued by public authorities.

An eloquent case[2], in which the local authorities infringed the right to private property, was investigated in one of the cases, according to which the applicant, owner of an apartment, inherited from his grandmother, by a court decision as following the restitution of the property of the repressed persons, his property deeds were annulled and he was evicted from his apartment. By the same decision, the local public administration was obliged to grant him an apartment equivalent to the returned one. By a decision of the local authorities, the applicant was granted another apartment, which was municipal property, and at his request that this apartment be transferred to him, the local council made the transfer of the building conditional on the payment of 100% of its cost.

As the prior request was rejected, the applicant appealed to the court, which ruled in his favor. We agree with the solution of the courts, or, in the conditions in which the complainant was deprived of his legally obtained property, the state was obliged to grant him a free apartment. Per a contrario, the complainant was forced to bear a disproportionate and excessive burden, being arbitrarily deprived of his property, which,

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[1] Chisinau Court of Appeal, Republic of Moldova, *Decision in case no. 2a-466/16 of March 9, 2016* https://cac.instante.justice.md/ro/pigd_integration/pdf/cce48f99-bbf4-e511-a1ab-005056a5d154

[2] Supreme Court of Justice of the Republic of Moldova, *Decision in case no. 3ra-770/17 of July 12, 2017* http://jurisprudenta.csj.md/search_col_civil.php?id=37726

in the light of the European judge may lead to a violation of art. 1, Protocol no. 1 to the Convention. Or, being the most severe measure of restricting the right to property, the deprivation of property imposes on the state the positive obligation to offer financial compensations to the owner, in relation to the loss suffered. The solution of the courts, which did not tolerate the mistake of the local authorities, is welcome. However, in the case of addressing the ECtHR, the solution of the European court was a predictable one.

3. *Criminal procedure (contravention)* is a form of exercise of justice, which ensures the protection of fundamental rights and freedoms, including the right to property, by criminalizing in the Criminal Code and the Contravention Code socially dangerous acts, which can seriously harm the formation and normal development of patrimonial social relations.

However, here we will refer to the issue of unauthorized constructions, the demolition of which is largely the responsibility of the contravention court. Let's reflect the following image: in numerous court decisions, including no. 4 - 1366/2019 of July 31, 2019[1], the Chisinau Court, Ciocana headquarters did not order the demolition of the unauthorized construction, and in another suite, for example: no. 4-2618 / 2019 of February 6, 2020[2], the court found in favor of the demolition of the unauthorized construction with the remediation of the affected constructions for committing the contravention provided in art. 179 Contravention Code "Unauthorized constructions and unauthorized interventions on existing constructions".

However, this approach is diametrically opposed by the court of the sanction provided by art. 179, the Contravention Code, is generated by the ambiguity of the legislator's exposition in the Contravention Code and not by the discretion of the court. Demolition of illegal constructions is not included as a sanction in art. 179, of the Contravention Code, it

[1] Chisinau Court, Ciocana headquarters, Republic of Moldova, *Decision in case no. 4 - 1366/2019 of July 31, 2019* https://jc.instante.justice.md/ro/pigd_integration/pdf/9ff9b192-836d-40c6-8b2e-7c1bb408776d

[2] Chisinau Court, Ciocana headquarters, Republic of Moldova, *Decision in case no. 4 - 2618/2019 of February 6, 2020* https://jc.instante.justice.md/ro/pigd_integration/pdf/2ec97010-23d9-4cb6-bcd8-562801fb6177

results that it can be applied in the case of such a contravention from the content of art. 439^6 of the same Code. However, the ambiguity of the sanction of demolition of illegal constructions results from the provisions of art. 423^{10} para. (4), the Contravention Code, which stipulates that: "In case of finding the contraventions provided in art. 178 and 179, the ascertaining agent *is entitled* to order the cessation of the execution of the construction works and to request the court to apply the safety measure provided in art. 439^6 ". Thus, in case of finding the contravention provided in art. 179, of the Contravention Code, the ascertaining agent is entitled, but not obliged, to request the court to apply the security measure provided in art. 439^6, the Contravention Code, so that the demolition of illegal constructions is a matter of discretion[1].

However, in my view, it is necessary to grant the right to decide on this measure to the court, which will order the application of the measure in the light of the principle of proportionality, in order not to admit the restriction of the right to property arbitrarily and not to be in the situation of violation of other rights guaranteed by the Convention, as, for example, in the case of *Ivanova and Cherkezov v. Bulgaria*[2], in which the applicants complained of a violation of Art. 1, Protocol no. 1 and art. 8 of the Convention, following a decision regarding the demolition of their house, built in the absence of a building permit. In this case, the European Court found that art. 1, Protocol no. 1, was not violated, because the house was built in the absence of a construction permit, but found that art. 8 of the Convention. In order to do so, the European Court pointed out that the applicants had lived in the house at issue for several years and that this was a 'home' and that the applicants did not have a procedure in place to review the proportionality of the measure. demolition of the house, given that this was their only place of residence.

[1] National Anticorruption Center, *Strategic Analysis on Judicial Practice on Cases of Unauthorized Construction* (Chisinau, 2018) https://cna.md/public/files/Studiu_constructii.pdf

[2] European Court of Human Rights, *Judgment in the case of Ivanova and Cherkezov v. Bulgaria of 21 April 2016* (application no. 46577/15) https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-162117%22]}

II. CASE OF CONDEMNATIONS OF THE REPUBLIC OF MOLDOVA TO THE ECtHR FOR VIOLATION OF ART. 1, PROTOCOL NO. 1 TO THE CONVENTION.

After all, the primary task of enforcing the Convention lies with the national courts. Although judges make enormous efforts to comply with European standards, constantly report in their own decisions the findings of the European Court and apply and interpret national law in accordance with European jurisprudence, we attest to some particular problems of our state regarding art. 1, Protocol no. 1 to the Convention. In particular, European case law in this area is overshadowed by two general issues: non-execution or late execution of the judgment and illegal quashing of judgments.

The issue of non-execution or late execution of the judgment cannot be put on the shoulders of the court, but of the legislative authority (by adopting socially oriented legislation, which provides social/ service housing to a wide range of people at the expense of local and executive public authorities) and the executive authority (by failing to ensure an effective enforcement mechanism). At the moment, this issue has been overcome, as a result of the adoption of the Law on reparation by the state of the damage caused by violating the right to a reasonable trial of the case or the right to a reasonable execution of court decision no. 87 of April 21, 2011 (hereinafter Law no. 87/2011[1]) and the abrogation, for the most part, of the legal framework granting the right to housing to large categories of persons. However, the adoption of Law no. 87/2011 does not deprive persons of the right to apply to the ECtHR if it considers that, by exercising this remedy at national level, it has not been awarded compensation in accordance with European standards, if its judgment has not been enforced or enforced late. In other words, even if the individual has made use of the new remedy, but has not received a fair satisfaction at the national level, he can apply to the ECtHR.

In this regard, we attest to the fact that the courts still need European lessons. However, the questionable point appears in the situation of insufficient amounts granted at national level. For example in

[1] Law on reparation by the state of the damage caused by violating the right to a reasonable trial of the case or the right to the reasonable execution of the court decision, no. 87 of April 21, 2011 (*Official Monitor of the Republic of Moldova, no. 107-109, art. 282 of July 1, 2011*)

the case of *Ciolacu v. Moldova*[1] of 4 September 2018, although the applicant made use of an internal remedy based on Law no. 87/2011 and brought an action for damages for non-execution of the 2004 judgment for the collection of a sum of money in his favor, the European Court noted that the amount awarded to the applicant was obviously lower than that generally granted in cases similar against Moldova, and again condemned us for violating art. 1, Protocol no. 1.

Similarly, in a more recent judgment, *Osadcii and others v. Moldova*[2] of 7 July 2020, in which, although in the end the court rulings in favor of the applicants on the granting of housing were executed at national level between 66 and 72 months, the European Court was not convinced that the amounts awarded to the applicants at national level were adequate to those awarded by the Court in similar cases against the Republic of Moldova. However, this conviction has an excuse for national judges, dictated by the novelty of Law no. 87/2011, which was adopted in 2011, and the application to the ECtHR was submitted in 2012, respectively in a relatively short period.

The catalog of these decisions does not end here. Although the Supreme Court of Justice issued an advisory opinion[3], suggesting to the courts the amount of moral prejudice in cases involving non-execution/ late execution of judgments, the study of judicial practice shows that magistrates do not take into account these requirements, granting compensation inferior to those at the Strasbourg Court.

Another peculiarity of our country's convictions for violating art. 1, Protocol no. 1, is the irregular quashing of court decisions, generated by the unjustified admission by the courts of requests for review or of late appeals. The principle of the rule of law indicates that a court decision can be reviewed only on the basis of the grounds expressly

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[1] European Court of Human Rights, *Judgment in the case of Ciolacu v. Moldova September 4, 2018* (application no. 22400/13). https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22FRE%22],%22appno%22:[%2222400/13%22],%22documentcollectionid2%22:[%22COMMITTEE%22],%22itemid%22:[%22001-186029%22]}

[2] European Court of Human Rights, *Judgment in the case of Osadcii and Others v. Moldova of 07 July 2020* (applications no. 51662/12 and 60 other applications) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203490%22]}

[3]Supreme Court of Justice of the Republic of Moldova, *Advisory Opinion on Fair Satisfaction no. 6*. http://jurisprudenta.csj.md/search_rec_csj.php?id=21

provided by art. 449, Code of Civil Procedure, and can be challenged only within the term granted by the legislator.

Pandora's box was opened in *Popov (no. 2) against Moldova*[1], in which the European forum found a violation of art. 1, Protocol 1 to the Convention, as a result of the quashing of the irrevocable court decision on the restitution of a nationalized house, by admitting the request for review after more than 6 years, in the absence of reasons to declare the review. This decision was followed by numerous other convictions for the same issue. Even though the first conviction on this issue was adopted in 2005, such convictions continue to be taken by the ECHR for more than 15 years[2]. In order to be aware of the seriousness and topicality of the problem, we certify that, only in 2019, the European Court issued 12 decisions, in which it found the violation of art. 6 and art. 1 of Protocol no. 1 for deprivation of property by admitting late actions or appeals, or by improper application of the review.

For example, in a recently issued case, *Mitropolia Basarabiei şi Parohia Naşterii Domnului din Mihalaşa contra Moldovei*[3],on October 1, 2019, the European Court found a violation of art. 6 § 1 and art.1, Protocol no. 1 ECHR, following the quashing of an irrevocable court decision on the recognition of property through the irregular application of the review. Here, too, it is alarming that the decision to admit the request for review dates back to April 20, 2010, in the context in which already in 2005 the European Court reported the issue of quashing judgments as a result of the illegal admission of the request for review. This category also includes the resounding case lost to the ECHR, *Ojog and others against Moldova*[4], in which the courts committed the same

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[1] European Court of Human Rights, *Judgment in Popov v. Moldova no. 2 of 6 December 2005* (application no. 19960/04) https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22popov%22],%22documentcollectionid2%22:[%22JUDGMENTS%22],%22itemid%22:[%22001-71507%22]}

[2] Center for Legal Resources of the Republic of Moldova, *Admission of requests for review in civil cases - is the practice of the Supreme Court of Justice uniform?* Analytical document. (Chisinau, 2018) https://crjm.org/wp-content/uploads/2018/04/CRJM-practica-CSJ-cauze-civile-2018.pdf .pag. 13.

[3] European Court of Human Rights, *Judgment in Mitropolia Basarabiei şi Parohia Naşterii Domnului din Mihalaşa v. Moldova, of October 1, 2019* (application no. 65637/10) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-196577%22]}

[4] European Court of Human Rights, *Judgment in the case of Ojog and others v. Moldova of 13 December 2011* (application no. 1988/06) https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22ojog%22],%22documentcollectio

error, and which caused much controversy in academia and politics. Although the applicants claimed that the review procedure initiated by third parties was a disguised appeal in order to obtain a retrial, the Government objected and noted that this review was necessary to correct some serious miscarriages of justice. However, the Court attached particular importance to the fact that the requests for review submitted by the same defendants were rejected three times by the same court until the review was accepted three years after the decision in question became final.

In these convictions at the ECHR, the responsibility lies solely with the courts, which have misapplied procedural rules and ordered the review of irrevocable judgments, in the absence of substantial or imperative grounds that would justify the admission of the request for review or they admitted late appeals for examination and finally violated the "principle of security of legal relations", so "dear" to the European judge.

However, at present, this issue has been raised by the courts, in particular by the Supreme Court of Justice, which, according to one report[1], rejects 95% requests for review for fear of further convictions at the European Court. But the courts must be careful not to move to the other side of the barricade, when rejecting requests for review, in the presence of reasons indicated in art. 449 Code of Civil Procedure.

The violation of the right to property was also found on other particular occasions, by the fact that the courts tolerated certain vicious and arbitrary practices of the executive authority. For example, in the case of *Fortuna v. Moldova*[2], the authority guilty of conviction at the ECtHR is the national social insurance house, which initially calculated an old-age pension of 10,401.67 lei for the applicant, who retired in 1999, but subsequently paid him only 280.60 lei, and the courts did not remedy the error of the executive authority. In the case of "*Tiramavia"*

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[1] Supreme Court of Justice of the Republic of Moldova, *Activity report of the Supreme Court of Justice for 2018* http://csj.md/images/Raport_CSJ.pdf

[2] European Court of Human Rights, *Judgment in the case of Furtuna v. Moldova of 04 February 2020* (application no. 54104/07) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200723%22]}

S.R.L. and others against Moldova[1], responsible for violating art. 1, Protocol no. 1, is the State Administration of Civil Aviation, which ordered the withdrawal of air operator certificates, arbitrarily and illegally, and the national courts did not explain these omissions. Such decisions are numerous.

At the same time, some convictions cannot be blamed on the judicial authority, in the situation where the conviction is based on a legal norm that contradicts the Convention and that did not leave the judge another way to act. Or judges cannot refuse to do justice, even if the law does not meet the quality standard, but they are put in front of the situation to look for a fair and rational solution. Although magistrates prefer to apply a rule that would expressly regulate the situation deduced to the court, the hypothesis of a legislative vacuum is not excluded, in case the legislative norm does not cover the new legal relations related to the property right, in this case they have to resort to the rule of interpretation of the situation, according to the analogy of law or principles of law. On the other hand, the detailed regulation of legal relations is inadmissible. Or, lately, we are witnessing a process of normative overabundance, which, in the end, is another system issue and which confuses judges.

However, magistrates have several ways to act. If the law contravenes the Convention, they may refuse to apply it and even directly apply, to the detriment of national law, the provisions of the Convention, or they may apply to the Constitutional Court. However, they have the obligation to interpret and apply national law in accordance with the jurisprudence of the ECHR, which is an important guide in the exercise of justice. Also, the courts are to take into account not only the judgments issued regarding Moldova, but also those in relation to other states, if the circumstances of the case under examination are similar to those investigated by the ECHR and on which it pronounced[2].

Of course, it is necessary to hold judges accountable for these convictions, or, in a democratic society, the presence of irresponsible

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[1] European Court of Human Rights, *Judgment in the case "Tiramavia" S.R.L. and others v. Moldova of 4 September 2018* (applications no. 54115/09, 55707/09 and 55770/09)https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-186021%22]}

[2] Gina Ignat, *Influenţa CEDO asupra raporturilor juridice civile* (București: Hamangiu, 2015), 68-69.

subjects cannot be tolerated, regardless of their status[1]. Therefore, the judge cannot make an exception to the principle of equality before the law and liability for its violation, even if he is the holder of a functional immunity. Violations of the ECHR are an indicator of judges' assessment. As an example[2], in a judgment, the Judges' Performance Evaluation Board found that: "the judge is referred to in ECHR judgments: *Odgon v. Moldova* (art. 8 of the Convention), *Rusu Lintax SRL v. Moldova* (art. 1 Protocol No. 1 to the ECHR), *Savotchko v. Moldova* (art. 8 ECHR) and the *Stîngaci v. Moldova* case" awarding him the score" - 4 ".

Of course, this tool is not enough to hold judges accountable. At the moment, more attention is being paid to the patrimonial liability of judges/prosecutors for acts that led to the condemnation of the state by the ECHR (including amicable settlements, unilateral declarations), which generated the granting of financial means from the public budget, ie the right of regress of the state against judges/prosecutors for convictions at the ECHR. As the Constitutional Court found in decision no. 23 of July 25, 2016[3], the institution of regression itself is not contrary to the constitutional principles, as long as the guarantees inherent in the independence of judges are respected through the mechanism of material liability.

But we cannot agree with the reversals brought to the Law on the Government Agent, by Law no. 205 of November 26, 2020[4], related to the institution of regress, by which the disciplinary sanctioning of judges and prosecutors was instituted as a ground for introducing the action in regress. The initiative of this bill comes as a result of the condemnation of the Republic of Moldova in the case of *Ojog and others against*

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[1] Daniela Cozma, *Răspunderea magistraților - garanție a legalității și eficienței puterii judecătorești în Republica Moldova și România*. Tz de doctor în drept (Chișinău: 2021), 9.

[2] Decision of the Judges' Performance Evaluation Board no. 92/11 of October 11, 2019 https://www.csm.md/files/Hotaririle%20CEvaluare/2019/11/92-11.pdf

[3] Constitutional Court of the Republic of Moldova. *Decision no. 23 of July 25, 2016* https://www.constcourt.md/public/ccdoc/hotariri/ro-h2325072016roeba96.pdf

[4] Law for the modification of some normative acts, no. 205 of November 26, 2020 (*Official Monitor of the Republic of Moldova no. 360-371 art. 295 of December 25, 2020*).

Moldova, mentioned above, known to the public, the "*Gemini case*", through which the state budget is to be paid the amount of $ 3.6 million.

Many criticisms have been leveled at this bill, and they are rightly so. However, the fixed limits of material liability of judges are not established, given that the full amount ordered by the European Forum cannot be charged to judges and the formula for calculating the degree of guilt of the judge / prosecutor is not established; these essential moments being left to the discretion of the court or disciplinary body.

At the same time, we cannot ignore the fact that the permanent reform of the judiciary, the normative overabundance, the extremely high workload, the insufficiency of judges and auxiliary staff (especially in the courts and courts of appeal in Chisinau) require magistrates to commit errors, to adopt hasty and insufficiently motivated solutions and to develop a non-unitary judicial practice. For these reasons, we emphasize the need to increase the number of states of judges, in order to reduce the overcrowding of magistrates.

The competence of magistrates in the field of human rights is still one of the most stringent measures in the judiciary, or without their diligent training in this area of great relevance, it is difficult to achieve better results. Or, we cannot neglect the evolutionary trend of the ECHR jurisprudence in the field of art. 1, Protocol no. 1, which involves the "continuous pursuit" of these decisions by magistrates and, therefore, it is necessary for the exponents of the judicial authority to acquire a true attachment to the right to property.

Although, for the most part, the government's effort to overcome the problems facing the judiciary is reduced to fighting corruption, focusing on this track, in our opinion, will not bring the expected result. As Dan Claudiu Dănișor[1] also claims, "a state that destroys its justice is a state that devours itself". In our opinion, it is necessary to ensure the material independence of judges, who are a "vulnerable target" in relation to the responsibility they assume in the exercise of justice. Although the salaries of judges were significantly increased in 2012, we consider that their amount does not ensure the financial independence necessary for the independent exercise of the act of justice.

In addition, it is necessary to strengthen the credibility of litigants in the courts. Or the imposing number of requests to the ECHR and the

[1] Claudiu Dan Dănișor, *Disfuncţionalităţi ale sistemul constituţional*. http://documents.tips/documents/disfunctionalitati-ale-sistemului-constitutional.html

frequent publication of opinion polls, of course, to the detriment of justice, is a catalyst for the discrediting of justice, which inevitably affects the functioning of the judiciary. The bill will ultimately be left to each of us, or, in the absence of a viable judicial system, people will have to go to court in defense of their rights. For this reason we consider it necessary to publish surveys, interviews, which would elucidate the other "part of the coin", ie to convey to society the good things that take place in the judiciary, and to achieve this goal it is necessary to strengthen collaboration more fruitful between civil society and the judiciary. It is necessary for the judiciary to share the problems it faces in order to identify solutions.

CONCLUSIONS

In the architecture of a genuine democracy, the role of the judge in the triad of state powers is decisive, because he applies the law in individual cases, being the backbone of the society that ultimately decides. Although the courts in resolving disputes do not cease to refer to the conventional norms and interpretations given by the ECHR in its jurisprudence, still most judgments condemning the violation of art. 1, Protocol no. 1, are reprehensible to them.

Of course, it is necessary to hold judges accountable for violations of the ECHR. However, from the perspective of a State law, in which all three powers are on a position of legal equality, it is necessary to establish a similar mechanism for holding patrimonial liability and the exponents of legislative and executive power, if they are responsible for a conviction of the Republic of Moldova to the ECHR. However, it is unfortunate that parliamentarians and public servants from the executive authorities have been exempted from the amendments to the state's right of regress for convictions at the ECHR, who are also guilty of convictions at the ECHR. However, Moldova has lost cases at the ECHR for the imperfection of the legislation, such as the *Prigala against Moldova* and for certain vicious and arbitrary practices admitted by the executive authorities such as the *Fortuna v. Moldova* cases, "*Tiramavia" S.R.L. and others against Moldova*, etc., mentioned above.

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ABOUT CERTAIN EFFECTS OF THE DECISION OF THE CONSTITUTIONAL COURT OF ROMANIA NO. 189/2021

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Abstract:

Decision No 189/18 March 2021 of the Constitutional Court of Romania has deemed unconstitutional Art 21 Para 6 of the Law No 165/2013, the only provision stating the means of evaluation of a real estate, thus providing the criterion of the notarial grid, which determines a legislative vacuum that needs to be filled.

However, until an intervention in this regard by the legislator, it is imperative to clarify the situation of the ongoing files, in the sense of establishing the way in which the valuation of real estate is carried out, given that the process of restitution and reparation of damages caused by communism has been training for decades.

Key words: *decision of the Constitutional Court; restitution of property; real estate evaluation; criteria.*

INTRODUCTION

Decision No 189/2021 of the Constitutional Court of Romania[2] comes to strengthen a previously agreed solution and to urge the legislator to adapt the law to its binding decisions, which seek to respect the fundamental principles of law and constitutional rules.

Compared to the effects produced by the analyzed decision on the concrete application of the law, it is necessary to discuss some direct consequences that it produces and to identify a solution, which would ensure the fluency and efficiency of the judicial procedures.

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[2] Decision of the Romanian Constitutional Court No 189/2021 published in the Official Gazette No 466/4 May 2021

1. THE EFFECTS OF THE DECISION NO 189/2021

By Decision No 189 pronounced in the hearing of March 18, 2021, the Constitutional Court of Romania admitted the exception of unconstitutionality (...) (n.n.) and found that the provisions of Art 21 Para 6 of Law No 165/2013 regarding the measures for finalizing the process of restitution, in kind or by equivalent, of the buildings abusively taken over during the communist regime in Romania, as amended by Law No 219/2020 for the amendment and completion of Law No 165/2013 on the measures for completing the process of restitution, in kind or by equivalent, of buildings abusively taken over during the communist regime in Romania are unconstitutional.

The provision declared unconstitutional has the following text: "The evaluation of the real estate that is the object of the decision shall be made using the notarial grid valid on the date of entry into force of Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of buildings abusively taken over during the communist regime in Romania, with subsequent amendments and completions, taking into account the technical characteristics of the building and the category of use at the date of its takeover. The evaluation is expressed in points. As an exception, in cases where compensatory measures are granted to the owner of the property right, former owner or his legal or testamentary heirs, and the property right was not traded after the abusive state takeover of the building, the valuation of the building subject to the decision is made by using the notarial grid valid for the year preceding the issuance of the decision by the National Commission. A point is worth one RON".

This anticipable decision of the Constitutional Court sanctions a slip of the legislature that insists on the normative consecration of a formula on whose unconstitutionality the Court had previously ruled.

As it was noticed, Art 21 Para 6 of the Law No 165/2013 creates between two social categories (on the one hand the owners deprived of their assets during the communist period or their heirs, and on the other hand the assignees of the rights of those in the first mentioned category) a situation of inequality (prohibited by Art 16 of the Romanian Constitution) and discriminatory (prohibited by Art 4 of the Romanian Constitution).

This regulation gives rise to an unequal and discriminatory situation because it establishes a differentiation on arbitrary criteria between persons in the same legal situation.

Why do we say such thing? Because the differentiation is made based on a criterion which must be the same regardless of which of the two categories of beneficiaries of the law it applies: the evaluation of real estate.

The same real estate is measured with different units of measurement of its value when it comes to beneficiaries belonging to different categories. If the beneficiary of the reparatory measures is the former owner or his heirs, the evaluation of the property shall be made depending on the notarial grids from the year precedent to the issuance of the Decision and if the beneficiary of the reparatory measures is an assignee, the evaluation of the same real estate is made according to the notarial grids from 2013 as well as taking into account the category of use of the property at the date of taking over.

The evaluation of real estate is never likely to have variants. The evaluation of the real estate represents a way of reporting it to a unique standard. The good is not likely to have two values at the same time.

The legislator made a double mistake: on the one hand, it normatively stated an unconstitutional formula and on the other hand it ignored the recent jurisprudence of the Constitutional Court which, by Decision No 725/2020 has stated this regarding a normative act also issued by the Romanian Parliament aiming the exact same issue as the Law No 219/2020.

The Court states in Pct 54-55 of the Decision No 725/2020 of the CCR[1]: "Under these circumstances, the achievement of a differentiation between the two categories of beneficiaries of the compensations – found in the same legal situation, this time with reference to the means of evaluation of the real estate, finds no justification in the light of the Constitutional Court's interpretation of the principle of equality and non-discrimination. In addition, the value of a real estate cannot be different depending on the owner of the compensations which are granted for it, the criterion used by the legislator for the achievement of the so-called correction for discrimination being a purely subjective one, which has nothing to do with the beneficiaries of the compensations, and, therefore,

[1] Decision of the Romanian Constitutional Court No 725/2020 published in the Official Gazette No 959/19 October 2020

contrary to the provisions of Art 16 of the Constitution. Thus being, The Court notes that the criticisms of the complainant in relation to the principle of equal rights are well-founded, as the Law on the adoption of the Government Emergency Ordinance No 72/2020 for the suspension of the application of the provisions of Art 21 Para 6 of Law No 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of buildings abusively taken over during the communist regime in Romania and the establishment of transitional measures establishes a differentiation on arbitrary criteria between persons in the same legal situation.

Two circumstances must be emphasized: 1. Decision No 189/2021 of the Constitutional Court does not rule upon the unconstitutionality of any interpretation of Art 21 Para 6 of the Law No 165/2013, but clearly expresses the unconstitutionality of Art 21 Para 6 of the Law No 165/2013 in any of its possible interpretations, therefore not a certain interpretation of the text is unconstitutional but unconstitutional is the text of the law itself; 2. Decision No 189/2021 of the Constitutional Court has been published in the Official Gazette of Romania No 466/4 May 2021.

The two aspects previously highlighted determine, according to the provisions of Art 31 Para 3 of the Law No 47/1992[1] and Art 147 Para 1 of the Constitution[2], as the formulation found unconstitutional of Art

[1] Art 31 – (1) The decision which establishes the unconstitutionality of a law, ordinance or provision of a law or ordinance in force[*)] is definitive and mandatory.

[*)] The wording "into force" from the content of Art 31 Para 1 is constitutional insofar as it is interpreted in the sense that the laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur even after their expiration, according to the Decision of the Constitutional Court No 766/2011.

(2) In case of admission of the exception, the Court will also rule on the constitutionality of other provisions of the challenged act, from which, necessarily and obviously, the provisions mentioned in the notification cannot be dissociated.

(3) The provisions of the laws and ordinances in force found to be unconstitutional shall cease to have legal effect 45 days after the publication of the decision of the Constitutional Court, if, during this period, the Parliament or the Government, as the case may be, does not agree the unconstitutional provisions with the Constitution. During this period, the provisions found to be unconstitutional are suspended by law.

[2] The provisions of the laws and ordinances in force, as well as those from the regulations, found unconstitutional, shall cease their effects within 45 days from the publication of the decision of the Constitutional Court if, during this period, the Parliament or the Government as the case may be, do not corelate the unconstitutional provisions with the provisions of the Constitution.

21 Para 6 of the Law No 165/2013 to no longer be able to produce any legal effect starting with May 4th, 2021.

Therefore, appears perfectly legitimate the question: "What will happen from the perspective of the legal situation, in the following cases? 1. The situation of the administrative files gathered by the National Commission for Real Estate Compensation which must be solved by Points Compensation Decisions; 2. The situation of litigations submitted to competent courts having as object appeals against the Points Compensation Decisions issued by the National Commission for Real Estate Compensation, applications which challenge the means of determination of the number of compensation points; 3. The situation of the Points Compensation Decisions issued by the National Commission for Real Estate Compensation prior to May 4th, 2021 and for which the deadline for submitting an appeal has not yet expired[1].

We have opted to analyze the hypotheses in which, as one can note, there are procedural leverages to invoke the effect of the CCR Decision No 189/2021.

It is interesting, for the present study, to analyze what may be the immediate consequence for the Compensation Decisions issued and challenged, or issued and challengeable, as well as for the not yet adopted Compensation Decisions as long as the text of Art 21 Para 6 of Law No 165/2013 was declared not to be in accordance with the provisions of the Constitution.

The immediate consequence can be seen only after an emphasize of the place and role of Art 21 Para 6 of the Law No 165/2013 in determining the compensations: thus, according to Art 16 of the above-mentioned law, restitution claims that cannot be resolved by restitution in kind at the level of entities invested by law are resolved by granting compensatory measures in the form of points, which are determined according to Art 21 Para 6-7. Art 21 Para 6 of the law states that the evaluation of the real estate which is the object of the decision shall be made through the application of the notarial grid valid at the entrance into force of the Law No 165/2013 concerning the measures for the completion of the restitution process of real estate in Romania, with

[1] Art 35 of the Law No 165/2013 – (1) The decisions issued in compliance with Art 33-34 may be challenged by the person who considers to be entitled in front of the civil section of the tribunal in whose circumscription the real estate is located, within 30 days from the communication of the decision.

subsequent modifications and completions, in considering the technical features of the real estate and the category of use at the date of its takeover. As an exception, in cases where compensatory measures are granted to the owner of the property right, former owner or his legal or testamentary heirs, and the property right was not traded after the abusive state takeover of the property, the evaluation of the property subject to the decision is made by using the notarial grid valid for the year preceding the issuance of the decision by the National Commission. The evaluation is expressed in points. A point is worth one RON.

Also, according to Art 21 Para 6^1, 6^2, 7-9 of the law if, through the existing documents in the compensation file, the location or technical characteristics of the building for which compensations are established cannot be established, the assessment is made by applying the minimum value for the area or category of building provided by the notarial grid for that locality, according to the provisions of Para 6. If, through the existing documents in the compensation file, it is not possible to establish the surface and/or the description, from an architectural point of view, of the constructions for which compensations are established, compensatory measures are granted for a usable area of 21 sqm. The evaluation shall be made by the application of the minimum value for the area or category of building stated by the notarial grid applicable for that locality. The number of points shall be determined after the decrease of the updated value for compensations to be received for the evaluated real estate according to Para 6. Subsequent to the verification and evaluation, at the proposal of the Secretary of the National Commission, the commission shall validate or not the decision of the entity invested by the law and, where appropriate, approve the score established according to Para 7^1. If the decision of the entity invested by the law is validated, the National Commission shall issue the Points Compensation Decision for the real estate taken over abusively.

As it can be noted from the quoted texts, in the context of the Law No 165/2013, which represents the central normative act in the area of

[1] By its Decision No 686/2014, published in the Official Gazette No 68/27 January 2015, the Constitutional Court has ascertained that the provisions of Art 21 Para 8 are constitutional to the extent to which they are not applicable for the decisions/provisions of the entities invested in solving the notifications, issued for the application of different court decisions by which the courts ruled irrevocably/definitively on the quality of entitled persons and on the extension of the property right.

compensations, Art 21 Para 6 has a fundamental role, representing the keystone of the entire normative edifice.

The effect of the CCR Decision No 189/2021 on the situation of compensations is represented by the maintenance of the issuance of a Compensation Decision by points in order to grant compensation for real estate that cannot be returned in kind, but the number of points cannot be established according to the criteria proposed by Art 21 Para 6 whose provisions have been declared unconstitutional.

And then what can be the solution within the hypotheses stated during the 45 days from the publication in the Official Gazette of the Decision of the Constitutional Court and until the adoption by the Romanian Parliament or Government of a new constitutional regulation this time?

First of all, it must be mentioned that the statement of the term of 45 days does not refer to a sanction addressed to the two entities which could fill in the legal vacuum left by the unconstitutional text and which no longer produces any effect. The history of the phenomenon of law making has proved that there are numerous situations in which the Romanian Parliament or Government have not issued within the term of 45 days a new regulation even in the case of important legal rules.

Could we imagine a solution in which the administrative procedure for determining the compensations by the National Commission for Real Estate Compensations to be suspended until the emergence of new regulations? Could we imagine a solution in which the cases pending before the courts are suspended or postponed for the same reason until a new regulation emerges?

The answer is definitely not. Such measures would not have the slightest legal coverage.

Thus, Art 2 of the Civil Code states the order in which the sources of civil law are applied to legislate a specific legal situation. We could note that if the special norm dedicated for such situation has been found unconstitutional, we shall identify first of all even in the normative act represented by Law No 165/2013 statements that provide regulation to the concrete legal situations, such as: Art 1 Para 1-2, Art 2 letters a)-b). Thus, according to the law the real estate abusively taken over by the communist regime are to be restored in kind. If the restoration in kind of the real estate abusively taken over by the communist regime is no longer possible, the equivalent remedial measures that can be granted are the

compensation with goods offered in equivalent by the invested entity with the settlement of the request formulated based on Law No 10/2001 regarding the legal regime of some buildings abusively taken over between March 6, 1945-December 22, 1989, republished, with the subsequent modifications and completions, the measures provided by the Land Fund Law No 18/1991, republished, with subsequent amendments and completions, and Law No 1/2000 for the reconstitution of the property right over the agricultural and forest lands, requested according to the provisions of the Land Fund Law No 18/1991 and of Law No 169/1997, with the subsequent modifications and completions, as well as the measure of compensation by points, provided in chapter III. Art 2 of Law No 165/2013 enshrines the principles underlying the granting of measures provided by law, namely: a) the principle of the prevalence of restitution in kind, b) the principle of equity.

The law (which is the special law in the area of restitutions) uses as principle the following: the principle of prevalence of restitution in kind – which means that the compensation should completely cover the material damage suffered.

The impossibility of restitution in kind determines that the same damage be repaired in the equivalent. The use of the term equivalent in legal meaning cannot be foreign to the meaning of the term in Romanian: "Which has the same value, the same effect, the same meaning or the same meaning as something else".

Compensation is subject to the principle of fairness. This principle necessarily requires that it be fair that the compensation established as the equivalent of the immovable property which cannot be restituted in kind should cover the material damage suffered in the same way as the restitution in kind of the property could have done.

These regulations in force, quoted and interpreted determine, in the absence of the effects of Art 21 Para 6, the obligation to determine the number of compensation deck in relation to the real value of the real estate that cannot be returned in kind. This value is to be determined by means of an appraisal expertise ordered both in the administrative procedure by the National Commission for Real Estate Compensation and in the judicial proceedings pending before the competent courts.

In the sense of those highlighted are also the provisions of the General Law (the Civil Code), which in Art 1527-1531 and in Art 566

state the obligation to execute in the fair equivalent of the obligation that is not executed in kind.

Also, this is the way in which the jurisprudence of the European Court of Human Rights has established the remedial measures for the damage caused by the violation of the right to an asset (stated by Art 1 of the Additional Protocol No 1 to the Convention). We hereby refer to the effects of the decision ruled by the European Court of Human Rights in February 26, 2019 in the case *Ana Ionescu and others v Romania*, in which was mentioned that, under the circumstances of the litigation, the restoration of the real estate in debate shall place the plaintiffs, as it is possible, in a situation similar to the one in which they would have been if Art 1 of the Protocol No 1 would not have been violated. In the absence of such restoration by the defendant State, the Court states that it must pay the applicants, as compensation for pecuniary damage, an amount corresponding to the present value of the property[1].

Hereby, by this decision, the Court found that the reparation corresponding to the impossibility of restitution of the property in kind cannot be other than an amount corresponding to the present value of the properties.

Likewise, in the hypotheses we talked about, in the absence of the provisions of Art 21 Para 6 of Law No 165/2013, once the right to a good within the meaning of the Convention has been established, the corresponding reparation can only consist in relation to the current value of the real estate impossible to return in kind.

CONCLUSIONS

This "incident" of unconstitutionality sanctioned by the Decision No 189/2021 and whose effects we have subjected to analysis, manages to bring back in the legal concrete, without proposing this and, unfortunately, only for a period of time, the direct and real application of the principle through which the Romanian state, after the 1989 Revolution, undertook to repair the damage caused during the communist regime: *restitutio in integrum*!

[1] Para 38-39

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THE PRINCIPLE OF AVAILABILITY OF THE PARTY IN THE CIVIL LITIGATION AND THE REVISION OF THE BANK CREDIT AGREEMENT

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Abstract:

The investiture of the national court in the matter of the abusive feature of certain clauses in the contract determines the application of the Court of Luxembourg case-law, considerable in this matter. The jurisprudence of the CJEU has consistently stated that the court may verify ex officio the abusive nature of certain clauses, regardless of the jurisdictional procedure in which it is located, but the court can only remove it from application or replace it with supplementary rules of national law, if necessary results that the contract can no longer continue as a result of the abolition of the abusive clause.

If the investiture of the court regards the hardship, the court shall be summoned to verify its conditions, the analysis being different than the above hypothesis and the solution being in strong relation with the means in which the plaintiff has stated his requirement. The court shall verify the requirements of hardship depending on the law applicable for the contract and shall order the adjustment of the contract depending on the requirement submitted by the plaintiff.

Key words: *principle of availability; abusive clause; contract; national court; EU case-law; hardship; the adjustment of the contract.*

INTRODUCTION

Legal practice has revealed that in order to re-establish credit agreements, in which it was held that the consumer's position is disadvantaged in relation to the bank's professional, several types of legal action have been taken, depending on the applicant's choice or orientation by the legal specialist who assisted or represented him.

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The preoccupation of consumers was to determine the disappearance or modification of clauses which, according to them, generate important imbalances between the rights and obligations of the contractual parties, and the banks have aimed the maintenance of the contracts, all the more so as they claimed that after the entry into force of the G.E.O No 50/2010[1] adapted the contracts to the requirements of the new normative act, adopted for the transposition and implementation in the national legislation of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers.

Thus, requests were made regarding the finding of the abusive feature of some contractual clauses, being requested the ascertainment of their absolute nullity, their removal from the contract and the restitution of the differences between the amounts actually paid and those due following the cancellation of the clauses.

In other cases, the plaintiffs requested the application of hardship, claiming exclusively that the performance of the contract became excessively onerous for them, due to exceptional changes in the initial circumstances of the contract, so they requested the adaptation of the contract, according to a formula claimed by the plaintiffs or left at the consideration of the court.

There have been litigations in which the consumer, by aiming the adjustment of the contract as a consequence of it, prevailed both from the abusive feature of certain clauses from the bank credit agreement, with all the effects resulting from here, as well as of hardship, though the two institutions are very different[2].

If the abusive nature of the clauses becomes clear, the situation of the court's investiture becomes clear by virtue of the case law of the

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[1] Regarding the bank credit agreements for consumers, published in the Official Gazette No 389/11 June 2010; it aimed the transposition and implementation in our legislation o the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

[2] Regarding the bank credit agreements in CHF, see also F.Popa, "Câteva observaţii cu privire la aplicarea impreviziunii în materia contractelor de credit acordate în CHF", *Revista Română de drept al afacerilor* no. 8 (2015): 64; I.F.Popa, "Impreviziunea şi creditele oferite consumatorilor. Constituie darea în plată şi conversia valutară remedii ale impreviziunii?", *RRDP* no. 1 (2017): 126; I.I.Neamţ, "Din nou despre conversia monedei creditului şi "îngheţarea" cursului valutar. A schimbat cauza Andriciuc ceva?", *RRDP* no. 1 (2019): 448.

Luxembourg Court, which holds that the court is obliged to verify ex officio the abusive nature of certain contractual clauses[1], as regards the consequences of admitting this head of claim or the performance of such verification, the situation is not certain, as compared to the same supranational jurisprudence the domestic judge removes the clause from the contract but can only replace it with a supplementary provision of domestic law, if it exists.

Similar, in the area of hardship, the request to adjust the contract usually aims a solution proposed by the plaintiff, which does not correspond in all cases with the legal requirement that the adjustment determine the fair distribution between parties of the losses and benefits resulting from changing circumstances taken into account at the conclusion of the contract.

In these cases, the limits of the court's investment and the possibilities recognized for it to resolve the request are of interest, the most important effect pursued by the plaintiff being the pecuniary consequences of finding the abusive nature of the clauses or of the hardship, which are directly related to the contract adaptation.

1. THE AVAILABILITY OF THE PARTY IN THE CIVIL LITIGATION. GENERAL NOTIONS

The principle of the availability of the party in the civil litigation, expressly recognized in Art 9 of the Code of Civil Procedure, states that the object and limits of the trial are established only based on the requests and defences of the parties, in corroboration with Art 22 of the same code, resulting that the judge cannot rule upon other aspects exceeding the limitations of his investment.

Even if the two principles meet, the role of the judge in finding out the truth attenuating in some places the principle of availability, the court cannot substitute the parties beyond the possibilities granted by Art 22 of the Code of Civil Procedure, regarding the administration of evidence or the taking of certain procedural measures, the restoration of the legal qualification of the acts and facts deduced to the court. Thus, the judge cannot alter the object of the request, considering that he is invested with something else than what was requested and cannot change the reasoning

[1] C-243/08, Para 31, C 40/08, Para 32, C 137/08 Para 49.

of the parties from his own perspective to justify a ruling which is not related to the limitations of his own investiture.

However, if there are issues of supranational law in question, the jurisprudence of the European Court of Justice has accustomed us to the fact that, due to the importance of these rules, in order to ensure the principles of equivalence[1] and effectiveness[2], the domestic court must verify certain issues ex officio, such as abusive clauses.

In such cases, it is possible to limit the availability of the internal procedure, based on the binding jurisprudence of the Court of Justice of the European Union, but, further, the court must decide the fate of the contract brought before the court, so that, if it no longer receives concrete guidance from the court, will return to availability.

2. HYPOTHESES

a. In the first category of litigations, the abusive character of some contractual clauses was argued, thus criticized for absolute nullity, requesting their removal from the contract and the refunding of the amounts collected under the abusive clauses.

There were also situations in which, as consequence of the ascertainment of the abusive feature, it has been requested the replacement of the criticized clauses with others, accompanied by the refunding of the amounts[3].

The Court of Justice of the European Union has stated that the national court is compelled to analyse ex officio the abusive feature of a contractual clause which fits in the area of application of the Directive 93/13 and by it to supplement the existing imbalance between consumer

[1] C 618/10, Para 46 – If the principle of the procedural autonomy is recognized in the Member States, it must be recognized the condition, however, that they are no less favorable than those governing similar domestic actions (principle of equivalence).

[2] C 618/10, Para 49 – As regards the principle of effectiveness, it is the Court's settled case-law that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analyzed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies.

[3] I.I.Neamţ, "Clauze abuzive. Conversia monedei creditului și „îngheţarea cursului valutar": soluţii compatibile cu analiza clauzelor abuzive?", *RRDP* no. 5 (2016): 133-134.

and seller or provider[1]. The role of the national judge cannot be limited only to the ruling upon the possible abusive nature of a contractual clause, but it refers also to his obligation to examine ex officio this aspect as soon as he has the necessary legal and factual elements in this regard[2].

However, such an ex officio investment concerns the analysis of the abusive nature of some clauses, and not the concrete consequences produced by such a finding, the jurisprudence of the CJEU referring mainly to the obligation of the court to remove the clause from the contract, further, depending on the nature of the clause raising the question of the possibility of continuing the contract or, on the contrary, of its termination. Thus, to the question addressed by the national court in a preliminary procedure, in the meaning of determining if, when it is ascertained the nullity of an abusive clause stated by a contract with a consumer, the court may amend that particular contract by modifying that clause, the CJEU's answer is generally a negative one.

From the analysis of Art 6 Para 1 of the Directive 93/13 and of the objectives and general economy of the Directive, the Court has stated that, though the text offers to Members States a certain margin of autonomy regarding the definition of the legal regimes applicable to abusive clauses, it expressly imposes the obligation to foresee that those clauses "do not generate obligations for the consumer". The national courts shall have the obligation to exclude the application of an abusive contractual clause for it to not generate mandatory effects upon the consumer, without having the possibility to change its content. If maintaining the contract is legally possible, according to domestic norms, it shall continue to exist without any other modification than the one resulting from the removal of the abusive clauses[3].

The hypothesis of the non-essential clauses does not raise issues, being completely circumscribed to the case-law of the application case C-618/10, because the court, by ascertaining the abusive feature of the clauses, removes them from the contract and orders the refunding of the amounts cashed in based on them, allowing the contract to continue without them. This is the case of the arrangement fee, of granting, of early repayment of the creditor, of risk, without which the contract may still exist, their inclusion in the annual percentage rate of charge (APR) is

[1] C-618/10, Para 42
[2] C-618/10, Para 43
[3] C-618/10, Para 65

not relevant from the perspective of classifying the benefit as non-essential, as they do not belong to the main object of the contract. Thus, in the application C-186/16[1], the CJEU has stated that the notion of "main object of the contract", in the meaning of Art 4 Para 2 of the Directive 93/13/EEC includes a contractual clause according to which the loan must be repaid in the same foreign currency in which was initially granted, "by taking into consideration that this clause states an essential service characterizing this agreement". *Per a contrario*, if that clause does not establish an essential service for the contract, it is not part of its main object and can be analysed from the point of view of its abusive nature with the consequence of its elimination if that character is found.

There are situations in which the contract cannot continue after the removal of the clause, because it refers to an essential service and its removal would modify the nature of contract or with its deprivation of object.

Regarding such a hypothesis, compared to the interest clause, the price of the loan, which is an essential one, in C-269/19 the CJEU noted that Art 6 Para 1 of Council Directive 93/13/EEC must be interpreted as meaning that, following a finding that the clauses defining the mechanism for setting the variable interest rate in a loan agreement are abusive and when that contract cannot continue to exist after the removal of the abusive clauses in question, the annulment of that contract would have particularly detrimental consequences for the consumer and there is no additional national law, *the national court must take all necessary measures to protect the consumer, taking into account all its domestic law the particularly harmful consequences which the cancellation of the contract in question could have*. The Court notes that there is nothing to prevent, inter alia, the national court from inviting the parties to negotiate in order to determine the methods of calculating the interest rate, provided that it establishes the framework of those negotiations and seeks to strike a real balance between the rights and obligations of the contractors, taking into account, inter alia, the objective of consumer protection underlying Directive 93/13.

Thus, in such cases, given the impossibility of continuing the contract without those clauses, the annulment of the contract having particularly detrimental consequences for the consumer, who would have to repay the rest of credit, the domestic court is summoned to identify the

[1] Ruxandra Paula Andriciuc et al. *v* Banca Românească SA

national law norms to replace the removed clause, if such norms do exist. However, if such a text cannot be identified to replace the will of the parties regarding that aspect, the contract cannot continue, renegotiation being the only solution, since the court cannot replace the abusive clause.

The CJEU notes that Directive 93/13 does not seek to provide uniform solutions as regards the consequences to be drawn from the finding that a contractual term is unfair, so that the objectives of the European legislature could generally be achieved by simply not applying for the consumer of the abusive clause, however, if the contract could not continue to exist without that term and there is no possibility of replacing it with additional national law[1], renegotiation is required.

In this context, it becomes relevant for the national judge the object of the court's request for investiture, possibly specified or amended, added, because if the verification of the abusive nature of some clauses does not require investment, regarding the consequences of such a finding, the court cannot go beyond the consumer-plaintiff's request.

In other words, if he merely seeks a finding of abusive nature, the removal of the clauses and the termination of the contract, the court cannot order its continuation. Also, if the sole head of claim concerns the abusive nature of certain clauses, without other requests, the court may not order the refund of the amounts collected under the null clauses. If after the acceptance of the main head of claim it has been requested the continuation of the contract from a certain perspective, with a certain content of the respective clause, the court cannot order as such, if the request does not comply with a supplementary provision of domestic law[2].

Thus, it is difficult the solution when, after the removal of the abusive clause, usually essential, the contract cannot continue, and the

[1] This is the case of the interest from credit agreements in foreign currency, for which in the Romanian law there is no rule that establishes a certain amount or a certain formula, as a legal interest. In the case of the loan granted in foreign currency, for which the restitution is made in the same currency, the agreement of the parties in this respect already reproduces the rule of monetary nominalism (Art 1578 of the previous Civil Code, Art 2164 of the current Civil Code), and if there is raised the issue of finding that the clause was abusive (although it is not possible, see C-81/19), the supplementary rule with the same content would be applied in addition.

[2] For example, to request the application of a legal interest, determined by a certain text of law, which is applied if the parties do not agree otherwise, respectively another amount of the interest.

internal norms do not state a supplementary provision to replace the null clause[1]. How will the contract continue, given that the consumer does not want to terminate it as it would have serious consequences, being obliged to return everything he received under the credit agreement? The judge cannot replace it, as there is no supplementary norm, in the same time he cannot order the termination of the contract as it cannot continue…and then, from the direction given by the Luxembourg Court, all that remains is for the judge to "force" the parties to negotiate, determining the limits of this negotiation, without prior notice.

b. If the application of hardship is required, because the performance of the contract has become excessively onerous for the plaintiff, due to exceptional changes in the initial circumstances of the conclusion of the contract and is required the adjustment of the contract, using a formula stated by the plaintiff or left at the appreciation of the court, first the judge shall verify the requirements of hardship.

The parties could have agreed in the contract for a hardship clause[2], which concretely provides for the automatic adaptation of the contract, but, at the level of the credit agreements concerned, prior to the New Civil Code, no such means was practiced, legal culture not being adapted to such procedures.

The conditions of hardship are determined after the regulation applicable for the contract, because the ones concluded under the former Civil Code are subjected to the regulation from 1864 and those subsequent to 1st October 2011, to the New Civil Code.

Regarding the contracts concluded under the Civil Code of 1864, it is admissible to apply the theory of hardship, this being accepted at the jurisprudential level, starting from Art 970 of the previous Civil Code, although the internal regulation lacked the criteria according to which it could be assessed the existence of hardship and the possibility of the court to adapt the contract.

In the event of a strong imbalance between the parties' benefits, due to an exceptional change in the circumstances in which to contract, to restore the contractual balance by increasing or decreasing the value of

[1] There is no internal rule that provides for a legal interest on foreign currency loans that can be applied instead of the one mentioned in the clause deleted as abusive.

[2] V.Sandăr, "Configuraţia impreviziunii în noul Cod civil. Consideraţii cu privire la clauzele de hardship", in *Revista Română de drept al afacerilor* no. 10 (2013): 75-76

the performance of one of the parties or even termination of the contract, under the previous Civil Code jurisprudential or doctrinal solutions, in contracts with successive execution[1], based either on the theory *rebus sic stantibus*, or on the theory of good faith and equity[2]. It was noted the need to re-establish the contract in view of the major price fluctuations with the consequence of creating extremely onerous, unbearable imbalances between the services of the parties. The hardship could be recognized even if the party were able to fulfil their obligation, but this execution would require an unreasonable, exorbitant effort on its part, in conditions of blatant inequity.

With regard to new contracts, after October 1st, 2011, the law expressly allows the invocation of the hardship if the execution of the contract has become excessively onerous due to an exceptional change of circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation[3].

The Civil Code imposes certain conditions for notifying the court with the request to adapt the contract, respectively: 1. the change of circumstances occurred after the conclusion of the contract; 2. the change of circumstances, as well as its extent, were not and could not have been reasonably considered by the debtor at the time of concluding the contract; 3. the debtor did not take the risk of changing circumstances and could not reasonably be considered to have assumed that risk; 4. the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adaptation of the contract.

In the same context, if the court ascertained the incidence of hardship, shall have to adjust the contract or to order its termination, situation against which it is bound by the limits given by the investment application.

With regard to *currency hardship*, the execution of the contract must become excessively onerous, not in relation to the consideration received by the debtor, but in relation to how onerous the execution of the debtor's obligation was at the time of concluding the contract. This

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[1] A.Tabacu, *Contractul de închiriere a suprafețelor locative* (Bucharest: Rosetti, 2005), 284-289

[2] E.Chelaru, "Forţa obligatorie a contractului, teoria impreviziunii şi competenţa în materie a instanţelor judecătoreşti", in *Dreptul* no. 9 (2003): 45-48

[3] Regarding the revision of the contract based on the law, see also D. Trăilă and B. Moroșan, "Revizuirea contractului în dreptul român. CONTRA revizuire", in *CJ* no. 6 (2019): 319

excessive growth in the area of currency hardship does not consider the debtor's patrimony or the consideration received by him, but the situation of his obligation prior to the change of circumstances[1].

As a rule, the specific imbalance of foreign currency loans presupposes currency hardship and is not part of the category of situations in which the increase of the debtor's obligations is correlated with an increase of the advantages procured to the creditor to exist hardship, under the conditions in which the bank receives the same remuneration as loaned, the effort that the debtor makes to obtain this amount of money must be excessive.

If the existence of hardship circumstances in foreign currency credit agreements is admitted, a fair distribution between the parties of the losses resulting for the debtor from the exceptional change in the exchange rate shall be required. The adjustment of the contract on the basis of hardship, which requires a fair distribution between the parties of the losses resulting for the debtor from the exceptional exchange rate, is supported for reasons of fairness, as the bank's claim on the loan granted must be taken into account, namely the amount loaned, which must not be affected.

The former Civil Code did not proposed solutions for the specific adjustment of the contract, considering that the court cannot interfere between the parties to determine their obligations. If the hardship was ascertained, the court did not interfere upon the contract, but only noted the obligation of the parties to renegotiate, considering the guidance provided by the court. As such, the court is in a situation of not having at hand criteria according to which the contract is re-established.

The New Civil Code currently refers to the plaintiff's request to adjust the contract by a fair distribution between the parties and the benefices resulting from the change of circumstances or to order its termination.

Subsequently, the G.E.O No 55/2016[2] may provide guiding criteria for the adjustment of the contract. Compared to this normative act, the priority solutions for adapting the contract may aim at the repayment

[1] L. Bercea, "Riscul valutar, impreviziunea şi conversia creditelor în valuta"- Legea dării în plată şi impreviziunea, in *RRDP* no.1 (2017): 42

[2] Published in the Official Gazette No 727/20 September 2016 – on credit agreements offered to consumers for real estate, as well as for the modification and amendment of the G.E.O No 50/2010 on consumer credit agreements.

term and the credit remunerations, respectively the rescheduling of the remaining amount to be repaid from the credit for a period of time that ensures the payment by the debtor does not exceed the initial level from the date of conclusion of the contract or at least the level prior to the exceptional exchange rate change. Against the background of hardship, it is also possible for the debtor to be partially or fully discharged from the debt consisting of credit remuneration, interest and commissions, subsequent to the exceptional change of circumstances. A third solution is also possible, namely an intervention on the remaining amount to be repaid of the loan by converting it into the national currency, or in that currency, at an exchange rate that ensures a fair distribution between the parties of the losses resulting for the debtor from the exceptional change of the exchange rate.

Art 34 of the G.E.O No 52/2016 regarding the conversion of the loan into an alternative currency, reports its performance at the exchange rate communicated by the NBR on the day of the conversion request, without being able to question the date of conclusion of the contract. Therefore, the conversion of the credit shall be made at the exchange rate of the NBR on the day of the conversion and not at the exchange rate from the day of the contract's conclusion, so that it cannot represent a solution, the one proposed, as a rule, by consumers, being inspired, indeed, by an unsuccessful normative act[1], respectively the "freezing" of the exchange rate from the moment of concluding the contract.

Art 36 of the G.E.O No 52/2016 states the obligation of the creditor to constantly notify and alert the consumer, if he has contracted a loan in a foreign currency, at least monthly, on paper, on the assumption that the total amount payable by the consumer which remains to be reimbursed or the periodic instalments varies by more than 20% in relation to the amount to which it would be raised if the exchange rate had been applied from the time the contract was concluded between credit agreement

[1] The draft law amending G.E.O No 50/2010 declared unconstitutional by the Decision No 52/2017, published in the Official Gazette of Romania, Part 1, No 161/3 March 2017. The law states the modification of the G.E.O No 50/2010 introducing an obligation on creditors of credit agreements granted in Swiss francs to convert the credit balance expressed in Swiss francs into RON, as well as the consumer's right to go to court to recalculate debt in the case of outsourced/sold/assigned credit agreements and in the case of contracts concluded with consumers who have been subject to enforcement. The conversion is made at the "exchange rate of the National Bank of Romania valid on the date of concluding the credit contract/agreement in Swiss francs".

currency and national currency, but Art 32 of the same law provides that when the consumer decides to use the right to convert the credit agreement into an alternative currency, the creditor does not impose any restrictions and offers the consumer the products available from the creditor's offer at the time of the consumer's request for conversion. The law does not state a certain exchange rate, but sends the parties to negotiations under the conditions stated by the corroboration of Art 32 and Art 34 of the G.E.O No 52/2016 resulting the fact that a possible modification of the currency of the loan can only consider the exchange rate available on the day of the conversion and not the one from the day of the agreement's conclusion.

The legal literature[1], regarding the exchange of the credit, as means of adjustment of the credit agreements concluded in foreign currency, mentions that the solution of credit rescheduling may be inequitable towards the excessive value of the credit as effect of the modifications of the exchange rate, thus affecting the consumer.

Regarding the partial or complete discharge of the debtor from the debt representing certain interests and commissions, as a consequence of the currency hardship, it has been stated[2] that it must be taken into consideration the fact that the intervention upon the amount left for reimbursement of the credit to a certain exchange rate, shall also be taken into account the fair distribution between the parties of the losses resulting for debtors from the exceptional change of the exchange rate. Basically, the conversion is made at an exchange rate that ensures this equitable distribution, which determines the non-application of the above provisions, regarding the exchange rate valid on the date of conversion. It is proposed to convert the loan into foreign currency in the national currency, at an exchange rate set by the judge, thus modifying the debtor's obligation both in terms of payment currency and in terms of economic value. The adjustment of the contract cannot aim an equalization of the services nor the distribution of the onerous effect upon the other party, so that are not appropriate, from the perspective of the adjustment, neither the exchange rate on the day of the agreement's conclusion, nor the exchange rate on the day of the conversion.

For the adjustment of the contract it has been shown that in a first stage it is necessary to deduce from the exchange rate resulted as effect

[1] Bercea, "Riscul valutar, impreviziunea şi conversia creditelor în valuta", 46-47
[2] Bercea, "Riscul valutar, impreviziunea şi conversia creditelor în valuta", 47-48

of the hardship of the weight of the currency risk, reasonably assumed by the consumer, and in a second phase, the fair distribution between the debtor and creditor of the effects produced on the exchange rate of added risk[1]. However, by converting the loan into the national currency, while keeping the interest initially provided, associated with the foreign currency credit agreement, a new imbalance is created, as the costs of the loan in foreign currency are usually lower, the interest rates being different and adapted by the bank according to the currency of the loan.

Such adaptation creates a serious difficulty for the judge in the context in which he cannot adapt/modify a single clause, disregarding the others, the contract must be understood as a unitary whole, and all its costs will be appreciated, to avoid the failure that from the need to adjust as a consequence of the hardship, to achieve a fair distribution of the loses between the parties of the contract.

As regards the time at which the contract is to be practically adjusted, it is important to take into account the date of the exceptional changes in the initial circumstances of the contract, as there has been an imbalance between the rights and obligations of the parties since then.

Anyhow, the preferred solution is the negotiation between the parties for the resettlement of the contractual clauses, even in the case of hardship, in the context in which once the litigation has emerged it is difficult to believe that the parties shall aim to balance the agreement, and not their own interest during the trial.

Therefore, the judge, having at hand the instrument of orienting the parties towards the amicable settlement of the dispute, could impose on them to negotiate, giving them a deadline in this regard and minimum guidance on the limits of negotiation. In all cases where the negotiation is not finalized, the judge being summoned to adapt the contract of the parties, even if this is allowed by the Civil Code, there is a risk that a party may be dissatisfied considering that the adaptation of the contract did not achieve a fair distribution of losses, however, the parties must accept this consequence as possible in relation to a final court procedure.

The general criteria for negotiation may also result from Decision No 623/2016[2] in which the Constitutional Court held that the hardship

[1] Bercea, "Riscul valutar, impreviziunea şi conversia creditelor în valuta", 47-48

[2] Para 97 of the decision regarding the exception of unconstitutionality of Art 1 Para 3, Art 3-4, Art 5 Para 2, Art 6-8, especially Art 8 Para 1, 3 and 5, Art 10-11 of the Law No 77/2016 on the giving in payment of real estate in order to settle the obligations

"does not aim to return to the benefits at the time of the conclusion of the credit agreement or to the risk accepted by the parties at the same time, being, therefore, foreign to them, but offers a legal basis for adapting or terminating the contract. The adjustment takes place when the social utility of the contract may be maintained, while the termination when in case of intervention of the new conditions the contract loses its social utility". The Court also mentioned that "firstly, the parties have an obligation to renegotiate the contract and, secondly, the renegotiation must be effective in relation to the new reality".

In this context, the procedural rules must also be taken into account, since, even in the realm of abusive clauses, where the judge can verify the abusive feature ex officio, he cannot substitute himself for the parties regarding the content of the request and the solutions requested by them[1].

When the request is of a precise nature, requesting the adaptation in a certain manner that the court considers as meeting the legal requirement that the proposed solution to achieve a fair distribution between the parties of the losses and benefits resulting from the change of circumstances conclusion of the contract, the court orders the adaptation of the contract in that manner.

However, if the adaptation solution, proposed by the consumer plaintiff, only completely transfers the losses to the defendant opponent or allows only the plaintiff to reap the benefits resulting from the change of circumstances existing at the conclusion of the contract, the court cannot admit the request.

For instance, in the case in which the plaintiff's request invests the court regarding a specific aspect, requesting the judge to rule a decision with a certain content (the establishment of a certain amount or a calculation formula for the interest, the determination for the entire period of the contract of a certain exchange rate), the court must analyse these requests and verify if they are compliant with Art 1271 Para 2 let a) of the Civil Code, in the sense that by this it is distributed or not,

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assumed through loans, as well as the law in its ensemble, published in the Official Gazette of Romania, Part 1, No 53/18 January 2017.

[1] C. Zamșa, "Efectele impreviziunii: adaptarea și încetarea contractului, între negociere și litigiu, prezent și viitor", in *Revista Română de Drept al Afacerilor* no. 7 (2009); D. Trăilă and B. Moroșan, "Revizuirea contractului în dreptul român. PRO revizuire", in *CJ* no. 7 (2019): 392

equitably between the parties the losses and the benefits resulting from the change of circumstances.

The problem may arise when the plaintiff does not specify the request, showing concretely in what sense he wants to adapt the contract but asks the court to find a solution to adapt.

Here two options are possible: the court requests the specification of the object of the request in the regularization procedure under the sanction of nullity of the request in case of non-compliance or the court itself identifies the solution of adaptation. Therefore, if the plaintiff generically requests the judge to adjust the contract in order to achieve this fair distribution between the parties of the losses and benefices resulting from the change of circumstances, without determining certain limits, it is raised the question if the judge has the possibility to specifically establish the future contractual clauses, in the meaning of saving the contract or on the contrary, in this situation will he ascertain the termination of the contract according to Art 1271 Para 2 let b) of the Civil Code[1]?

Indeed, the Civil Code does not refer to the plaintiff's request, providing only what the court can do, but such possibilities must be linked to its investiture, because if it could be substituted for the parties, considering that a certain solution, not required by them or which is not implied from the demand economy (implicit), better corresponds to the balancing of the contract, it would be considered that Art 1271 of the Civil Code derogating from Art 9 of the Code of Civil Procedure regulating the principle of availability in the civil procedure, an artifice difficult to accept compared to the different nature of the two types of norms.

Practically, the provisions of the Civil Code need the procedural norms to be applied, so that where it was wanted to confer to the court other possibilities than those provided by the Code of Civil Procedure, it expressly provided for it[2], which cannot be retained in the case of Art 1271 of the Civil Code.

[1] R. Rizoiu, "Paradoxul călătorului în timp a fost evitat (…) la timp: Condiţiile (constituţionale ale) dării în plată", in *RRDP* no.1 (2017): 156-157.
[2] For instance, Art 117, Art 128 of the Civil Code etc.

The fact that in certain cases, incidentally, the court could verify the hardship without express investiture[1] does not transfer to it the specific means of adjusting the contract, in the absence of a request from a party which will precisely determine its investiture[2].

CONCLUSIONS

When the investiture of the court aims mainly the ascertainment of the abusive feature of certain clauses, it is necessary the application of the Court of Luxembourg case-law, considerable in this matter, the courts being preoccupied, on the one hand, to analyse the abusive feature of the clauses and, on the other hand, in the situation of the admittance of the request, to determine the specific performance of the contract. Given that the jurisprudence of the CJEU has consistently stated that the court may also verify ex officio the abusive nature of certain clauses, regardless of the jurisdictional procedure in which it is located, taking into account that the court after finding the abusive nature of a clause can only remove it from application or replace it with supplementary rules of national law, if necessary, results in the event that it finds that the contract can no longer continue as a result of the abolition of the abusive clause and that it is not possible to apply a supplementary rule. in a stalemate caused by the fact that practically the solution can produce more serious consequences on the consumer than if no action had been taken.

Finding the absolute nullity due to the abusive nature of an essential clause and not being able to put anything in place in the absence of a supplementary rule in domestic law, the court is forced to determine by its decision the impossibility of continuing the contract, which in the case of credit agreements usually entails the early maturity and the obligation of the consumer to repay the credit and its cost in full, in a single benefit.

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[1] Regarding the Law No 77/2016 on the giving in payment, the Decision 623/2016 of the Constitutional Court (Para 119) states that – "the only interpretation submitted to the constitutional frame in the case of a general regulation of hardship in the performance of the bank credit agreements is that according to which the court, in the absence of an agreement between the parties, has the competence and obligation to apply the hardship if it ascertains that the conditions for its existence are fulfilled.

[2] For the particular case of the application of the law of the datio in solutum, see also A. D. Buz, "Regăsirea echilibrului pierdut: deziderat comun al reglementărilor din materia clauzelor abusive", in *Revista Română de drept al afacerilor* no. 2 (2017): 109-110.

Such cases may be avoided during the procedure, by sending the parties to negotiations for the amicable extinguishment of the litigation, given the duties of the judge recognized by Art 21 Para 2 in relation to art 227 Para 1 of the Code of Civil Procedure.

If the investiture of the court aims the hardship, the court shall be summoned to verify its conditions, the analysis being different than the above hypothesis and the solution being in strong relation with the means in which the plaintiff has stated his requirement. The court shall verify the requirements of hardship depending on the law applicable for the contract and shall order the adjustment of the contract depending on the requirement submitted by the plaintiff.

When the court is required to adapt the contract to a certain extent, obviously without the agreement of the parties, the court must consider whether that method meets the condition of fair distribution between the parties of the losses and benefits resulting from the change of circumstances taken into account at the conclusion of the contract or, on the contrary, if it is not a question of a real equitable distribution of them, but of the creation of a contractual imbalance to the detriment of the defendant and exclusively in favour of the plaintiff.

However, if the request is not specified, the plaintiff asking the court to decide how to distribute the losses and benefits resulting from the change of circumstances, the court, in application of the principle of availability and the role of the judge in civil proceedings, cannot be considered invested with a request certain content, having a measure that was not actually requested out of ignorance, lack of interest or even out of curiosity.

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CONDITIONS REQUIRED FOR OPENING INSOLVENCY PROCEEDINGS

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Abstract:

Law no. 85/2014 produced a unification of the regulations on insolvency procedure and insolvency prevention procedures representing a unique working tool for insolvency practitioners.

Although some institutions have been amended, they are still found in the current regulation, also called the Insolvency Code, many of the previous legislations, which have proved useful and necessary.

Thus, regarding the opening of the insolvency procedure, the law preserves the two main ways in which the insolvency procedure can be opened against the debtor, modifying in some places, some features of this opening procedure.

Key words*: *debtor; insolvency; opening proceedings; creditor.

I. OPENING REMARKS

Law no. 85/2014 achieved a unification of the regulations on the insolvency proceedings and insolvency prevention, and provided the insolvency practitioners with a unique working tool.

While a number of institutions did sustain changes, many of the previous regulations, that had proven useful and necessary, are still found in the current piece of regulation, known also as the Insolvency Code.

Thus, as to the opening of the insolvency proceedings, the law maintains the two key means of opening the insolvency proceedings against the debtor, with but incidental amendments of their characteristics.

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II. CONCERNING THE STATE OF INSOLVENCY

Pursuant to Article 5(1)(29) of Law no 85/2014, *"insolvency is that state of the debtor's property that is characterized by insufficient funds available to cover for the certain, liquid and due debts, as follows: a) the debtor's insolvency is presumed when, after 60 days of the respective due date, the debtor failed to make payment of its debt to the creditor; this is a relative presumption; b) the insolvency is imminent when it is proven that the debtor would not be able to make payment of its committed due debts on their respective due date from the funds it has available on such due date".*

The proof of insolvency requires adducing of evidence that shows: the failure to make payment of the debts and the insufficient funds available. The mere failure to make payment of the debts does not qualify as conclusive and sufficient evidence of insolvency, because the insufficient funds available need to be evidenced, too.

The presumption of manifest insolvency provided at Article 5(1)(29) of Law no. 85/2014, which implies that insolvency is presumed when the debtor failed to make payment of its debt to a creditor after 60 days of its respective due date is a relative legal presumption (jurist tantum) that can be reversed by any evidence to the contrary - the proof of sufficient funds available.

In order to prove such, the debtor is allowed to produce documents supporting that it holds funds, meaning that there are funds available to make payment of its debts to creditors; thus, the second condition for insolvency - the insufficient funds available - is not met.

Creditors, in their turn, are required to prove the debtor's insolvency due to the insufficient funds available and, as such, in absence of such evidence, the second fundamental condition to open the insolvency proceedings is not met.

Insofar as the debtor proves availability of sufficient funds, the action should be dismissed because the conditions laid down at Article 5(1)(29) of Law no. 85/2014 are not met, meaning that are there is no debtor's insolvency.

The mere failure to make payment of the debts does not amount to debtor's payment incapacity, a finding that Ilfov Tribunal I held long time ago under its judgment dated 16 June 1923[1].

The insolvency proceedings are not an avenue to recover claims by means of forcedly executing the debtor in default, but these are special proceedings applied to a debtor in payment incapacity.

III. THE CERTAIN NATURE OF THE CLAIM

Another condition that needs to be met for the insolvency proceedings to be opened is the certain nature of the creditor's claim.

Pursuant to Article 5(1)(20) of Law no. 85/2014, *"For the purposes of this law, certain claim means that claim the very existence of which stems from the claim instrument or also from other instruments, even when these are not authentic, issued or recognized by the debtor"*.

An examination of the claim instrument alleged by the creditor should find with certainty the existence of the claim alleged by it, just as there should be also other instruments issued or recognized by the debtor stating the claimed amount.

As we have already shown, a certain claim is that claim the existence of which stems from the very claim instrument or also from other instruments, even when these are not authentic, issued or recognized by the debtor. Consequently, a claim means both the principal sum, as well as any ancillary liabilities attached thereof, computed according to the agreement between the parties.

Furthermore, these amounts claimed by the creditor should be also due, otherwise the due condition shall not be deemed met.

Insofar as the creditor and the debtor are parties to an agreement the performance of which has reached a deadlock for whatever reasons, such disputes should not be taken by the court as grounds to open the insolvency proceedings against the party that refuses to make payment of a given amount of money, but the court is required to look carefully into the situation between the parties.

Thus, the condition of putting in default by the creditor of the obligation not performed should be reviewed.

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[1] General case-law 1923, 301, apud. St. D. Cărpenaru, *Drept comercial român*, 7th edition (Bucharest: Universul Juridic, 2007), 631

Notice to the debtor in default is a preliminary condition for any of the contractual remedies listed at Article 1.516(2) of the Civil Code[1]. This applies to all obligations falling due after the coming into force of the New Civil Code, regardless of the date when the obligation arose (Article 114 of Law no. 71/2011).

Pursuant to the provisions of Article 1.521 of the Civil Code, the notice of default of the debtor takes effect de jure when the law or the contract provides so, or at the initiative of the creditor.

The notice of default is a necessary condition for holding the debtor to pay damages, and it is explained by the implied presumption according to which as long as the creditor remains passive, the default, faulty or late performance is deemed not to have caused it any loss, and it agreed to postpone the due date of the debt[2].

Article 1.521 and following of the Civil Code distinguish between noticing the debtor in default by the creditor, and the de jure default of the debtor in performance of the obligation.

The first case concerns the unilateral will of the creditor under the contract that gives formal notice to the debtor and demands it to perform the obligation assumed[3]. As the doctrine has held[1], this is the expression

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[1] While Article 1.516 of the New Civil Code seemingly demands for putting in default as a prerequisite for termination, things are quite different in reality. First, the parties may waive this formality considering that, pursuant to Article 1.552(1) of the New Civil Code, one of the three scenarios where a valid unilateral declaration of termination could be issued is when the parties "agreed so". Similarly, Article 1.553 of the New Civil Code which regulates the termination clause (commissoria lex) settles for referring to termination "de jure" of the contract and recognizes to the parties the possibility that, under an agreement, they determine that termination takes effect "by mere default", meaning without a prior notice of default. Additionally, there are also legal exclusion from the requirement to put in default, and these are found in the matter of social contracts. An example in this regard is Article 1.727 of the New Civil Code concerning the sale which reads that "when the sale occurred without a payment term, and the buyer has not made payment of the price, the seller may, within 15 days of the hand-over date, to declare termination without notice of default, and to claim to be returned the movable property sold, as long as this is still in possession of the buyer, and has not sustained alterations". See C. Popa and A. Lisievici, *Rezoluțiunea în Noul Cod civil (I)*, 41 ; N. Daghie, *Izvoarele obligațiilor civile* (Bucharest: Universul Juridic, 2018), 175.

[2] M.-L. Belu Magdo, 376.

[3] The lawmaker takes over the solution already enshrined under Article 1079 of the 1864 Civil Code to the effect that, as a rule, the debtor is not deemed in default at the mere expiry of the time-limit, but the creditor is required to make a formal gesture claiming the performance of its claim.

of the good faith that should govern the creditor's actions when pursuing the recovery of its claim.

Article 1524 of the Civil Code reads that the debtor is not in default when it offered, on its respective due date, the due performance, even without observing the formalities required under the law for noticing the creditor in default (Articles 1510-1515 of the Civil Code), but the creditor unreasonably refused to receive it.

Another situation is represented also by the case when the creditor has made a pre-payment to the debtor and files for the latter's insolvency in the ground of the debtor's refusal to return this amount of money.

Thus, we can speak about the applicability of Article 1544 of the Civil Code which entitles the debtor to retain the pre-payments made by the creditor when the first can prove that the latter is in default of contractual duties by failing, for instance, to put in place the delivery conditions for the goods/services ordered, despite the debtor having always reassured it its availability to perform.

The confirmatory earnest money is also a conventional and projected measurement of the compensations consisting of depositing a given amount of money or other fungible goods at the time when the contract is executed[2]:

- in order to be retained in case of a default without justification of the obligation by the party that assumed it, or to be returned in a double amount in case of a default by the party that received the earnest money.

Thus, insofar as the debtor proves the impossibility to perform its obligation due to the fault of the creditor, it can retain the pre-payment subject to the terms of Article 1544 of the Civil Code.

When the debtor fails to prove that it holds sufficient funds or that its non-performance was caused by the creditor in default, and proves a certain, of a fixed amount and due claim that is older than 60 days and in excess of lei 50,000, the relative presumption of insolvency shall take effect, and the court is to uphold the creditor's action.

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[1] See N. Vézina, "La demeure, le devoir de bonne fois et la sanction extrajudiciare des droits du créancier", in *Revue de droit de l'Université de Sherbrooke* (1996): 455 and following. *apud* S.I. Vidu, "Câteva aspecte privind evaluarea legală a daunelor-interese moratorii", in *RRDJ* no. 5 (2015): 139.

[2] G. Boroi and M.-M. Pivniceru (coordinators), *Fișe de drept civil* (2017), 471.

Nevertheless, the debtor has available also other means to prevent the opening of the insolvency proceedings.

Thus, considering that pursuant to Article 72(5)-(6) of Law no. 85/2014, when the claim of the creditor that filed for the opening of the proceedings is paid before the closure of the debates, the insolvency judge shall dismiss the action as devoid of object, and the security lodged shall be returned accordingly.

When the debtor fails to make payment of the creditor's claim before the closure of the debates, and the insolvency judge determines that the debtor is in insolvency, it shall uphold the action seeking the opening of the proceedings brought up by the creditor and, under judgment, shall open either the general or the simplified insolvency proceedings, as applicable. In this case, the security shall be returned to the creditor insofar as the court ordered it to consign a security, as a consequence of the debtor's challenge.

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THE BENEFIT OF EXCUSSION – SPECIFIC DEFENCE UNDER THE SURETYSHIP RELATION

Nora Andreea DAGHIE[1]

Abstract:

The main effect of suretyship is the obligation of the surety to perform the debtor's obligation where the latter fails in the voluntarily performance thereof.

By invoking the plea of excussion, the conventional or legal surety resorts to the option of requesting the creditor which started proceedings against the surety to first proceed against the assets of the principal debtor, within the limits of the principal debtor's assets value, which the surety shall indicate to the creditor.

This defence whereby the surety pursues its exoneration, in part or in full, from its guarantee obligation, arises from the ancillary nature of the guarantee obligation, on the one hand, and from the legal relation of surety itself, on the other hand.

Key words: *obligation; non-performance; guarantee; limits; conditions.*

PREAMBLE[2]

By reference to the collateral, which, theoretically, ensures a higher security of enforcement, the suretyship distinguishes itself by a lower formalism and a much higher degree of suppleness.

The Romanian law of 2009 defines the suretyship in the Civil Code, in Art. 2280, as "the agreement whereby a party, the surety, undertakes towards the other party, who is the creditor in another obligational relation, to fulfil free of charge or in exchange for a remuneration the debtor's obligation unless the later fulfills it"[3].

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[2] See Nora Daghie, „Aspecte teoretice și practice cu privire la natura juridică și felurile fideiusiunii", in *Dreptul* no. 9 (September 2020): 30, 32-34.

[3] For a dictionary definition, see Dumitru Rădescu, Elena Rădescu and Georgeta Stoican, *Dicționar de Drept civil și proceduri civile*, 2nd edition (Bucharest: C.H. Beck,

Therefore, by the mechanism of suretyship, the creditor will have as a joint guarantee at least two estates: first of all, of course, the principal's estate but, apart from this, he can also dispose of the estate of the surety/sureties.

Suretyship gives rise to an obligation to perform and is a personal guarantee[1], ancillary to the main obligation undertaken by the debtor towards the creditor. Consequently, the parties to the suretyship agreement are only the creditor and the surety (the person who undertakes the obligation to secure the debtor's obligation; a third party to the relation between the creditor and the debtor[2]). The debtor of the secured obligation is not a party to the suretyship agreement. The direct result of the fact that the debtor is a third party to the suretyship agreement is that the suretyship can be contracted even without the knowledge and even against the will of the principal (Art. 2283 of the Civil Code)[3].

Also, the surety may commit not only for the principal, but also for its surety. Thus, according to Art. 2284 of the Civil Code, the suretyship may be created to secure the obligation of another surety.

The legal nature of suretyship is voluntary, meaning that

2017), 491; Mircea Costin and Călin Costin, *Dicționar de drept civil de la A la Z*, 3rd edition (Bucharest: Universul Juridic, 2019), 434.

"The person who guarantees for another will be the person who pays, goes an old saying. Suretyship is therefore dangerous; that is why Loysel said: «Pleige, plaide; gage rend, et bailler caution est occasion de double procès»" – Dimitrie Alexandresco, *Explicațiunea teoretică și practică a Dreptului civil român, Tomul X Contractele (III). Garanțiile* (Bucharest: Universul Juridic, 2017), 116.

[1] The specific aspect of the personal guarantees consists in affecting a person's patrimony, other than debtor's, to secure the fulfilment of the obligation, and the creditor may pursue said person (natural or legal – who becomes the personal guarantor) unless the personal debtor fulfills its obligation. The personal guarantor undertakes the capacity as guarantor debtor towards creditor, which affects its own patrimony next to the debtor's patrimony for the purpose of fulfilling the creditor's rights. The creditor will thus benefit from the joint guarantee over the debtor's patrimony and the joint guarantee over the personal guarantor's patrimony. Consequently, the mechanism of guarantee implies double or even multiple patrimonies for the general security of the loan. See Emod Veress, *Drept civil. Teoria generală a obligațiilor*, 2nd edition (Bucharest: C.H. Beck, 2016), 271.

[2] Călina Jugastru, *Drept civil. Teoria generală a obligațiilor* (Bucharest: Universul Juridic, 2017), 272.

[3] Emod Veress, *Drept civil. Teoria generală a obligațiilor*, 4th edition, (Bucharest: C.H. Beck, 2019), 317.

irrespective of the concrete species, the suretyship remains a conventional guarantee[1]. The source of suretyship will always be a special agreement, based on a particular legal intention: to guarantee the fulfilment of another's debt[2].

The guarantor may oppose to the creditor two specific legal means typical for the suretyship relation[3]: The benefit of excussion (Article 2294 of the Civil Code) and the benefit of division (Article 2298 of the Civil Code).

CONDITIONS FOR INVOKING THE BENEFIT OF EXCUSSION

The foreclosure of the guarantor is not conditional on a prior foreclosure of the main debtor, as the creditor may request the performance of the obligation from the guarantor in the presence of a simple non-performance from the main debtor[4]. In other words, on the due date of the main liability, the unpaid creditor may choose to foreclose either the debtor, or the guarantor, without being forced to comply with new orders[5].

The benefit of excussion is a faculty granted by the Civil Code to the guarantor, to request the creditor, which proceeded to the foreclosure against it (by suing the guarantor or by initiation of the enforcement procedure, in the event that the suretyship agreement represents the

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[1] Any agreement involves the meeting of the parties' will on the subject, term and other modalities of the agreement – irrespective of the solemn, real or consensual modality of formation of the obligations. See Mircea Dan Bob, *Obligația contractuală în dreptul roman cu trimiteri comparative la Codul civil* (Bucharest: Universul Juridic, 2015), 51.
Suretyship always derives from an agreement, therefore it implies an agreement concluded by a suretyship and a creditor and the right to guarantee cannot derive from the law or by order of the court of law, unlike the mortgage where, in specific circumstances, a mortgage right is established under the law (e.g. the legal mortgage in case of the contractor for the payment of the work price, set forth in Art. 1869 of the Civil Code and Art. 2386 item 6 of the Civil Code). See Gabriel Boroi and Mona-Maria Pivniceru (coordinators), *Fișe de drept civil*, 2nd revised and enlarged edition (Bucharest: Hamangiu, 2017), 518.

[2] Paul Vasilescu, *Civil Law (Drept civil). Obligations*, 2nd revised edition (Bucharest: Hamangiu, 2017), 129.

[3] Gabriel Boroi, Carla Alexandra Anghelescu and Ioana Nicolae, *Fișe de drept civil*, 5th revised and enlarged edition (Bucharest: Hamangiu, 2020), 159.

[4] Boroi, Anghelescu and Nicolae, *Fișe de drept civil,* 159.

[5] Florică Ciutacu, *Drept civil. Teoria generală a obligațiilor* (Bucharest: Universul Juridic, 2020), 144.

enforceable title[1]), to first foreclose the debtor's assets, and only thereafter, if it is not compensated, to foreclose it (Article 2294 of the Civil Code).

This right of the guarantor is the direct consequence of the fact that its obligation is subsidiary to the obligation of the main debtor, it is only a "safety line" for those situations in which the (main) debtor does not keep its promise[2].

The scope of the benefit of excussion only covers the conventional suretyship and the legal suretyship[3]. The judicial guarantor cannot request the creditor to foreclose the assets of the main debtor or the assets of another guarantor[4], on the ground that this type of guarantee has already undergone a judicial assessment of the situation of the parties. According to the doctrine[5], in the event that it is required the set-up of the judicial suretyship, the main debtor's situation is already difficult, and the grant of a security as a dilatory component would conflict with the measurement purpose.

Article 2295 (1) of the Civil Code requires the guarantor to actively involve in the creditor's action against the main debtor. He should facilitate to the creditor the access to the property asset of the main debtor[6]. Thus, the guarantor can only oppose the creditor the benefit of excussion within the limit of the value of the assets subject to foreclosure belonging to the main debtor, which it shall indicate to the

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[1] Gabriel Boroi and Alexandru Ilie, *Comentariile Codului civil. Garantiile personale. Privilegiile și garanțiile reale* (Bucharest: Hamangiu, 2012), 21.

[2] Radu Rizoiu, *Curs de garanții civile* (Bucharest: Hamangiu, 2020), 190.

[3] „(...) depending on the freedom which parties have to conclude the suretyship agreement and without referring to the guarantee source (always the agreement), we shall distinguish between:

a. conventional (consensual) suretyship – the parties to the legal obligational relationship (the debtor and the creditor) agree on the need that the debtor bring the commitment of a guarantor which should guarantee the performance of the obligation. (...)

b. legal suretyship – by a legal provision, the debtor is obliged to bring a guarantor for guaranteeing the obligations incumbent on it. (...)

c. judicial suretyship – in a litigious case, the court orders to bring a guarantor which should guarantee the obligation to a third party (...)" - Daghie, *„Aspecte"*, 34-35.

[4] Jugastru, *Drept civil. Teoria generală a obligațiilor*, 275.

[5] Rizoiu, *Curs de garanții civile*, 193.

[6] Rizoiu, *Curs de garanții civile*, 191.

creditor [1], paying, at the same time, the necessary amounts for the foreclosure of these assets.

According to the provisions of Art. 2295 (2) of the Civil Code, when the creditor delays the foreclosure due to its fault, it is liable toward the guarantor for the main debtor's insolvency arising from the indication of the assets subject to foreclosure up to the amount of their value. Consequently, if the amount of the assets indicated is higher or at least equal to the amount of the receivable, the guarantor's foreclosure cannot take place anymore; when the amount of the assets is lower than the amount of the receivable, the creditor may also foreclose the guarantor only within the limit in which the amount of receivables exceeds that of the assets presented by the guarantor to be foreclosed[2].

From the procedural point of view, relying upon the benefit should be made either in the court of first instance, *in limine litis*, "before the trial of the merits of the case" [Art. 2295 (1) 1st sentence of the Civil Code][3], or during the stage of enforcement, by way of appeal against enforcement, if there was no trial on the merits of the case[4].

By reference to the provisions of Art. 2300 of the Civil Code, when the guarantor opts for acting jointly and severally with the main debtor (either as joint and several guarantor, or as joint and several co-debtor), the benefit of excussion cannot be invoked, so that the joint and several guarantor can be foreclosed before the foreclosure of the main

[1] Civil Code of 1864 required certain conditions regarding the debtor's assets which the guarantor had to indicate at the same time with the benefit of excussion: the assets should be placed within the jurisdiction of the court of appeal where the payment should have been made, not to be litigious assets and already mortgaged assets for the payment of the debt and which are not anymore in the possession of the debtor (Art. 1664 of the Civil Code).

[2] Liviu Pop, Ionuț-Florin Popa and Stelian Ioan Vidu, *Drept civil. Obligațiile*, 2nd revised and enlarged edition (Bucharest: Universul Juridic, 2020), 615.

[3] The benefit of excussion is included, undoubtedly, into the category of pleas and it should be relied on by a statement of defense, unless the suretyship agreement is an enforceable title. Failure to file a statement of defense within the deadline provided for by law shall entail the defendant's lapse of the right to invoke pleas, except those of public order, unless otherwise provided for by law [Art. 208 (2) of the Code of Civil Procedure]. In this regard, see Emod Veress, *Contractul de fideiusiune* (Bucharest: C.H. Beck, 2015), 166.

[4] Boroi, Anghelescu and Nicolae, *Fișe de drept civil*, 160.

debtor and shall be held liable for the entire debt[1] Therefore, the doctrine[2] considers that, no matter the legal classification of the surety (suretyship or other personal guarantee), the benefit of excussion shall not exist in the case of a promissory note secured by a surety as in the matter of the promissory notes, the guarantor is held liable jointly and severally with the secured debtor.

The party which granted suretyship to another guarantor of the main debtor is in a specific situation. It shall never rely on the benefit of excussion as the guarantor which guarantees for another guarantor of 2nd degree[3], the guaranteeing obligation of which becomes active when those parties first obliged – the main debtor and its direct guarantors – "are insolvent or released by certain personal pleas of the main debtor or its guarantors" (Art. 2304 of the Civil Code).

WAIVER OF THE BENEFIT OF EXCUSSION – NON-USUAL PROVISION

Article 2294 (1) of the Civil Code allows the guarantor to early waive the benefit of excussion, to confer the suretyship an increased value (for the creditor) and thus, increase the degree of trust which this confers to the loan[4].

In this case, suretyship is deprived of its subsidiary nature and the creditor may directly bring action against the guarantor, before or in parallel with the enforcement initiated against the main debtor[5].

In practice, those situations in which professional creditors (banks) impose to the guarantor to expressly waive its benefit of excussion even by the security document are very frequent, which automatically confers the creditor a right of option, as it selects at its discretion the party to foreclose first (the main debtor or the guarantor)[6].

On these grounds, in our opinion, this waiver is a non-usual clause, within the meaning of the provisions of Art. 1203 of the Civil

[1] Cristina Irimia, „Article 2300 of the Civil Code" in *New Civil Code. Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2014), 2388-2389.
[2] Boroi, Anghelescu and Nicolae, *Fișe de drept civil*, 160.
[3] Irimia, *Article 2300 of the Civil Code*, 2391.
[4] Rizoiu, *Curs de garanții civile*, 192.
[5] Veress, *Contractul de fideiusiune*, 163.
[6] Vasilescu, *Civil Law (Drept civil). Obligations*, 135.

Code[1], it should be accepted as express and clearly express the will of the guarantor to waive. In this respect, the former doctrine indicated that it could not be supposed that the guarantor waived the benefit of excussion, if, at the time when it should have relied on it, the debtor had no assets; excussion can be relied in later, when the debtor acquires movable or immovable assets[2].

The non-usual standard clauses shall only produce effects if accepted, expressly, in writing, by the other party, just reasoned by the fact that the party using such standard clauses could obtain thus a unjust benefit to the detriment of its co-contractor, which perhaps, does not know or does not understand the effects of the respective clauses[3].

The text of Art. 1203 of the Civil Code does not set forth the exact manner in which this acceptance should be made, any conditions according to which this written wording shows that the party accepted the respective clauses, shall meet the requirement of the rule at issue.

In the literature[4] we find as well, the opinion according to which, the wording of paragraph (1) of Article 2294 of the Civil Code should not be understood that the implicit waiver is excluded, but, on the contrary, read in conjunction with Art. 2295 of the Civil Code, it follows that invoking again the benefit within the legal deadline shall result in the presumption of tacit waiver.

Indeed, the waiver may be tacit as well, but only in the case in which it has not an anticipated nature. Tacit waiver actually occurs only in the case in which the guarantor has the opportunity to rely on the benefit of excussion, however, it does not do it [5].

CONCLUSIONS

The benefit of excussion represent the special manner in which

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[1] To ensure the contractual balance between the parties, in order to protect the weaker party to the agreement, the Civil Code keeps in Art. 1203 those clauses which could be operated by either party to the concluded agreement.

[2] Alexandresco, *Explicațiunea teoretică și practică a Dreptului civil român, Tomul X Contractele (III). Garanțiile*, 144.

[3] Nora Andreea Daghie, *Sources of Civil Obligations* (Bucharest: Universul Juridic, 2018), 90.

[4] To this end, see Irimia, *Article 2294 of the Civil Code*, 2383.

[5] Emod Veress, *Drept civil. General Theory of Obligations* (Teoria generală a obligațiilor), 5th edition (Bucharest: C.H. Beck, 2020), 354.

the guarantor may sell in relation to the creditor, the characteristics of its guarantee obligations and its relative autonomy toward the main obligation[1]. It operates as a plea, as a means of defense of the guarantor, which is based on the equity idea[2] and, therefore, it cannot be invoked by any public judges.

By relying on the benefit of excussion, the guarantor intends to be held harmless from the total or partial performance of the guarantee obligation[3].

The immediate effect of relying on the benefit od excussion is dilatory, as it suspends the foreclosure of the guarantor up to the moment when the results of the debtor's foreclosure are known[4]. Thus, in the event that the receivable is recovered, the guarantor's obligation is settled as well, as a consequence of its ancillary nature. When the foreclosure does not result in the recovery of its receivable or the assets foreclosed only partially cover its amount, the foreclosure shall continue against the guarantor, within the limit in which the creditor's right remained uncovered.

Under the procedural point of view, the creditor's action against the guarantor cannot be suspended until the fulfilment of the enforcement procedure of the main debtor or may be rejected as being at an early stage[5].

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[1] Rizoiu, *Curs de garanții civile*, 190.
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GENERAL ASPECTS REGARDING THE MAIN SUBJECTS OF BANKING LAW

Adriana PÎRVU[1]

Abstract:

The banking system consists of all credit institutions operating in a state, their activity being authorized, coordinated and supervised by the central bank of the state. Credit institutions are Romanian legal entities specialized in providing financial services. They have the quality of traders, being organized in the form of joint stock companies.

Key words: *banking system; credit institutions; non-banking financial institutions; e-money institutions.*

INTRODUCTION

The notion of "credit institution" is of Community origin, being enshrined in Council Directive No. 780 of 12 December 1977, "the first banking directive"[2], the first article of which states that the credit institution is the undertaking whose activity it consists in receiving funds from the public and in granting loans on their own account ".

Following the repeal of Directive no. 780 of 12 December 1977 by Directive of the European Parliament and of the Council no. 2000/12 / EC of 20 March 2000 on the initiation of the activity of credit institutions[3], the deinition of "credit institution" has been extended, this being, according to the new regulation (Article 1 point 1 letter a) of the Directive), "an enterprise whose activity consists in receiving deposits or other repayable funds from the public and in granting loans on its own account".

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[2] Ion Turcu, *Banking operations and contracts. Treaty on banking law*, vol.I (Bucharest: Lumina Lex, 2004), 137-138.

[3] Published in Official Journal no 126 of 12 May 2000.

The Directive was transposed into national law by Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, which includes in the sphere of credit institutions entities whose activity consists in attracting deposits or other repayable funds from the public and in granting loans on own account.

1. UNITS OF CREDIT INSTITUTIONS

Credit institutions, which are Romanian legal entities, may operate in Romania through their own units, such as subsidiaries, branches or agencies.

Law no. 31/1990 on commercial companies defines the subsidiary by art. 42: "subsidiaries are companies with legal personality and are established in one of the forms listed in art. 2 (of the law, respectively general partnership, limited partnership , joint stock company, joint stock company and limited liability company) and under the conditions provided for therein. They will have the legal regime of the form of society in which they were constituted. "

According to GEO 99/2006, the subsidiary is an entity in a relationship with a mother company (art. 7 paragraph (1) point 5). A mother company is (in accordance with art. 7 paragraph (1) point 19 of the ordinance) "an entity that is in any of the following situations:

a) has the majority of voting rights in another entity (a subsidiary);

b) has the right to appoint or replace the majority of the members of the management, administration or supervisory bodies of another entity (a subsidiary) and is at the same time a shareholder / associate or member of that entity;

c) has the right to exercise a dominant influence over an entity (a subsidiary) of which the shareholder / associate or member is, by virtue of a contract concluded with that entity or of some provisions of the constitutive act of the entity, if the applicable legislation allows the subsidiary to be subject to such contracts or provisions;

d) is a shareholder / associate or member of an entity and the majority of the members of the management, administration or supervisory bodies of that subsidiary, in office in the current financial year, in the previous financial year and until the date on which the annual financial statements are prepared consolidated, have been appointed only as a result of the exercise of their voting rights; this provision does not apply in the

situation where another entity has towards the subsidiary the rights provided in let. a), b) or c);
e) is a shareholder / associate or member of an entity and controls alone, based on an agreement concluded with other shareholders / associates or members of that entity (a subsidiary), the majority of the voting rights in that subsidiary;
f) has the right to exercise or in fact exercises a dominant influence or control over another entity (a subsidiary);
g) the parent company together with another entity (a subsidiary) are managed on a single basis by the parent company. "

According to Article 7 paragraph (2) point 1 of the ordinance, the subsidiary is also an entity over which, in the opinion of the competent authority, a parent company effectively exercises a dominant influence.
Unlike subsidiaries, the branches are dismemberments without legal personality of the companies (art. 43 of Law no. 31/1990). They are registered in the trade register of the county in which they will carry out their activity, prior to the beginning of their operation.

In the banking sector, the branch of a credit institution is, according to GEO 99/2006, an operational unit legally dependent on the credit institution, which directly performs all or some of its activities.

The Agency is a unit without legal personality[1] of the credit institution created in an area of interest, to facilitate the conduct of operations for its clients or to expand into a new market segment.

2. ELECTRONIC MONEY INSTITUTIONS

Electronic money has emerged as a result of the development of electronic commerce and was regulated for the first time by Directive 2000/46 / EC, later repealed by Directive 2009/110 / EC. In our country,

[1] By Decision no. 4197 of December 16, 2011 pronounced on appeal by the Second Civil Section of the High Court of Cassation and Justice, it decided that an agency established by a banking institution, in accordance with the provisions of art. 43 para. (3) of Law no. 31/1990, cannot be the holder of rights and obligations as it is an entity lacking legal personality, not having the procedural capacity to use to stand as a defendant. Therefore, the subordinate relations in which the agency is with the parent company determine the obligation of the agency to conclude legal acts only on behalf of the parent company, only the latter having procedural capacity as holder of rights and obligations. The decision is available at https://legeaz.net/spete-civil-iccj-2011/decizia-4197-2011 , accessed on 18.03.2021.

the Directive was transposed by Law no. 127/2011 on the activity of issuing electronic money.

The activity of issuing electronic money is currently regulated by Law no. 210/2019 on the activity of issuing electronic money[1], a law that repealed the previous regulation (Law no. 127/2011).

Electronic money is defined by the legislator as "an electronically stored monetary value, including magnetic, representing a claim on the issuer, issued upon receipt of funds, for the purpose of conducting payment transactions and which is accepted by a person other than the electronic money issuer "(Art. 4 letter f) of the law).

A legal person may become an electronic money institution only after a special authorization, which is obtained following legal procedures. According to GEO 99/2006, electronic money institutions are legal entities, regulated as credit institutions specialized in issuing electronic money. The activity of these institutions is authorized and supervised by the central bank of the state.

Electronic money institutions have, in addition to the right to issue electronic money, the right to perform payment services, deposits and cash withdrawals.

Electronic money is the equivalent of money in material form. It can only be used in the electronic environment. Issuing institutions are financial institutions similar to banks. They created electronic currencies out of a desire to avoid banks' monopolies, high fees and regulations imposed on them, but also out of a desire to create a product that is easy to use in financial transactions, by fast, simple and secure means. Electronic coins can be used with prepaid cards or online.

Electronic currencies are generated in accounts and are used through them. An important aspect is that, unlike the payment made from the personal account, the payment made in electronic money is anonymous, from this point of view having the same effect as the payment made in fiat money. Also known as e-cash, digital cash, e-money or electronic money, this currency is used for low value payments[2].

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[1] Published in the Official Gazette no. 914 of November 13, 2019.

[2] Raul Felix Hodoș, "Electronic money and issuing institutions. Legal regime ", *Journal of companies and commercial law* no.1 (2018), https://lege5.ro/Gratuit/gi4domjwgq2a/moneda-electronica-si-institutiile-emitente-regimul-juridic .

A special aspect of these currencies is that they cannot be used for lending or financing.

Electronic currency should not be confused with virtual currency (crypto-currency). Traditionally, it is considered that the currency is a means of payment issued and guaranteed by a sovereign state through its central bank or by the European Union, through the European Central Bank. In opposition, cryptocurrencies are not issued or guaranteed by a central bank or a public authority.

Cryptocurrencies are defined by Directive (EU) No 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, as well as amending Directives 2009/138 / EC and 2013 / 36 / EU. According to the Directive, virtual currency is a digital representation of value that is not issued or guaranteed by a central bank or public authority, is not necessarily legally bound and does not have the legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically. It is usually used for the sale-purchase of goods or services or as an investment method.

3. LEGAL ENTITIES THAT CARRY OUT OPERATIONS SPECIFIC TO BANKING

CEC Bank SA is a universal commercial bank, whose sole shareholder is the Romanian state, through the Ministry of Public Finance. The main objectives of the bank are to finance SMEs, agriculture, public administrations and projects that contribute to economic development and job creation or maintenance. At the same time, the bank provides support to its customers for accessing European funds and supports government programs[1].

The activity of CEC Bank SA is regulated by GEO no. 42/2005 regarding the establishment of reorganization measures of the CEC SA[2] Savings and Consignment House and by Order no. 425 regarding the Statute of CEC Bank SA, issued by the Ministry of Economy and Finance[3]. By the Statute, CEC Bank SA is constituted as a legal entity

[1] For more information, see https://www.cec.ro/despre-noi, accessed on 18.03.2021.
[2] Published in the Official Gazette no. 463 of January 1, 2005.
[3] Published in the Official Gazette no. 164 of March 4, 2008.

under private law, organized in the legal form of a joint stock company and carries out its activity as a bank, in accordance with the provisions of the applicable legislation, the statute, its own organization and functioning regulations. of the bank and of the internal regulations issued in accordance with the law (art. 2 of the Statute).

Non-banking financial institutions and their assimilated entities are regulated by Law no. 93/2009[1], they being entities, other than credit institutions, that carry out lending activity on a professional basis, in accordance with the law (art. 5 letter c) of the Law). They are incorporated as joint stock companies.

Non-banking financial institutions may carry out lending activities based on the law (art. 14 paragraph (1) of the law), such as:

- granting loans, including, but not limited to: consumer loans, mortgages, real estate loans, microcredits, financing of commercial transactions, factoring operations, discounting, lump sums;
- financial leasing;
- issuing guarantees, assuming guarantee commitments, assuming financing commitments;
- granting loans with the receipt of pledged goods, respectively pledge through pawnshops;
- granting loans to members of non-profit associations organized on the basis of the free consent of employees / pensioners, in order to support through financial loans their members by these entities, organized in the legal form of mutual aid houses;
- other forms of credit financing.

Unlike the situation of credit institutions, the National Bank of Romania has no attributions regarding the establishment of non-banking financial institutions, but only regarding their prudential monitoring and supervision.

Payment institutions are regulated by Law no. 209/2019, which defines them as legal persons authorized by law to provide payment services on the territory of the European Union and the European Economic Area (art. 5 paragraph (1) point 30). Like credit institutions, it requires obtaining an operating license issued by the NBR. The latter also carries out their prudential supervision.

[1] Published in the Official Gazette no. 259 of April 21, 2009.

CONCLUSIONS

The banking market, seen as a whole of the sale-purchase relations of banking services and products is an active market, in a continuous evolution.

The main topics active on the banking market, credit institutions are also in a continuous dynamic, they are reinventing themselves, adapting to the increasingly varied needs of the market. Knowledge of the main credit institutions, their operation, the main products and services they offer is currently an essential requirement for those who want to act consciously in the field of economic and financial relations.

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THE PRESENCE OF RELIGIOUS SYMBOLS AND CLOTHING IN THE PRE-UNIVERSITY AND ACADEMIC SCHOOL ENVIRONMENT. THE JURISPRUDENTIAL PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS.

Mihaela-Adriana OPRESCU[1]

Abstract:

Looking around us, in an extremely mobile world under the generous umbrella of globalization, we can easily notice that the sensitive issues related to religious beliefs and their manifestations have posed genuine challenges to states while attempting to shape the place of religion in modern pluralistic societies.

In this context, the presence of religious symbols and clothing (Islamic veil, burqa, niqab, crucifix etc.) in the pre-university and academic school environment has prompted, for several years, significant debates in various European countries. The European Court of Human Rights is empowered to verify the extent to which a fair balance is ensured between the fundamental right of the individual to religious freedom in active manifestations, on the one hand, and state policy, on the other hand, in an increasingly heterogeneous religious landscape.

Key words: *religious beliefs; religious symbols; ECHR; fundamental rights; school environment.*

INTRODUCTION

The external manifestations of conscience or religion are oftentimes controversial and sensitive mainly in a growing pluralistic society. One may easily notice that in the past two decades, European countries have been faced with legal and political challenges generated

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by religious pluralism whose premises are found mostly in the immigration waves of the past years. Cultural diversity implies a variety of religions whose practice claims certain ostensible behaviours, materialised in different practices, wearing certain clothing items or the use of some religious symbols in public areas.

In this field, under these given circumstances, one can easily notice that by weighing up the individual rights, on the one hand, and the State's role, on the other hand, the Strasbourg Court tips the balance in favour of the latter, whereby the jurisprudence of the European Court of Human Rights[1] constantly and consistently capitalises on two principles: that of state neutrality and that of secularism.

As emphasised by the legal literature[2], while state neutrality implies an equidistant attitude of the State towards cults and religion generally, without excluding the use and display of religious symbols, secularism represents a divide between the two areas, "*the State merely protecting religious freedom, while at the same time keeping a considerable distance from any religious manifestation, without any sort of interference in either of the two sides.*"

What might seem surprising, at least at first, is that this concept of state neutrality, used to justify the national measures meant to reduce the visibility of religion in public areas in the name of the protection of the religious freedom "for all", in fact legitimises the prohibition of the free expression of religious beliefs and convictions.

THE LEGAL FRAMEWORK

As it appears protected by the provisions of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[3], the freedom of thought, conscience and religion

[1] *Brevitatis causa*, in this study, all references to the European Court of Human Rights shall be made using the acronym ECHR.

[2] Bianca Selejan-Guţan, "Semne şi simboluri religioase în jurisprudenţa de la Strasbourg", in *Pandectele Române* no. 5 (2011): 103.

[3] The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 and entered into force on 3 September 1953, was ratified by Romania through Law No. 30/1994 (published in the Official Gazette No. 135 of 31 May 1994). *Brevitatis causa*, in this study, all references to the Convention for the Protection of Human Rights and Fundamental Freedoms shall be made using the term "the Convention".

is one of the main pillars of a democratic society, according to the meaning of the Convention[1]. The personal scope of the provisions of paragraph 1 of Article 9 of the Convention is a generous one (any natural or legal person), while the material one is also devised under an extremely ample factual context, the religion or the faith being manifested "*either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*"

Furthermore, article 2 of Protocol 1 to the Convention[2], referred to under the marginal name of the "Right to education", guarantees a particular aspect of the religious freedom, namely the parents' right to assure their children's education according to their religious beliefs: "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*"

Equally, the provisions of Articles 10[3] and 11[4] of the Convention are sometimes presented as clear means for the implementation of the provisions of Article 9, or when the externalization of one's faith or of

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[1] According to Article 9, paragraph 1 of the Convention, "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance*". Paragraph 2 of the same article stipulates that "*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*"

[2] Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris, opened for signature on 20/03/1952 and entered into force on 18/05/1954, was ratified by Romania through Law No. 30/1994 (published in the Official Gazette No. 135 of 31 May 1994).

[3] As per Article 10 paragraph 1 of the Convention: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*"

[4] As per Article 11 paragraph 1 of the Convention: "*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests*."

one's religious behaviour reverberates in the field of the freedom of expression or of association.

Other international legal sources can also be found in the field, such as Article 18 of the International Covenant on Civil and Political Rights[1], Article 10 of the Charter of Fundamental Rights of the European Union[2], etc.

One can notice that the term "*religion*" does not benefit from an *expressis verbis* definition in the provisions of the Convention (nor in any other international document), as neither does the jurisprudence of the European Court on Human Rights offer a fusion of elements that give content to this concept, which comprises the variety of values, beliefs, convictions, religious practices.

As to its scope, by looking at the jurisprudence in this field, one may note that the Strasbourg Court has never tried to limit the protection of Article 9 of the Convention to the "great religions" (see Christianity, Judaism, Islamism), the scope of the previously quoted stipulation being an unrestricted one, targeting both the minority denominations, and the cults generally.

As underlined by the legal literature[3], the freedom consecrated by Article 9 of the Convention is, in its religious dimension, among the essential elements of the believers' identity and life conception, but, at

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[1] The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations Organisation on 16 December1966 and entered into force on 23 March 1976, was ratified by Romania through Decree No. 212/1974 (published in Official Bulletin No. 146 of 20 November 1974). Article 18 paragraph 1 of the Covenant stipulates that: "*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching*."

[2] The Charter of Fundamental Rights of the European Union (published in the Official Journal C 202 of 7 June 2016), available [Online] at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, accessed on 16 February 2021. Article 10 of this Charter protects the freedom of thought, conscience and religion under the same conditions as the Convention, at the same time guaranteeing the parents' right to "*ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions*."

[3] Frédéric Sudre, Jean-Pierre Marquénaud, Joël Andriantsimbazovina, Adeline Gouttenoire and Michel Levinet, *Marile hotărâri ale Curţii Europene a Drepturilor Omului* (Bucharest: Rosetti, 2011), 457.

the same time, it is an asset for non-believers, agnostics, sceptics, or the indifferent ones.

In this matter, building on the premise of state neutrality as to religion, one may argue that religious freedom is essential for both the believers, who cannot be prevented from having and/or practising their religion, and the non-believers, who cannot be forced to join and/or practise a religion[1].

If religious freedom – which pertains to the *forum internum* (thinking, conceptions pertaining to a certain religion, personal set of moral values) – is absolute and unsusceptible of limitations[2], then the manifestation of religious beliefs – verbally or through certain conducts (*forum externum*) – can be subjected to restrictions, which must faithfully follow the provisions of Article 9, paragraph 2 of the Convention, namely: they are prescribed by law; they are necessary in a democratic society; the purpose of restrictions is to preserve public safety, public order, health or morals, or to protect the rights and freedoms of others. In fact, any individual freedom is also social because of the individual's legal existence in his/her social externalisation.

As such, it can be noted that the very way in which paragraph 2 of Article 9 of the Convention has been elaborated underlines the dual structure of the freedom of religion from the perspective of the two composing elements (internal and external). By doing so, it is tacitly admitted that, in democratic societies where several religions coexist among the same population, it might be necessary for restrictions to be imposed in what regards the manifestation of religious beliefs in order to reconcile the interests of the various groups and to assure the respect of all faiths, obviously by complying with the condition of proportionality of the State's interference by reference to the purpose pursued.

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[1] See ECHR, *Case Kokkinakis v. Greece*, Judgement of 25 May 1993, [ECLI:CE:ECHR:1993:0525JUD001430788], paragraph 31; CEDO, *Case Buscarini and Others v. San Marino*, Decision of 18 February 1999, [ECLI:CE:ECHR:1999:0218JUD002464594], paragraph 34.

[2] As such, since this refers to profound values and beliefs which pertain to the *forum internum* of the individual and which cannot, in themselves, harm the public order, they are not susceptible to limitations from State authorities and cannot be the object of constraints. For more details, see Jean-François Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 206; Corneliu Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole. Vol.I Drepturi şi libertăţi* (Bucharest: All Beck, 2005), 697

Hence, as underlined in *Case Eweida and Others v. the United Kinkdom*[1], an individual's manifestation of his/her religious belief is a fundamental right, "*because a healthy democratic society needs to tolerate and sustain pluralism and diversity*" and even more so if the individual "*has made religion a central tenet of his or her life*"; as such, he/she must have the possibility of communicating that belief to others, including by wearing religious clothing or symbols.

Despite all these, with reference to the afore-mentioned information, the right to wear religious clothing and symbols as a form of manifestation of certain beliefs or convictions is not absolute; therefore, it is regulated by the legitimate interests of other natural or legal persons. From this point of view, the jurisprudence of ECHR in interpreting Article 9 of the Convention in this field is structured on four levels: the public space; schools and universities; the civil service and public services; the workplace.

Equally, if one considers the existence of religious symbols in educational institutions, then a distinction should be made between whether the allegedly infringed freedom of wearing religious clothing is invoked by the teacher or by the student (or pupil).

USING RELIGIOUS CLOTHING AND SYMBOLS IN SCHOOLS AND UNIVERSITIES

The magnitude of the immigration wave in Europe – from Africa, Turkey, etc. – has created the premises for a new type of conflict whose central object is represented by religion and its ostensible forms of manifestation. Wearing the Islamic veil and other clothing items imposed by Islam – a religion whose presence is visibly growing in Europe – has given to the judge in Strasbourg the possibility of building a fruitful jurisprudence around Article 9 of the Convention.

Undeniably, however, the presence of religious clothing items and symbols in schools and universities is a subject that is quite sensitive from a political point of view; that is why the Court tried to offer a jurisprudential approach that would bring as little damage as possible to the national interests and sensitivities at stake, but that would also support the interest of the secularised State.

[1] ECHR, *Case Eweida and Others v. the United Kingdom*, Judgement of 15 January 2013, [ECLI:CE:ECHR:2013:0115JUD004842010], paragraph 94.

From this perspective, the common element of the decisions made by the ECHR in the cases regarding the wearing/existence of religious clothing items and symbols in public educational institutions is represented by the acknowledgement of the large margin of appreciation available for states, which, at first sight, seems to introduce the idea that the Strasbourg Court uses different units of measure in this field.

As to the teaching staff, the ECHR tried to set an equilibrium between the teachers' right to manifest their religion (including by using clothing items during their teaching activities), on the one hand, and the principle of neutrality of public education, namely the protection of the legitimate interests of pupils and students, on the other hand.

The case of *Kurtulmuş v. Turkey*[1] introduced the case of a female teacher at the School of Economics within the University of Istanbul, who had been repeatedly sanctioned with formal warnings and, in the end, she was let go, because she continued wearing the Islamic veil even though the dress code of that educational institution prohibited women from using that clothing item during their professional activities.

Having noted that the legal regulation on the dress code of civil servants represented an interference (stipulated by the law) in an individual's right to manifest their religion – certainly, to the extent to which wearing the Islamic veil by Muslim women is a religious obligation[2] –, the Court proceeded to review the laws for compliance from the perspective of the purposes pursued by the Turkish State and of the necessity of such a restriction in a democratic society.

Taking the principle of the neutrality of public education in educational institutions as a reference, the Court believed that in a democratic society, the State could limit the wearing of the Islamic veil if this undermined the objective of protecting other people's rights and freedoms, as well as the public order. Additionally, the Court referred to the concept of "*neutral appearance*"; consequently, as a university lecturer and, therefore, as an incumbent of academic authority and a State representative, the applicant could not ignore "*the rules requiring her not to express her religious beliefs in public in an ostentatious manner*."

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[1] ECHR, *Case Kurtulmuş v. Turkey*, Judgement of 24 January 2006, [ECLI:CE:ECHR:2006:0124DEC006550001].

[2] See also ECHR, *Case Leyla Şahin v. Turkey*, Judgement of 10 November 2005, [ECLI:CE:ECHR:2005:1110JUD004477498], paragraph 78.

Furthermore, the Court underlined that protecting the constitutional principle of secularism lay at the basis of the mentioned national rules[1] and that, to an equal extent, "*a democratic State may be entitled to require public servants to be loyal to the constitutional principles on which it is founded*"[2]. Considering the margin of appreciation that the Turkish State enjoyed, the Court noted that the contested interference was justified in principle and proportional with the pursued objective.

The case of *Dahlab v. Switzerland*[3] also brought into question the situation of a plaintiff who worked as a teacher in primary education, who had converted to Islam, and who unsuccessfully contested before national courts the school's decision of prohibiting her to wear the Islamic veil during classes. Her case, which was pending before the ECHR, was dismissed as inadmissible, building again on the premise of the neutrality of public primary schools and of "*the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children.*"

The judgement also underlined that "*the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which […] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils*." Consequently, by analysing the right of a teacher to manifest his/her own religious convictions corroborated with the necessity of protecting children by maintaining a religious harmony, the Court noted that the margin of appreciation of the Swiss State was not exceeded, especially in the context of the young age of the

[1] The same idea can also be found in the Judgement mentioned in the previous footnote, paragraph 114.
[2] The same assertion ca be found in *Case Vogt*. See ECHR, *Case Vogt v. Germany*, Judgement of 26 September 1995, [ECLI:CE:ECHR:1995:0926JUD001785191], paragraph 59.
[3] ECHR, *Case Lucia Dahlab v. Switzerland*, Judgement of 15 February 2011, [ECLI:CE:ECHR:2001:0215DEC004239398].

children for whom the teacher had a responsibility as a representative of the State authority[1].

The same line of jurisprudence was maintained in the cases where pupils or students claimed that the provisions of Article 9 of the Convention had been infringed upon because they had not been allowed to wear religious clothing items at school – in the wide sense of the word – or they had even been sanctioned for doing so.

For instance, the case of *Leyla Șahin v. Turkey*[2] originates in the legal action taken by the plaintiff Leyla Șahin, who claimed that the regulation concerning the prohibition of wearing the Islamic veil in higher education institutions represented a violation of Articles 8, 9, 10, and 14 of the Convention, as well as of Article 2 of Protocol 1 to the Convention.

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[1] Surprisingly, the argument of the French State regarding the necessity to protect gender equality was seen as unsubstantiated by the Court in the context of another case, which analysed the wearing of the Islamic veil in the public space generally, not necessarily in educational institutions. See ECHR, *Case S.A.S. v. France*, Judgement of 1 July 2014, [CE:CEDO:2014:0701JUD004383511]. As such, in the afore-mentioned case, the Court noted that "*a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions [article 8 and article 9 paragraph (2) of the ECHR], unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms"* (paragraph 119). Furthermore, the Court also noted that "*however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It would point out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy*" (paragraph 120).

[2] The plaintiff, a Turkish citizen, was a 5th-year student at the School of Medicine within the University of Istanbul. Coming from a family of practicing Muslims, the plaintiff wore the Islamic veil during the first four (4) years of academic studies, but in February 1998, the Rector of the University of Istanbul adopted a memorandum regulating the criteria of admission to the university campus, which prohibited the participation to courses and seminars for female students wearing a headscarf and for male students wearing a beard. Since she did not want to give up the veil, the plaintiff was not allowed to participate in some written exams; furthermore, disciplinary sanctions were applied for breaking the dress code and for participating in an unauthorised protest against the said code. One year later, in 1999, the plaintiff dropped out from the School of Medicine from Istanbul and enrolled at the University of Vienna. See ECHR, *Case Leyla Șahin v. Turkey*, Judgement of 10 November 2005, [ECLI:CE:ECHR:2004:0629JUD004477498].

The Court first noted that the Memo adopted on 23 February 1998 (which preceded the plaintiff's enrolment at university) by the University of Istanbul, which prohibited the wearing of the Islamic veil, represented an interference in the exercise of the plaintiff's right to religious manifestation.

In the recitals of the decision, having as reference points the concept of state neutrality and the principle of secularism (consecrated in Turkey's Constitution), the Strasbourg Court underlined, however, "*the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs*" and stated that „*this role is conducive to public order, religious harmony and tolerance in a democratic society*" [paragraph 107 of Judgement Leyla Șahin]. Furthermore, as understood by the Court, in order to determine the scope of the margin of appreciation that the contracting states enjoyed, it was mandatory to take into account the need to ensure a fair balance between "*the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism*"[1], all these elements being seen as indispensable in a democratic society.

The Court also noted that, given Turkey's context, where the values of pluralism, the respect of other people's rights and, especially, gender equality before the law were taught and implemented, it was clear that the competent authorities appreciated that wearing religious symbols in universities contradicted these values.

Under these circumstances, the Court referred for the first time to the transposition of a clothing item with a religious symbolistic to the political area, especially by highlighting the existence in the Turkish society of some extremist political movements "*which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts*" [paragraph 115, section 3, Judgement Leyla Șahin]. To reach the conclusion that the provisions of Article 9 of the Conventions were not violated, the Court emphasized that the Turkish constitutional system focused on gender equality, one of the essential principles underlying the Convention and an objective of the member states of the Council of Europe, that is why the issue of the Islamic veil in the national context could not have been revealed without taking into account the impact that the wearing of this symbol (presented or

[1] Paragraph 110 of Judgement Leyla.

perceived as a mandatory religious duty) could have had on those not wearing it[1].

A similar judgement was given in the case of *Köse and Others v. Turkey* in 2010[2], when the Strasbourg Court noted that there was no infringement on Article 9 of the Convention as to the prohibition of participating to courses applied to students wearing a veil in "İmam-Hatip" high schools (non-tertiary public schools with a religious profile existing in Turkey), except for the religious courses on the Quran. The Court emphasized that the legislation at issue contained general provisions which applied without discrimination to all pupils, irrespective of their religious belief and, in particular, served the legitimate interest of maintaining the neutrality of non-tertiary education, which addressed to an audience made up of teenagers who could have been exposed to the risk of pressure. From this perspective, the Court underlined the State's obligation – in the fulfilment of its duties in matters of education and teaching – to make sure that "*the information or the knowledge included in the curriculum is disseminated objectively, critically and pluralistically, in a serene atmosphere, without any premature proselytism*."

Other cases argued the compatibility with the provisions of Article 9 of the Convention and of Protocol no. 1 of certain French public colleges to allow the participation in the physical education classes of female students wearing a headscarf, as well as their subsequent expulsion because of their non-compliance with the obligation of mandatory attendance. Illustrative here are the cases of *Kervanci v. France*[3] and *Dogru v. France*[4] initiated by the claims submitted by the Muslim plaintiffs Esma-Nur Kervanci and Belgin Dogru, aged 12,

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[1] Case Șahin also highlighted the Islamic veil as an element denoting gender discrimination, because it targets women particularly, being an element inherited from the patriarchy of traditional religious or cultural practices. See Maleiha Malik, "Complex Equality: Muslim Women and the 'Headscarf'". *Droit et société* 2008 (1): 127-152, available online at https://www.cairn.info/revue-droit-et-societe1-2008-1-page-127.htm, accessed on 20/04/2020.

[2] ECHR, *Case Köse and Others v. Turkey*, 7 December 2020, [ECLI:CE:ECHR:2006:0124DEC002662502].

[3] ECHR, *Kervanci v. France*, Judgement of 4 December 2008, [ECLI:CE:ECHR:2008:1204JUD003164504].

[4] ECHR, *Dogru v. France*, Judgement of 4 December 2008, [ECLI:CE:ECHR:2008:1204JUD002705805].

respectively 11 on the date of the interference (1998-1999), who complained about the fact that they attended the physical education classes wearing a headscarf and refused to remove it upon the teacher's request, who argued for the incompatibility between wearing that clothing item and working out.

Essentially, the expulsion decisions were based on four arguments: the violation by the two children of their obligation to attend physical education classes; the failure to comply with the internal regulations regarding the children's obligation to work out in sports equipment; the applicability of the provisions of an internal memorandum regarding the children's safety during physical education classes, which allowed instructors to prohibit any type of behaviour that endangered the children's safety and health; the applicability of the State Council decision of 10/03/1995, which stipulated that "*wearing a headscarf as a sign of religious affiliation was incompatible with the proper conduct of physical education and sports classes*"[1]. The children's parents unsuccessfully contested the school decisions before the French administrative courts; consequently, under these circumstances, the two underaged girls were obligated to take correspondence courses to continue their school studies.

In both cases, the ECHR noted that the interdiction for the children to participate in sports classes wearing a headscarf and the sanction to expulse them can be included in the interference notion stipulated by the law, necessary in a democratic society and whose legitimate purpose is to protect others' rights and freedoms, as well as the public order.

Building on the French secularism model, the Court elaborated their arguments on two elements: the first, built on the necessity to respect other people's pluralism and freedom, so that the manifestation of pupils' religious beliefs in schools did not transform into "*an ostentatious act that would constitute a source of pressure and exclusion*"[2]; the second, built on the national authorities' right to impose on educational

[1] See ECHR, *Case Dogru v. France*, the previously cited judgements, paragraph 10.

[2] See *Case Dogru v. France*, paragraph nr. 71; In fact, the reasoning of the court is that "having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention" (paragraph 72, Case Dogru).

institutions rules regarding the pupils' safety, hygiene, active attendance in class, so that the expulsion sanction was nothing but a natural consequence of the plaintiff's refusal "*to comply with the applicable rules inside the school, on which she has been completely informed and not because of her religious beliefs as she claims*"[1]. Consequently, the Court noted especially that the disciplinary procedures targeting the two plaintiffs complied entirely with the attempt to balance the different interests at stake and that the defending State did not go beyond the margin of appreciation at its disposal.

The year 2004 marked a paradigm shift as to the presence of religious elements in French schools. If until then the interdiction to wear certain clothing items was stipulated by internal institutional provisions of educational institutions, after that year the interdiction became general as a result of the entry into force of Law No. 2004-228 of 15 March 2004 which, in the implementation of the secularism principle, regulates the wearing of religious symbols or clothing items in schools, colleges, and public high schools. As such, the interdiction of wearing symbols or clothes that are a clear manifestation of specific religious beliefs has become applicable in the case of pupils from French schools, colleges, and public high schools without limitation to the physical education and sports classes.

The afore-mentioned normative document reaffirmed one of the essential principles of the French State architecture –secularism, according to which religion is fundamentally incompatible with the secularised institutions of the French Republic, which is why the manifestations of one's religious beliefs are excluded from the public area and remitted to the private one. Obviously, this law has affected religious minorities, especially the practicing Muslims, whose existence – both private and public – relies on religion and its forms of manifestation.

Building on this legislative background, the ECHR was vested with the solving of some cases that discussed an alleged violation of the provisions of Article 9 of the Convention in contextual situations relatively heterogeneous, more specifically: in the case of pupils' expulsion for having worn the Islamic headscarf[2], the turban or the

[1] See *Case Kervanci v. France*, paragraph 73.

[2] See ECHR, *Case Mahmoud Sadek Gamaleddyn v. France*, Judgement of 30 June 2009, [ECLI:CE:ECHR:2009:0630DEC001852708]. On the same topic, see also

"keski" (a mini-turban) inside an educational institution; in cases where one can notice the intransigent attitude of the school administration of not allowing female Muslim pupils to wear a veil until they entered the classroom where they then had to remove the veil or to replace it by a bonnet[1] or a bandana with no religious connotations[2] or of not allowing Sikh pupils to replace their turbans by a "keski"[3], etc.

Following the previous reasoning, in these cases, too, the ECHR embraced the same approach, so that the principles of neutrality and secularism that had been constantly referred to were highlighted as a means of protecting the pupils and students' rights and freedoms, being intimately connected to the values that the educational institutions must cultivate. Equally, the ECHR restated the idea according to which in the revealing of the rapport between the State and religions, regarding which there might reasonably be profound divergences in a democratic society, it is necessary to give special importance to the role played by the national decision-maker.

Therefore, one can easily notice that the Strasbourg Court built an entire architecture of the concept of school neutrality. Firstly, neutrality implies a negative obligation, so that education must not discriminate, prohibit, favour, or impose religious concepts. Secondly, there is a positive obligation when the purpose is that of preserving the diversity of opinions, beliefs, and values. According to the Court, the educational environment must be completely neutral, therefore protecting all pupils/students against the social pression that might be exercised by those who want to express their religious opinions and beliefs in a visible manner. We are, therefore, witnessing the jurisprudential consecration of an irrefragable presumption of proselytism in the case of wearing religious clothing items in educational areas. It is surprising to see in the Court's decisions that it does not give any importance to the actual conduct of the plaintiff, as it results from the factual situation, or to whether that person, when wearing the Islamic veil or headscarf, really wanted to commit an act of religious proselytism or not, or if the wearing

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ECHR, *Case Tuba Aktas v. France*, Judgement of 30 June 2009, [ECLI:CE:ECHR:2009:0630DEC004356308].

[1] See ECHR, *Case Mahmoud Sadek Gamaleddyn v. France*, mentioned in footnote 31.

[2] See ECHR, *Case Tuba Aktas v. France*, mentioned in footnote 31.

[3] See ECHR, *Case Ranjit Singh v. France*, Judgement of 30 June 2009, [ECLI:CE:ECHR:2009:0630DEC002756108]

of those clothes generated a hostile reaction from the pupils/teaching staff. Actually, from the facts of the cases, it is not clear if the plaintiffs – through their attitude, behaviour, or acts – did not comply with the principles of secularism and neutrality through acts of pressure, provocation, or proselytism by propaganda or infringement on other people's rights[1].

In this context, the case of *Lautsi v. Italy*[2] cannot be omitted, which originated in the complaint made against the Italian State by the plaintiff Soile Lautsi, who invoked an infringement on her children's right to the freedom of thought, conscience and religion, building on the presence of the crucifix displayed on the walls of the classrooms from the school where her children studied. Mention should be made that in the recitals of the judgement the plaintiff's religion was not mentioned.

By the judgement of 3 November 2009, the Court unanimously declared the complaint inadmissible and contested any infringement on Article 2 of Protocol 1 examined in corroboration with Article 9 of the European Convention on Human Rights. Subsequently, upon the request of the Italian Government, the case was sent before the Great Chamber, who, by the Judgement of 18 May 2011, noted that there was no infringement on Article 2 of Protocol 1 or Article 9 of the Convention.

The Court also underlined that by the decision to keep the crucifixes in the classrooms of the public school that the plaintiff's children attended, the authorities acted within the limits of discretion of the Italian State in the context of its obligation to respect – in the exercise of the functions it assumes in the field of education and training – the parents' right to give their children the education and training according to their religious and philosophical beliefs.

Under these circumstances, some questions can be raised as naturally as possible: How can this change in the Court's jurisprudence be justified? Are there significant differences as to the factual situation, an aspect that justifies an antithesis in argumentation? Are there real antinomies or just apparent ones in the argumentation of the ECHR? And, most importantly, a question that might trigger a real polemic: Can

[1] See also Ergül Çelİksoy, "A critical analysis of the jurisprudence of the ECHTR on Islamic headscarves and religious symbols", *Human Rights Review* No. 14 (December 2017): 94.

[2] See, ECHR, Case Lautsi vs. Italia, Judgement of 18 may 2011, [ECLI:CE:ECHR:2011:0318JUD003081406].

the ECHR be accused of partisanship in the context in which the judgement pronounced in the case of *Lautsi v. Italy* targeted the Christian Europe[1]?

To answer these questions, it is necessary to make a comparison between the jurisprudence in the field against France and Turkey, on the one hand, and the jurisprudence against Italy, on the other hand.

The first aspect worth mentioning is that the situations that generated those national litigations are not identical: in the first case, the litigation was related to clothing items whose wearing was required/imposed by the practising of religious beliefs (undeniably, a religious obligation), whereas in the second case, the situation was related to the presence of a religious symbol – the Christian crucifix – in classrooms in Italy.

Second, if the wearing of religious clothing can be considered a form of manifestation of religious beliefs, the presence of the crucifix, however, does not impinge upon the pupils' religious freedom in its both components: *forum internum* and *forum externum*. In the case of *Lautsi v. Italy*, the Great Chamber noted that no elements could be identified to reveal the potential influence the crucifix displayed in the classroom might have on pupils (paragraph 66); that, equally, the presence of this religious symbol could not be associated with the compulsory teaching about or adherence to Christianity, and that it did not probate an attitude of intolerance from the Italian authorities towards those pupils who practised a different religion, were non-believers, or held philosophical beliefs that were not attached to any religion (paragraph 74).

Therefore, this shows the difference that the Court has made between the two religious objects: the crucifix – a passive symbol – and the Islamic veil – an active symbol in the display of religious convictions and beliefs, which might lead to acts of intolerance that, in their turn, could generate violence[2].

Related to the afore-mentioned information, it can be said that the differences between the cases are mainly determined by the symbolism

[1] Mention should be made that in the procedure written before the Great Chamber (Case Lautsi) 33 Members of the European Parliament, as well as several governmental organisations and 11 European states intervened.

[2] See Mihaela-Adriana Oprescu, "Freedom of religion, in the jurisprudence of the European Court of Human Rights", *On-line Journal Modelling the New Europe* (2016) 19: 40.

of the religious elements. From this standpoint, we dare state that in the political and social context of the past years, the Islamic veil is seen rather as a symbol of a violent religious radicalization than as a sign of religious piety[1].

As to the concept of religious neutrality[2], by analysing the jurisprudential arguments expressed in the judgements examined, it can be noted that the Strasbourg Court has offered several different interpretations about what religious neutrality in an educational spare means.

As such, in the cases against France and Turkey, neutrality is revealed through the complete absence of any ostentatious element of religious symbolism from educational institutions. It is on this type of intransigent and rigid neutrality that the interference of statutory authorities in the manifestation of the individual's religious convictions is performed.

The case of *Lautsi v. Italy* offers another perspective on neutrality[3], under the form of the absence of constraint on the individual, the State agreeing to have strong institutional relations with a certain religion or to offer it a privileged status in the public space. After all, the Vatican is in Rome.

The afore-mentioned aspect illustrates that, in the member states of the Council of Europe, the relationship between religion and the State bears the mark of each country's historic and cultural contexts. As such, if the Italian area is closely tied to Christian values, the French one carries the historic heritage of the French Revolution and the principle of secularism according to which religious manifestation does not find its place in the public area. This, however, leads to a paradox because, when

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[1] This perception is visible even in Turkey, home to the largest Muslim population in Europe. See Peter Cumper and Tom Lewis, "'Taking religion seriously'? Human Rights and Hijab in Europe − some problems of adjudication", https://core.ac.uk/download/pdf/30648467.pdf.

[2] For an opinion supporting the idea that being neutral does not imply having a positive or a negative obligation, see Malcolm Evans, "The Freedom of Religion or Belief in the ECHR since Kokkinakis. Or « Quoting Kokkinakis »", *Religion and Human Rights* No. 12 (2017), 96.

[3] See also Julie Ringelhei, *"Du voile au crucifix: la neutralité de l'État dans la jurisprudence de la Cour Européenne des Droits de l'Homme", CRIDHO Working Paper* (2014)/1, available online at http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP-2014-1-JRingelheim-DuVoileAuCrucifix.pdf, accessed on 21 April 2021.

using the vocabulary of tolerance, the French States relies on religion (in the *forum externum* exclusively) in an intolerant manner, an aspect that has been uncontested since 1789. The interpretation given by the national courts of law and confirmed by the ECHR approves the idea that the French secularism guarantees neutrality.

In the case of *Leila Şahin*, the constitutional principles of secularism of the Turkish State and of gender equality offered consistency to the judgement, the Islamic veil being highlighted as a pretext for a war of symbols and religious beliefs in a country where the great majority of the population is Muslim. From this standpoint, the focus has been on the impact that this symbol might have on those who choose not to wear it, irrespective of whether it is presented or perceived as a constraining religious obligation or not.

Therefore, it is obvious that the neutrality of education in the member states of the Council of Europe has a variable geometry, which is as natural as possible given the subsidiary character of the control exerted by the Court and its wish to maintain Europe's cultural diversity[1]. Without any grounds to being accused of being biased, the Court acknowledges the European diversity, mainly that of the legal systems and cultures, that is why the State's margin of appreciation proves its essential role in the theoretical construction developed based on Article 9 of the Convention.

CONCLUSIONS

The purpose of this study has been that of highlighting the way in which the jurisprudence of the ECHR has evolved around Article 9 of the Convention in an extremely mobile world under the generous umbrella or globalisation. This context has helped us notice the fact that the sensitive issued related to religious beliefs and their manifestation have generated real challenges in the attempt to delineate the role of religion in modern pluralistic societies and in educational areas, where the States undertakes the role of guarantor of confessional neutrality.

[1] For more on the margin of appreciation theory, see Radu Chiriţă, *Convenţia europeană a drepturilor omului.Comentarii şi explicaţii*, ediţia II (Bucharest: C. H. Beck,2008): 17-20. See also Bianca Selejan-Guţan, *Protecţia europeană a drepturilor omului* (Bucharest: C.H. Beck, 2006): 38.

While religious freedom – which pertains to the *forum internum* of the individual (reasoning, beliefs specific to a certain religion, the set of personal moral values) – is absolute and unsusceptible to limitations, the exteriorisation of religious beliefs, on the other hand, through specific behaviours, including the wearing of religious clothing items, can be subjected to restrictions as per Article 9, paragraph 2 of the Convention, or when these restrictions are stipulated by the law, necessary in a democratic society, and the purpose of instituting them is to preserve public safety, public order, public health or morals, or to protect other people's rights and freedoms.

In conclusion, the jurisprudence generated by the application of Article 9 of the Convention has shown, on the one hand, the Court's concern for the preservation of a minimum level for the protection of the individual's right to religious freedom and, on the other hand, the capitalisation on the margin of appreciation theory of the states with a view to protecting the cultural identity of European member states.

Undoubtedly, the attitude of the Strasbourg Court has been a prudent one, as it tried to conciliate the freedom of religion with the national constitutional traditions and, implicitly, with the principles underlying the very fibre of the state architecture.

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RIGHT TO A NAME IN CONNECTION WITH IMAGE RIGHT AND PRIVACY RIGHT[1]

Oana Nicoleta RETEA[2]

***Abstract**:*

Attached to privacy are aspects such as image, physical appearance and voice of the person, name, all targeting the personality, family and individual. The aime of this articleis to underline the protection of the right to name in its capacity of non-patrimonial personal right, as is realized from several angles. Therefore, this paper will contribute to a better understanding of the three rights and to emphasys each and any existing connection between them. Moreover, with the decision of Î.C.C.J. of the virtual space where the activity of the Facebook application takes place as a public space, we identify a series of consequences that directly concern also the issue of the right to name.

***Key words**: legal protection; identity; private life; name; image; case law.*

INTRODUCTION

As many daily actions, both in the public and in the private spheres, require a person to provide evidence of his or her own identity, personal status and also evidence of the nature of the links between different family members, problems regarding names have emerged in cross-border situations all over the world.

From the outset, we note that a person's name is a constituent element of his or her identity and privacy, the protection of which is enshrined in Article 7 of the Charter and Article 8 of the ECHR. Thus, even if it is not explicitly mentioned in this Article 8, it is no less true that

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a person's name is related to his or her private and family life since it is a way of identifying the person and the connection with a particular family.

The provisions of the Civil Code protect the right to free expression, respectively art. 70, as well as art. 30 of the Romanian Constitution, accessible and predictable provisions in the sense of the jurisprudence of the Constitutional Court, and equally, are provisions that protect the right to image, honor and reputation, enshrined in art. 71-74, art. 253 of the Civil Code, as well as in art. 1 para. 3 of the Romanian Constitution, reported to art. 252 of Civil Code according to which: Every natural person has the right to the protection of the intrinsic values of the human being, such as life, health, physical and mental integrity, dignity, privacy, freedom of conscience scientific, artistic, literary or technical creation.

At the same time, art. 72 paragraph 1 of the Civil Code enshrines the right of any person to respect his dignity, prohibiting any harm to the honor and reputation of a person, without his consent or without respecting the limits provided by art. 75, the latter provision concerning the violations permitted by law or by the international human rights conventions and pacts to which Romania is a party, respectively the exercise of constitutional rights and freedoms in good faith and in compliance with international pacts and conventions to which Romania is a part.

Based on art.73 Civil Code everyone has the right to his own image. In this context, paragraph 2 of art.73 affirms the right of any person to exercise his right to his own image by prohibiting or impeding the reproduction of the image, the physical appearance, the voice as well as the use of such reproduction. We point out that the infringement of the right to the image - by publishing a photograph with a person next to an article on a website - does not fall within the limits provided by art.75 Civil Code (See: Civil sentence no. 33/2016 from 05.02.2016, Moldova Nouă Court).

Moreover, art. 71, paragraph 1 Civil Code states that everyone has the right to respect for his private life, and art. 75 presents only the restrictions of the scope of application of the rights provided by art. 70-73, art.82 Civil Code. At the same time, the use in bad faith of the name, the image, the voice represents according to art. 74 lit. h Civil Code an

infringement of the right to privacy, thus including in this notion the interference with the right to image / right to name[1].

PERSONALITY RIGHTS AND ONLINE APPS

We emphasize that a series of legal consequences emerge after the pronouncement of Decision no. 4546 dated 27.11.2016 by High Court of Cassation and Justice in Romania (Î.C.C.J). Thus, crimes that have as a constituent element "public space" can be committed online, on the social network Facebook, as well as misdemeanors. Last but not least, Facebook posts can be the subject of tortious civil liability, if the content of the messages interferes with the right to honor, dignity, image, name, the right to privacy.

In the case of Tamiz against Google - England and Wales, Court of Appeal (Civil Section) 2013, anonymous comments were made on a blog platform hosted by Google. The applicant sent them a letter bringing the defamatory post to their attention. It took five weeks for Google to send the complaint to the blogger in question, which in turn took three days to remove the material from the site. The courts considered that Google was a secondary publisher by virtue of the fact that it took an unjustifiably long time to intervene. Although the courts have also taken into account the high level of help offered by Google to users of their platform, it opens the door for Internet Service Providers to be held liable if they do not act once a person informs them of the existence of a defamatory statement hosted on their platform[2].

The South Australian Supreme Court has dealt with a similar issue in Google versus Duffy's 2015 decision, and also held that once Google has received notification of false and defamatory statements, they can be held liable as a secondary publisher because it does not acted in a tamely useful[3].

In Muwema against Facebook Ireland, the 2016 decision, the High Court of Ireland had the opportunity to introduce the same principle in the Irish judicial precedent. However, the Court considered that the internet service provider was not obliged to remove defamatory posts

[1] Lucia Irimescu, *Noul Cod Civil. Comentarii, doctrină și jurisprudență. Vol. I* (Bucharest: Hamangiu, 2012), 116-117.
[2] https://www.bailii.org/ew/cases/EWCA/Civ/2013/68.html
[3] https://jade.io/article/415945

from an anonymous third party. Instead, the court chose to force Facebook to reveal the identity of the user in question[1]. This decision is not only impractical in a world of social media, but fails to provide appropriate remedies for those whose names have been mentioned in malicious and reckless comments, anonymous online, shared hundreds, thousands or even millions of times.

The publication of a private discussion on facebook messenger / whatsapp is likely to infringe the right to privacy, a social value protected by the European Convention on Human Rights, in art. 8, but also by the national legislation, through art. 71 of the Civil Code. For a conceptual clarification, given the legislative gap at the national level regarding the notion of correspondence, this task fell to the doctrine, meaning that definitions from other countries were borrowed, an edifying role having that of French Law no. 86-1067/1986[2], which defines it as "a message intended exclusively for one or more persons , physical or legal, determined and individualized ". From the teleological interpretation of this text of law it results, without denying that the discussions on messenger / whatsapp / e-mail fall into this sphere.

Even though Facebook is also the owner of the Whatsapp application, as we previously showed Î.C.C.J. has recognized as a public space to a limited extent only the activity carried out on the Facebook platform, although the reason for the operation of both applications is similar. Thus, the WhatsApp application was launched in 2010 and purchased by Facebook in 2014. Users must register with WhatsApp by providing their own mobile phone number after installing the application. The registration of a WhatsApp account ends by checking the mobile phone number with an access code that is sent via SMS. Using the service, users can send and receive a variety of media, such as text messages, photos, videos, documents, locations, voice messages, and voice calls. Individual chats and bilateral messages are possible. WhatsApp points out that messages sent and calls made through its service are "end-to-end encrypted" for security reasons. All these aspects were also taken into account in the decision of the Federal Court in Berlin (Bundeskartellamt, decision no.6 of 6.02.2019[3]), as well as the

[1] *http://www.bailii.org/ie/cases/IEHC/2016/H519.html*
[2] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000512205/
[3]https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5

fact that being part of Facebook companies, WhatsApp receives information and shares information[1] with Facebook companies[2] (in the same sense also see the European Commission in Case COMP / M.7217 - FACEBOOK / WHATSAPP[3]).

In this context, we appreciate that the defamatory posts made on a WhatsApp group-target a virtual space where a series of conversations take place like the Facebook application, being necessary to fall under the provisions of the decision of the Î.C.C.J. which includes such an activity as carried out in a public space. In support of the idea that the conversations on the WhatsApp application are likely to involve the liability of the person who made the defamatory statements / the person who took such statements we refer to the relevant case law. Therefore, the case of Riad Tawfiq Al Sadik against Suhad Subhi Sadik, the decision of 16.10.2019, the Supreme Court of Great Britain, retained the commission of a slander that took place in a WhatsApp group of only 34 people, many of the group members being acquainted of the applicant[4]. Sobrinho against Impresa Publishing, decision of 22.01.2016, the Supreme Court of Great Britain ruled that a publication can be defamatory and can exceed the threshold of serious injury, even if it was addressed to a single person. It also states that the circumstance of sending the defamatory message in error, as well as that of sending it on the occasion of the outbreak of a fit of rage, does not constitute a defense and exoneration against an action to demonstrate defamation. The fact that the statement was published in a small group of close people, such as members of a WhatsApp group, does not remove the responsibility of the person who posted the harmful message[5]. In case no. 17 Sa 52/18, section - labor law, decision of 17.03.2019, the Court of Baden-Württemberg in Germany held that the fact of the employee who communicated untrue statements about his employer in a conversation on WhatsApp justifies

[1] Maria C. Wasastjerna, „The Implications of Big Data and Privacy on Competition Analysis in Merger Control and The Controversial Competition-Data Protection Interface", *European Business Law Review* no.3 (2019): 337-366.

[2] Vicente Bagnoli, „Questions that Have Arisen since the EU Decision on the Whatsapp Acquisition by Facebook", *Market and Competition Law Review* vol.III no.1 (2019): 15-51.

[3]https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

[4] https://www.casemine.com/judgement/uk/5da82b372c94e05def5d78ef

[5] https://www.casemine.com/judgement/uk/5a8ff72e60d03e7f57ea9348

the immediate termination of the employment contract. The court held that the WhatsApp discussion between the defendant and her friend met the conditions of slander, as the friend shared the defamatory information to other colleagues and because WhatsApp messages were a particularly serious accusation that affected the reputation and image of her employer. The court stated that in order not to incur liability, the employee had to verify the veracity of the information she disseminated, regardless of the fact that the message was communicated to a single person with whom she had friendly relations[1].

On the other hand, on 17 January 2019, the Frankfurt-Main Higher Regional Court (Oberlandesgericht Frankfurt am Main, OLG Frankfurt) ruled that a close family circle was an area free of defamation in which members could speak freely without fear of legal consequences. The defendant sent the statements as attachments to a WhatsApp message to her sister requesting that they be sent to their mother. In addition to the mother, they were communicated only to the cousin. The Court concluded that the statements in question in this case were made in an area without defamation and were therefore not illegal. The Court explained that there is a "realm of confidential communication within certain relationships of trust, especially in a close family circle, which has priority over the protection of honor", which is thus a "sphere without insults"[2].

Therefore, applying the algorithm retained by Î.C.C.J. in decision no. 4546 of 2016, regarding the public nature of the deed, we consider as thorough and legal claims made regarding the defamation made through conversations on such an application, as the social network WhatsApp can not equate, in terms of control of broadcast messages, with an electronic mailbox. At the same time, the use of defamatory expressions, in a public setting or accessible to the public on the occasion of expressing an opinion regarding a certain category of people (director of an institution, board members, etc.), undoubtedly causes their association with feelings. of contempt, repudiation, intolerance, so that it cannot be claimed that he acted without guilt. Thus, the need to protect the right to name, the right to image, the right to privacy in relation to the concrete

[1] https://www.mondaq.com/germany/unfair-wrongful-dismissal/867194/extraordinary-termination--libel-and-slander-via-whatsapp

[2] https://www.loc.gov/law/foreign-news/article/germany-court-holds-whatsapp-messages-to-close-family-members-are-defamation-free-zone/

circumstances of an imputed deed imposes a proportionate measure in relation to the value to be defended, human dignity, to protect it from any intimidation, hostility, degradation, humilliations and offenses.

CONCLUSIONS

If the imputed actions directly affect the personality, it thus give rise to a right to compensation. Therefore, it is ascertained the existence of an image damage by posting defamatory / malicious on Facebook of some pictures with a person, at the same time being seriously affected and his private life (see: Civil Sentence of 20.04.2020 Luduș Court).

When the moral damage is identified, it is obligatory to take into account the importance of the damaged values (right to image, right to name, right to privacy, honor, dignity, freedom of expression, right to reputation.), personal situation of the victim, education, culture, the standard of morality, given the violation of values without economic content and the protection of rights that fall within the scope of art.8 of the ECHR, but also of values protected by the Constitution and national laws. In other words, the existence of the damage is limited to the condition of reasonable assessment on an appropriate fair basis of the act and actual damage caused to the victim (according to Decision no. 153 / 27.01.2016, section I ,civile, Î.C.C.J.).

In the proof of the moral damage, the proof of the illicit deed is sufficient, following that the damage and the causal relationship will be presumed; It is therefore not necessary to prove unequivocally that the name/image/private life were damaged in any way in the context in which the scandalous and untrue statements made in the denigration campaign significantly affected the values which define the human personality.

According to the provisions of art. 1349 Civil Code. paragraph 1 <Any person has the duty to respect the rules of conduct imposed by the law or the custom of the place and not to infringe, through his actions or inactions, the rights or legitimate interests of other persons>. In this context, we show that the High Court of Cassation and Justice in decision no. 1589/2019 holds that "it diverted freedom of expression from its purpose and acted in bad faith by informing the public, through the written article, only of information that could create a negative image - hiding the information that could have contradicted that image and that

could be obtained as easily as the negative ones, insisting on the presentation of erroneous information and only pursuing the realization of one's own interest - .. .., and not a correct and accurate information of the public, ... the requirements provided by the provisions of article 1349 paragraphs (1) and (2) of the Civil Code for engaging in tortious civil liability are fulfilled. "

Contextually, we state that freedom of expression is not and must not be absolute[1], and the right to freedom of opinion and expression must be exercised within its natural limits, without prejudice to the rights and legitimate interests of others (Lingens v. Austria, judgment of 8 July 1968, para.41). And in the older case law of the European court (Õztûrk v. Turkey, 1999 Grand Chamber judgment), the responsibility for publishing defamatory statements against a person lies primarily with the person making it possible to make this information public.

Moreover, the denigrating statements and the purely insulting way of expression do not fall within the limits of the dose of exaggeration and provocation allowed by art. 10 ECHR (see: Civil Judgment no. 24595/2013, Bucharest District 1 Court).

There is the illicit deed by publishing unreal statements[2], the deed being committed intentionally, and the damage is certain and proven by the reactions of people who commented and supported such a post on Facebook, the causal link being per se.

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[1]Craiova Court of Appeal, decision no.60 from 11.03.2021.

[2] https://www.clujust.ro/hotarare-de-obligare-a-facebook-sa-dezvaluie-identitatea-administratorilor-de-pagina/

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DUTIES OF CIVIL SERVANTS IN THE SYSTEM OF PUBLIC ORDER AND SAFETY IN A PANDEMIC CONTEXT

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Abstract:

At the state level, public order and safety are key elements, which include law enforcement and enforcement activities, the provision of public services and the maintenance of public order. From this perspective, public safety involves both the relationship with the citizen and the relationship with the civil servant, who, in essence, is the one who carries out the actual activities and who applies the legal provisions.

Key words: *public order; public servant; system of public order and safety.*

INTRODUCTION

The concept of public safety refers to the activity that ensures the protection of public order, the functioning and stability of the state and its institutions, as well as the inviolability of life, health, freedom, property and honour of the citizen.[3]

The authorities and institutions that make up the system of law enforcement and public safety have material, functional and personal competencies assigned by law and consist of: the Supreme Council of

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[3] Related to public safety, the concept of public order defined as "the totality of unwritten norms that prescribe the behaviour of the individual in public, rules whose observance is a necessary presumption for civilized coexistence in a community of citizens." G. Gornig and M. Vlad, *Romanian and German Police Law* (Bucharest: C.H. Beck, 2012), 43.

National Defence (CSAT); the Ministry of Internal Affairs; the National Office for Refugees; the Romanian Intelligence Service; Foreign Intelligence Service, Security and Protection Service, Local Police, Ministry of National Defence.

The main specialized forces with responsibilities in the field of public order consist of structures within the structure of the Ministry of Internal Affairs, specialized in missions and activities consisting of the following categories: police (national), gendarmerie, border police, and military firefighters, organized in report with the specific operative situation and depending on the territorial elements.

The system of public order and security also has complementary forces, namely: military police units and subunits, local police units, special formations of penitentiaries, specialized structures of intelligence services, certain formations within the National Agency for Fiscal Administration, formations civilian firefighters, security guards and protection of persons, sanitary-veterinary inspection.

DUTIES OF MAINTENANCE OF PUBLIC ORDER AND SECURITY OF LAW ENFORCEMENT BODIES

Maintaining public order and safety is the basic mission of public order institutions, integrated into the general objective of protection and respect for human rights.

Such an approach leads to the idea that the entire relationship between the law enforcement body and the community must have the following rules: respect for and protection of human rights, protection and preservation of public order, but also the protection of the rights and freedoms of others.

From this perspective, the person responsible for law enforcement in a democratic society, established internationally by regional or universal standards, plays a very important role, in the case of this general issue, but also in the case of a specific one, such as the crisis of public health generated by the SARS-VOC pandemic 2.

Art. 1 of the Annex to the Code of Conduct for Law Enforcement Officials[1], adopted in December 1979 by the General Assembly of the United Nations sets out their responsibilities:

[1] At European level, "Recommendation Rec (2001) 10 on the European Code of Police Ethics contributes to the promotion of the principles considered vital in a democratic

"Persons responsible for law enforcement must always perform their duties according to the law, serving the community and defending all persons against illegal acts according to the high degree of responsibility required by their profession".[1]

At the international level, standards for the protection and observance of human rights in the work of law enforcement authorities, adopted within the United Nations, have become universal, with the international community accepting them as a set of minimum law enforcement rules.[2]

At the national level, human rights and freedoms are included in the Romanian Constitution, the constitutional provisions being in accordance with the Universal Declaration of Human Rights, with the pacts and treaties to which our country is a party.

However, human rights cannot be exercised in the absence of social order, as the effectiveness of law enforcement activities depends on the existence of a tolerable level of crime, but also on an insignificant intensity of social unrest and tensions.

In conditions of social order, but also of social dysfunctions, the activity of state agents has significant and direct implications on the community and human rights and freedoms, and can have positive or negative effects on society, depending on the due respect, as well as the community, in turn interested in maintaining a positive social climate, has an important role.

The guarantee of respect for human rights standards can be achieved only by observing rules of conduct specific to the activity of structures that are part of the integrated system of public order and safety. Rules of conduct must be harmonized, because each action has certain specific features that depend on the field, season, weather, nature of the

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society, both in the effectiveness of the police and in its acceptance by the public, marking a new trend in this domain. See, M. - I. Grigore-Rădulescu, *Attributions of the Romanian Police* (Bucharest: Universul Juridic, 2014), 326.

[1] C. Silion, I. Crânguș and L. Rotaru, *Manual de informare și instruire a personalului Jandarmeriei Române în domeniul dreptului umanitar și respectării drepturilor omului*, (Bucharest: M.A.I, 2007), 72.

[2] C. F. Popescu and M – I. Grigore-Rădulescu, *Protecția juridică a drepturilor omului*, (Bucharest: Universul Juridic, 2014), 39; R. Miga-Beșteliu and C. Brumar, *Protecția internațională a drepturilor omului. Note de curs*, 5th Edition (Bucharest: Universul Juridic, 2010), 26.

meeting, purpose and extent of the action, social value of the participants, etc.[1]

At the same time, in order to avoid or reduce cases of human rights violations, a special role played by the education of law enforcement, based on the following fundamental principles:

- the principle of legality of actions;
- the principle of respect and defence of human dignity;
- the principle of avoiding surprise, limitation, proportionality and gradual use of force;
- the principle of minimum risk;
- the principle of defending the human being; the principle of confidentiality of the data with which they come into contact in the activity carried out and the principle of transparency.

The active but not ostentatious presence of public order structures in the street, in support of the citizen often leads to obtaining quality results in order to ensure the climate of public order and safety and maintaining control over illicit or immoral activities.

Usually, due to the specificity of the actions and activities they carry out, the agents from the integrated system of public order and safety are the most vulnerable, the most prone to violating the fundamental rights and freedoms of citizens. They are in a permanent "fight" with crime regardless of the forms in which it manifests itself and may be tempted to respond violently to violence, sometimes not respecting the degree of proportionality.

The police officer has to defend the fundamental values of the state, in which a main and dominant role is represented by human rights and freedoms. He is at the forefront of law enforcement and is committed to combating discrimination and abuse while respecting human rights.

However, a certain number of state agents exhibit abusive behaviour, determined by the feeling of inviolability. I believe they have it through their official capacity as a representative of the state authority. They consider that they have a privileged position and any violation of the law is tolerated, due to the feeling that in the case of an investigation they will benefit from privileged treatment from colleagues.

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[1] Silion, Crânguș and Rotaru, *Manual de informare și instruire a personalului Jandarmeriei Române în domeniul dreptului umanitar și respectării drepturilor omului*, 35.

In addition, some police officers show contempt for people who come from the poor class of society, or who have poor material possibilities. In many situations, they treat people in a discriminatory way, categorizing them according to their position in society, quickly solving the problems of those who were in a privileged social class.

Another aspect that significantly affects the image and credibility of the police institution is the fact that some police officers exceed the scope of their duties and by committing abuses during the exercise of their duties in maintaining public order and peace harm the exercise of human rights and freedoms. Usually, by implicitly infringing them, other rights and freedoms are affected, some of them being fundamental, likely to be violated being equality in rights, the right to life and physical and mental integrity, individual freedom, etc.

These behaviours are the first that civil society notices and sanctions, bringing a negative image on all public order structures, strongly unbalancing the image of the citizen towards the police institution in general.

EXERCISE OF POLICE ACTIVITY FOR THE DEFENSE OF THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Democracy is the essence of the individual's freedom to do what is not contrary to the interests of others, the law limiting this freedom by establishing its dimensions, thus constituting an interest and a social value.[1]

The state and the rule of law represent the supreme values of all democratic nations and constitute the foundation of the organization of power in the state, aiming to achieve the optimal balance, so that the relationship between human rights and the functioning of state authorities is in harmony of the social order.

From a social perspective, the purpose of the police is to ensure and maintain the rule of law established within the state, thus protecting the public interest and the fundamental values of society. In other words,

[1] M.-I. Grigore-Rădulescu, *Teoria generală a dreptului*, 3rd Edition, revised and added (Bucharest: Universul Juridic, 2019), 68; I. Boghirnea, *Teoria generală a dreptului*, 2nd Edition, revised and added (Craiova: SITECH, 2013), 47-48.

the police institution is the lever at the disposal of the state to protect society and to ensure legality and the rule of law in a society.

The modern police officer is at the service of the citizen, comes to meet him, to listen his requests and solve them according to his skills. He can also guide him how and where to solve them if his problems exceed the scope of his duties, defends the community by respect for human rights and freedoms, the honour of the citizen, protecting society against illicit acts, regardless of nationality, origin, race, religious or political beliefs, social conditions and shows a high degree of responsibility.

The agent of the state has the right to request information in order to know permanently the situation in the area of responsibility, and this can be obtained only by gaining the trust of the community and by a permanent and close relationship with the members of the society. Trust in the modern police officer can only be gained if he has a proper professional conduct and takes the necessary measures in an appropriate way to defend the social values of the community, and the permanent dialogue with society offers him the opportunity to obtain the necessary data to prevent and combat acts antisocial. Through his "partnership" with society, the police officer actively participates in the elimination of phenomena and elements that favour or give birth to antisocial acts and contribute to the anti-criminal education of the community.

According to the law, in the exercise of their attributions, the police are invested with the power of public authority. which gives the police officer the right to exercise his duties, within the limits of legal competence, based on the principles of legality, respect, professionalism, transparency, but also the priority of public interest both during the exercise of the profession and in his free time. This authority also follows from the hierarchical position that related to the function it holds in the rule of law system.

The police officer has the role of mediator of the conflict in society and must contribute to maintaining an extremely sensitive balance, and the legitimacy of his actions derives from the function he performs within the state.

The essence of the police duties lies in the right of the state agent to impose on a certain cadre of persons to refrain from certain actions or to proceed in a certain way. This justifies the institution of the system of public order and safety within society, a society that in turn is aware that the gear of social self-regulation is not workable in any situation.

In the rule of law, where the supreme value is man, his rights and freedoms, the role of the police is to solve social problems by exercising its coercive force, within the limits of its competence and powers, which establish the methods, means and conditions of intervention.

In the context of the regulations adopted in preventing and combating the SARS-VOC2 pandemic, the police had to apply the legal provisions on quarantine and self-isolation, limit travel and the organization of public events, ensure security and protection of strategic objectives. All this done while meeting all his duties under the law and taking into account that, although many people were in quarantine or solitary confinement, they used the pandemic as an opportunity to commit acts contrary to the law.

In the police-community relationship, the positive relations derive from the call for mutual help, while the negative relations usually related to the situations of arrest or sanction following the violation of the legal norms.

Through the strategy he applies, the police officer provides the authority by which he forces others to act in the public interest by respecting and protecting social values, among the structural elements of the strategy in the police-community relationship remembering:

- firm police activity, reducing the feeling of fear of the community
- personal citizen contributions on crime, increasing the role of the community on crime,
- security and personal self-defence of citizens, multiple cooperation
- achievement of mutual association

The strategy used by him in the police-community relationship does not circumvent his basic missions in terms of professional law enforcement and the prevention and prevention of crime, but instead aligns with current requirements regarding respect for human rights and freedoms.

While analysing police and police officer's activity, Dr. Eugen Bianu (head of the Security Police during 1938), found out that the police institution, wants to be in perfect harmony in the relationship between state authority and the rights and freedoms of the citizen, namely the rights of the modern police officer and their impact on civil society. In addition to the right to apply coercive measures and a protective function, which is a main obligation of the modern police officer.

Compared to the highlighted aspects, it is easy to understand that the activity of the police officer in the police-community relationship based on maintaining and revitalizing relations between people in society, the population being efficiently and operatively against antisocial acts and the perpetrators of these illegal activities. Thus, the concept of "local police officer" was outlined, a concept that actually and legally guarantees the partnership between the police institution and the community as a beneficiary of the rule of law, but also a contributor to maintaining and respecting moral values.

The public power, the citizens, must understand and accept that for a good functioning of the relationship the authority of the state-the rights and freedoms of the citizen, and ensuring a climate of public order and peace, as well as ensuring a sense of security, the state agent and the civil servant. , his authority in the performance of his duties must be recognized in the first instance.

On the other hand, the civil servant from the public order structure is the "emblem" of the institution he represents through the first contact of the citizen with the police and not coincidentally, the degree of civilization of a city or a state determined by the impression produced by the police officer.

CONCLUSIONS

In a modern society, the fundamental role of civil servants and public safety is to ensure the protection of society, a problem that can be solved by a set of specific legal rules that strengthen the authority of the state and allow various institutions with responsibilities in the field take certain measures to prevent and combat illegal acts.

The joint activities of the different structures of law enforcement can be achieved by harmonizing police systems, involving a mutual knowledge of structures, methods, means of action and operational concepts.

Civil servants in the structures of public order and safety are those who represent the institution of the rule of law and by the nature of their activity protect social values - the basic pillars of a civilized nation. I am always in the service of society, defending the rights and freedoms of citizens, through a sustained effort that involves devotion, dedication, but

also professional behaviour based on solicitude, honesty, and especially based on discipline, will and spirit of sacrifice.

The main purpose of the police officer's activity is to ensure the climate of order and public peace. The professional police officer imposes confidence in the police, promotes cooperation with citizens, and defends their interests, in a word, raises to another rank the quality and efficiency of the police act.

From the perspective of preserving and defending fundamental social values in a state governed by the rule of law, we consider it essential that the police officer be provided with the necessary legal protection. This has to be anchored to current needs, so that the police officer is not induced to authority or the institution it represents, which is itself an erosion of the unconditional acceptance of authority.

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INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS IN THE CONTEXT OF THE GLOBAL PANDEMIC[1]

Mircea Mugurel ȘELEA[2]

Abstract:

The observance of the obligations assumed by the international legal instruments ratified by Romania is not achieved anyhow, but the context of the global pandemic, the rights of the persons targeted by the international judicial cooperation procedures, the time periods necessary for drafting the procedural documents must be taken into account. The emergence of the pandemic caused by the SARS – CoV-2 virus has produced a number of impediments to the international judicial cooperation in criminal matters, especially in the execution of European Arrest Warrants issued by EU Member States.

Key words: *international judicial cooperation; pandemic; European Arrest Warrant; provisional arrest; requested person.*

INTRODUCTION

The economic problems and the disappearance of some jobs generated by the emergence of the SARS - CoV-2 virus, determined the people who emigrated to the developed western countries, to return to the countries of origin, some of these people being involved in committing criminal acts, which has led to an increase in the number of requests for international judicial cooperation.

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The global pandemic has created specific difficulties in all areas, including international judicial cooperation in criminal matters, which society has never encountered before, with judicial authorities facing special situations in which they have had to find solutions to lead to the implementation of a quality act of justice, quickly, but also with respect for the rights of litigants who have been subject to international judicial cooperation procedures. The doctrine has shown that "*international judicial cooperation* means a specific mode of action, by which the world governments act by providing mutual assistance through the forms established by laws, agreements, treaties, conventions, for the purpose of proving criminal activity, arresting and punishing perpetrators of criminal acts and, implicitly, of reducing crime"[1].

On the other hand, the judicial authorities in Romania had to take into account the principle of pre-eminence of international law regulated by art. 4 paragraph 1 of Law no. 302/2004, according to which, Romania must comply with and execute the obligations provided in the norms contained in the treaties and conventions to which it is a party. At the same time, when solving the requests for the execution of a European arrest warrant, the provisions of art. 84 paragraph 2 of the same law according to which the warrant "is executed on the basis of the principle of mutual recognition and trust, in accordance with the provisions of Council Framework Decision 2002/584 / JHA of 13 June 2002 were taken into account".

The observance of the obligations assumed by the international legal instruments ratified by Romania is not achieved anyway, but the context of the global pandemic, the rights of the persons concerned by the international judicial cooperation procedures, the time periods necessary for the elaboration of the procedural acts must be taken into account. In this sense, the doctrine has emphasized that the fair trial is "an ideal of true justice that respects human rights."[2].

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[1] Alexandru Boroi (coordinator), Ioan Rusu and Minodora-Ioana Rusu, *Tratat de Cooperare judiciară internațională în materie penală* (Bucharest: C.H. Beck, 2016), 9.

[2] Jean Pradel, „La notion de proces equitable en droit penal europeen*"*, Rev.Gen.Droit *Ottawa* (1996): 506 apud Jean-Francois Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 378.

1. TIME-LIMITS IN THE PROCEDURE FOR EXECUTING THE EUROPEAN ARREST WARRANT

The emergence of the pandemic caused by the SARS-CoV-2 virus has produced a number of impediments to international judicial cooperation in criminal matters, in particular in case of the execution of European arrest warrants issued by EU Member States, the recognition of judgments handed down by foreign judicial authorities, the transfer of persons in order to execute a custodial sentence, requests for legal assistance requesting the hearing by videoconference of injured persons, witnesses or accused persons, or requesting the surrender of procedural acts.

Most of the problems were encountered in the procedure for the execution of European arrest warrants due to the restrictions imposed in the field of air transport, restrictions that led to the impossibility for the issuing authorities to take over the requested persons.

The role of the European Arrest Warrant is to simplify the procedure for the extradition of a person between EU Member States, the doctrine stating that "taking advantage of the new instruments of cooperation introduced by the Amsterdam Treaty under 3rd Pillar, through a framework decision the mechanism for transfer of a person located in the territory of a Member State at the request of the judicial authorities of another Member State was completely reformed"[1].

Since the beginning of the global pandemic period, the procedure for executing the European arrest warrant has been difficult, and the period of time required to complete the procedure has greatly increased. There were situations in where the requested persons, during the procedure, were provisionally arrested for surrender, the duration of the arrest being extended until the judicial authorities of the requesting State had the possibility to take over the requested person.

In the case of the alert entered in the Schengen Information System, according to art.102 paragraph 4 of Law 302 / 2004, the prosecutor notifies the court of appeal in whose district the requested person was caught, in order to decide on the measure of provisional arrest for surrender, but the judge can render several solutions. Thus, either it orders the provisional arrest for a maximum of 15 days, or it establishes,

[1] Florin Streteanu, „Câteva considerații privind mandatul european de arestare", in *Caiete de drept penal*, no.1 , C.H. Beck (2008): 2.

for a maximum of 30 days, a non-custodial preventive measure from those provided by the criminal procedural law. Law 302 / 2004 provides for two time-limits to be met by the issuing State, after the judge has ruled on the proposal made by the prosecutor. According to art.102 para.7, if within 15 days from the settlement of the proposal, the prosecutor does not present the European arrest warrant accompanied by the translation into Romanian, the judge orders the revocation of the measure of provisional arrest or of the non-custodial measure. Pursuant to paragraph 8 of the same Article, the alerting Member State shall transmit the warrant within a maximum of 10 days from the date of the resolution by which the judge took the preventive measure. If in case of non-compliance with the term of 15 days, the law provides the consequences, in the sense that the judge orders the revocation of the arrest or the non-custodial measure, in case of non-compliance with the term of 10 days, no sanction is provided.

In this context, the issue of the legal nature of the time-limit of 10 days provided by art.102 paragraph 8 of L aw302 / 2004 is raised, in the sense if this term is of recommendation or revocation, aspect that has importance on the effects of its non-observance. In our opinion, the term is of recommendation, being provided for the prosecutor to have sufficient time to translate the warrant in order to present it to the judge within the time-limit of 15 days provided by art.102 paragraph 7 of the law. Given that the legislator has established that if the time-limit of 15 days is not observed, the preventive measure is revoked, there is no reason to assume that non-compliance with the time-limit of 10 days would have any consequence on the provisional arrest, or, as the case may be, the non-custodial preventive measure. On the other hand, the European arrest warrant may be transmitted by the requesting State even after the judge, at the end of the time-limit of 15 days, has revoked the preventive measure. Such cases have also been encountered in the case law of national courts, in the sense that after the measure of judicial control was revoked as a result of non-compliance with the time-limit of 15 days[1], the requesting judicial authorities have submitted the European

[1] Resolution no. 75/2020 of 16.09.2020 of the Court of Appeal Craiova in the file no. 878/54/2020/a2

arrest warrant translated into Romanian, the court ordering the surrender of the requested person[1].

2. PREVENTIVE MEASURES IN THE PROCEDURE OF EXECUTION OF THE EUROPEAN ARREST WARRANT

If the time-limit of 10 days provided for in Article 102 paragraph 8 of Law 302/2004 is not complied with, and the judicial authorities of the requesting State submit the European arrest warrant, even after the expiry of the time-limit of 15 days provided for in paragraph 7 of the same article, after a longer period of time, the procedure to be followed may be called into question. Either the procedure started according to art. 102 of Law 302 / 2004, with the requested person released without being subjected to any preventive measure, or the procedure provided for by art.103 of Law 302 / 2004 and the prosecutor notifies the court with the proposal to take the measure of arresting the requested person?

If the initial procedure based on the alert introduced in the Schengen Information System continues, but due to non-compliance with the time-limit of 15 days, the preventive measure taken in the case has been revoked, there is a danger that the requested person will leave Romania, either during the procedure or after the judgment of the national court on the application for the execution of the European arrest warrant. There are also cases where after receiving the European arrest warrant, the court does not solve the request immediately, but may grant a time limit to request additional information or guarantees from the issuing judicial authority. The requested person may leave Romania immediately after the rendering of the decision admitting the request for the execution of the European arrest warrant. In this situation, even if the court admits the request for execution of the European arrest warrant and orders the arrest of the requested person for surrender to the requesting state, if the requested person is no longer in Romania, the decision cannot be enforced, and, implicitly, the European arrest warrant cannot be executed.

If the procedure provided by art.103 of Law 302/2004 is chosen and the prosecutor requests the arrest of the requested person, the question may be asked whether the court can still admit the prosecutor's

[1] Sentence no. 153/2020 of 23.09.2020 of the Court of Appeal Craiova in the file no. 878/54/2020

proposal, given that, previously, the same court revoked the preventive measure ordered on the basis of the alert in the Schengen Information System, revocation that occurred due to the fact that the requesting judicial authorities did not submit the European warrant within the time-limit of 15 days provided by art. art.102 para.7 of Law 302/2004.

According to art. 238 para. 3 Criminal Procedure Code, the defendant who was previously remanded in custody in the same case can no longer be subject to this measure again, unless new grounds have emerged that justify the need for his deprivation of liberty. At the same time, by the Decision no. 22 / 22.01.2017 of the Constitutional Court of Romania one has ascertained the unconstitutionality of the legislative solution regulated by art. 220 para.1 Criminal Procedure Code "which allows the measure of house arrest to be taken, provided that the defendant has previously been remanded in custody or arrested at home in the same case, in the absence of new grounds necessitating his deprivation of liberty".

In the doctrine[1], it was stated that the text of the law should also be taken into account in the event that the first proposal for pre-trial detention was rejected, and subsequently, a new proposal was formulated. In this respect, with regard to the new grounds on which pre-trial detention may be based, it was stated that "the new proposal may be formally based on the same cases of arrest, but must be based on the existence of new elements, therefore non-existent or unknown to the judge who solved the first proposal for arrest, being factual circumstances or legal grounds that could not be previously analysed and which, from a chronological point of view, were revealed after the solving of the first proposal."[2].

If the requesting judicial authorities have not submitted the European warrant within the 15 days provided by art. art.102 paragraph 7 of Law 302/2004, the measure is not revoked for aspects regarding the legality or necessity or proportionality of the requested person's deprivation of liberty, but for non-compliance with a procedure, respectively for the expiry of a time-limit within which the European arrest warrant had to be presented to the judge. In this context, at first

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[1] Isabele Tocan, „Măsurile preventive și alte măsuri procesuale" in *Codul de procedură penală Comentariu pe articole, Ediția 3*, ed. Mihail Udroiu – coordinator (Bucharest: C.H. Beck, 2020), 1468.

[2] Tocan, „Măsurile preventive și alte măsuri procesuale", 1468.

sight, it could be said that after receiving the European arrest warrant, at the request of the prosecutor, the judge could again order a preventive measure against the requested person, without the prosecutor invoking new grounds. However, in our opinion, if this idea were accepted, it could end up with the removal of the effects of non-compliance with the time-limit of 15 days provided by art. art.102 paragraph 7 of Law 302/2004 and the creation of a state of uncertainty towards the requested person by removing any guarantee regarding the application of the sanctions provided by law for non-compliance by the authorities with the procedural time-limits. Regarding the procedural guarantees, in doctrine[1] it has been shown that the predictability of the norm is a guarantee that it is not interpreted arbitrarily, and the lack of guarantees or their insufficient character attracts the unconstitutionality of the norm. It was emphasized that the accessibility and predictability of the law is appreciated by the European judges, who are careful that the law must precisely define the conditions and modalities of any limitation of fundamental guarantees, in order to avoid arbitrariness[2]. On the other hand, the national judge has the obligation to interpret and apply domestic law in relation to the ECHR, which is "the defender of individual freedoms recognized at European level."[3]

On a different note, the prosecutor has the possibility to invoke new grounds, but, in our opinion, the mere fact that the requesting foreign authorities have submitted the European arrest warrant is not a new reason to impose a new preventive measure. A new reason to request a new preventive measure could be the attempt of the requested person to evade the procedure of solving the request for execution of the European arrest warrant, by leaving the territory of Romania. However, it is very difficult to find out when the requested person wants to leave Romania, given that there is no obligation imposed by the national court, which he must comply with, so that the name of the requested person is not in the

[1] Dan Claudiu Dănișor, *Libertatea în capcană. Aporii ale justiției constituționale* (Craiova: Universitaria, 2014), 224.
[2] Jean-Francois Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 820; Sunday Times c. Regatului Unit, Cererea nr.6538/74, (CtEDO,26 aprilie 1979), par.49 și următ; Olsson c.Suedia, Cererea nr.10465 /83, (CtEDO, 24 martie 1988), par.61.
[3] Frederik Sudre, *Drept European şi Internaţional al Drepturilor Omului* (Iaşi: Polirom, 2006), 159.

records with the people that the border police have to stop crossing the border.

Instead, if the national judge admits the request for the execution of the European arrest warrant and decides the surrender of the requested person to the judicial authorities of the requesting state, according to art. 104 paragraph 11, second sentence of Law 302/2004, he must order, by the decision of surrender, the arrest of the person requested for surrender. Although there were cases where the requested persons requested that another non-custodial measure be imposed, the national courts rejected those requests, arguing that "only in this way can the police in charge with the execution of the European arrest warrant arrest and surrender this person to the judicial authorities of the requesting State"[1].

According to art. 113 para. 1 of Law 302/2004, the surrender of the requested person must take place within 10 days from the date when the decision admitting the request for surrender became final, and paragraph 2 of the same article stipulates that if, for independent reasons of authorities, the surrender could not be made on the set date, a new date is set, in which case the surrender will be made within 10 days from the new agreed date. Following the emergence of the SARS-CoV-2 virus, these time/limits were not met due to transport difficulties caused by measures imposed worldwide to prevent the spread of the virus. The requested persons invoked the provisions of art. 23 of the Council Framework Decision no. 2002/584 / JHA / 13 June 2002 on the European Arrest Warrant, which provide for the possibility of temporary suspension of surrender, however, in a case[2], H.C.C.J. established that art. 113 of Law no. 302/2004 transposes this article in an even less restrictive manner than that of the Framework Decision, in the sense that surrender is neither postponed nor suspended, but successive time limits are set for the execution.

Regarding the successive time-limits for surrender, we discuss an issue regarding the procedure to be followed if the requested person could not be taken over by the requesting foreign authorities, in the sense that the court must verify ex officio whether it maintains the arrest measure for the purpose of surrender or the verification shall be made at the request of the authorities of the requesting State. In this sense, we have in mind the provisions of art. 104 para. 9 of Law 302/2004

[1] Decision no. 405/9.07.2020 of H.C.C.J. – Criminal Division
[2] Decision no. 202/20.03.2020 of H.C.C.J. – Criminal Division

according to which "the court verifies periodically, but not later than 30 days, whether it is necessary to maintain the arrest in order to surrender". However, this article must also be interpreted in the light of art. 113 of Law 302/2004 according to which the surrender of the requested person is made within 10 days from the date when the decision becomes final, but if for reasons independent of the Romanian or foreign authorities the surrender could not be made, it will take place within 10 days from the new agreed date. In this context, in our opinion the court verifies ex officio the need to maintain the preventive measure, only the procedure carried out until the final decision admitting the request for surrender, after this moment the verification of the measure is done only at the request of the competent authorities of the requesting state. In support of this opinion there are the provisions of art. 113 of Law 302/2004 laying down the conditions under which the measure of arrest may be maintained, in the sense that there must be a cause independent of the authorities, which made it impossible to surrender within the time limit initially set. Therefore, the national court must be informed that the surrender could not be completed within the time limit initially set, given that by rendering final judgments of surrender, the national judge solves the request for the execution of the European arrest warrant, and subsequently he does not know how the surrender procedure runs. On the other hand, in order to analyse whether or not to maintain the measure of arrest in view of the surrender, the judge must analyse, in view of the reasons invoked by the foreign authorities, whether the conditions provided by art. art. 113 of Law 302/2004 are met. Although art. 104 para. 10 of Law 302/2004 stipulates that the total duration of the arrest until the actual surrender to the issuing Member State may not exceed 180 days, and art. 113 para. 3 of the same law establishes that the requested person is released if the maximum time-limits for surrender are exceeded, without the person concerned being received by the issuing state, in our opinion, the judge has the possibility to revoke the measure or not maintain it even if its duration has not reached 180 days.

In this respect, in case law[1] it has been pointed out that, given that a first time-limit has not been set for the surrender of the requested person, the judicial authorities of the requesting State may request neither a new time limit for surrender nor an extension of the length of the

[1] Decision no. 23/PI/2020 of 21.04.2020 of the Court of Appeal Oradea rendered in the file no. 87/35/P/2020

detention order for surrender. It was taken into account that the foreign judicial authorities "failed to establish a time-limit for the surrender of the requested person, a situation that determines that in the future the duration of his detention will be uncertain and depend on unpredictable factors contrary to the provisions of art. 5 of the ECHR"[1].

There were cases where the requested persons invoked the provisions of art. 114 para. 1 related to art. 58 para. 2 lit. c of Law no. 302/2004 according to which, the surrender can be postponed for a maximum of 3 months and only once when, due to special circumstances, the immediate surrender would have serious consequences for the requested person or his family.

The Supreme Court found that such requests were well-founded because the suspension of flights to the requesting State, due to the international epidemiological situation caused by the spread of the SARS-CoV-2 coronavirus, was limited to a special circumstance which would have serious consequences for the requested appellant[2]. Therefore, the measure of arrest was revoked, the requested person was released, ordering his arrest, in order to surrender, for a period of 30 days, from the date of cessation of the reasons that justified the postponement of surrender.

In such situations, after the national court orders the postponement of the surrender and the revocation of the arrest measure, until the date of disappearance of the reasons that determined the postponement of the surrender, the requested person is no longer subject to any obligation, there is a risk that he leaves Romania and the European arrest warrant can no longer be enforced. It could be said that the requested person would not be able to leave Romania, given that flights to most states are suspended, but it must be borne in mind that there is the possibility of crossing the border by road transport.

An alternative to postponing surrender would be the possibility of replacing the arrest measure with another milder preventive measure, but in case law[3] it was shown that the provisions of art. 104 paragraph 11 of Law no. 302/2004, in terms of the possibility of replacing the arrest measure with another milder one, are applicable only during the trial, and

[1] Decision no. 23/PI/2020 of 21.04.2020 of the Court of Appeal Oradea rendered in the file no. 87/35/P/2020
[2] Decision no. 223 of 2 April 2020 of H.C.C.J. – Criminal Division
[3] Decision no. 201 of 20 March 2020 of H.C.C.J. – Criminal Division

not after the decision by which the court admitted the request for execution of the European arrest warrant by sentence, by which also the arrest of the requested person in order to surrender is obligatorily ordered.

In our opinion, in the context of the transport difficulties that appeared during the global pandemic, it would be beneficial, both for the requested person and for the requesting state, that Law no. 302/2004 is amended in order to regulate the possibility of replacing the measure of arrest with house arrest or the measure of judicial control, even after the decision by which the national court admitted the request for execution of the European arrest warrant and ordered the surrender of the requested person became final. Such a regulation would be appropriate, because the postponement of the surrender for the case provided by art. 58 para. 2 lit. c of Law no. 302/2004 may be ordered for a maximum of 3 months and only once, but there is a risk that even after this period the requesting state will be unable to take over the requested person. On the other hand, if, during the procedure for the execution of the European arrest warrant, the total duration of the measure of pre-trial detention and the measure of house arrest cannot exceed 180 days, the total duration of the measure of judicial control could be longer. At the same time, the necessary nature of the pre-trial detention must be taken into account, as it results from the doctrine, ''the criterion of the need for limitation placed in the context of a democratic society will be a reference element in the particular analysis of each situation"[1], both on the occasion of the imposition by the legislator of the restrictive measures and at the moment when the constitutional court shall decide on the constitutionality of the normative acts that provide for such measures.

[1] Elena Simina Tănăsescu, „Drepturile și libertățile fundamentale" in *Constituţia României revizuită-comentarii şi explicaţii*, ed. Constantinescu Mihai, Iorgovan Antonie, Muraru Ioan and Elena Simina Tănăsescu (Bucharest: Editura All Beck, 2004), 109.

3. PROCEDURE FOR THE EXECUTION OF THE EUROPEAN ARREST WARRANT WHEN THE REQUESTED PERSON IS A MINOR

A special situation encountered in practice[1] was the one in which the requested person is a minor aged between 14 and 16 years, and the European arrest warrant was not issued for the execution of a custodial sentence, but was based on an ordinance imposing a preventive measure during the criminal investigation for the crime of theft, an act for which, according to the Romanian legislation, only non-custodial educational measures can be imposed against the minor. In the case, the judicial authorities of the requesting state stated that no forensic examination was performed to establish whether he had judgment at the time of the act, because according to the law of the requesting state, the juvenile is criminally liable if he has reached the age of 14 without the need for such expert's report. According to art.113 paragraph 2 of the Romanian Criminal Code "the minor aged between 14 and 16 years is criminally liable only if it is proved that he committed the act with judgment", an aspect that questioned the existence of the obligatory case of refusal to execute the European arrest warrant provided by art. 99 paragraph 1 letter c of Law 302/2004 according to which the request for execution is refused "when the person who is subject to the European arrest warrant is not criminally liable, due to his age, for the acts on which the arrest warrant is based in accordance to the Romanian law". In this respect, it was found that, in the present case, the judicial authorities of the requesting State did not determine whether the juvenile had committed the act with judgment or had no judgment, which is why the need for a medical forensic report establishing the existence or non-existence of judgment. Regarding this aspect, the representative of the Public Ministry and the lawyer of the requested person, expressed different opinions regarding the procedure of carrying out the forensic report, in the sense if the execution of this report is ordered by the national court notified with the request for execution of the European arrest warrant, or by the judicial authorities of the requesting State, taking into account that the prosecution phase has not been completed. Regarding the last hypothesis, the issue of the impossibility of carrying out the forensic report in the requesting state was raised given that the minor was no longer on the

[1] Case no. 586/54/2020 of the Court of Appeal Craiova – Criminal Division

territory of that state, but he was in Romania. However, in this case, the judicial authorities of the requesting State had the possibility to request the obtaining of this evidence by issuing an investigation order, as regulated by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, transposed in Title VI, Chapter II, Section 6 of Law 302/2004, order that had to be executed by the prosecutor's office in Romania, competent materially and territorially.

The national court ordered the forensic report to be drawn up in the framework of the procedure for solving the request for the execution of the European arrest warrant, taking into account the fact that according to the law of the requesting State, such a report was not mandatory and, on the other hand, according to art. 99 paragraph 1 letter c of Law 302/2004, in order for the case of refusal to be incident, it must be established whether the requested person "is not criminally liable, due to his age, for the acts on which the arrest warrant is based in accordance with the Romanian law". Or, according to ar. 113 para. 2 Romanian Criminal Code "the minor aged between 14 and 16 is criminally liable only if it is proven that he committed the act with judgment", and the evidence establishing the existence or non-existence of judgment is the forensic report, based on which the national court renders the decision solving the request for the execution of the European arrest warrant. The doctrine showed that "the expertise for establishing the judgment of the minor between 14 and 16 years of age who committed an act provided by the criminal law is carried out, expeditiously, at the request of the judicial bodies"[1].

After the forensic report was carried out, the national court accepted the request for the execution of the European arrest warrant, ordered the surrender of the requested person and his arrest for a period of 30 days, in order to be surrendered[2].

However, even in this case, due to the transport difficulties caused by the pandemic caused by the emergence of the SARS-CoV-2 virus, the requested person could not be taken over within the initial

[1] Francisca-Maria Vasile, „Minoritatea" in *Codul penal. Comentariu pe articole*, Ediția 3, ed. Bodoroncea Georgiana, Cioclei Valerian, Kuglay Irina, Lefterache Lavinia Valeria, Manea Teodor, Vasile Francisca-Maria and George Zlati (Bucharest: C.H. Beck, 2020), 472.

[2] Sentence no. 158 of 30 September 2020 rendered by the Court of Appeal Apel Craiova – Criminal Division in the file no. 586/54/2020

time-limit, which is why the authorities of the two states set a new surrender date, but even at this time the surrender was not completed. The national court[1] revoked the measure of arrest of the requested person, in the grounds of the decision showing that in relation to the act that is the object of the European arrest warrant - the offense of theft, according to the Romanian law, only non-custodial educational measures can be imposed against the minor, and the judicial authorities of the requesting state specified the legal system of the state, respectively it provides for the application of lenient measures, to which the minor is entitled, in order not to execute the sentence or measure to be imposed. In this context, it was considered that "the measure of provisional arrest is no longer proportionate to the purpose for which the European arrest warrant was issued, there is a risk that the long duration of the provisional measure will turn into a custodial sentence, although at the end of the criminal trial there is a high probability that the requested person will not be sentenced to a custodial sentence"[2]. On the other hand, the necessity and proportionality of the arrest is a condition provided by the national law, in doctrine[3] showing that custodial measures authorized by the ECHR must comply with internal rules.

If the national court accepts the request for execution of the European arrest warrant and orders the surrender of the requested person, but, after the decision becomes final, due to the impossibility of surrender, orders the revocation of the measure of arrest of the requested person, the question arises whether the surrender decision can still be executed. In our opinion, the answer is no, because the surrender operation presupposes that the requested person is arrested, but Law 302/2004 does not provide for the possibility of arresting the requested person again after this measure was revoked after the surrender decision became final. Such a measure is possible only if the postponement of the surrender has been ordered by the judgment by which the national court has admitted the request for the execution of the European arrest warrant. In this case, in our opinion, the provisions of art. 113 paragraph 3 of Law

[1] Resolution no. 102/2020 of 19 November 2020 rendered by the Court of Appeal Craiova – Criminal Division in the file no. 586/54/2020/a7

[2] Resolution no. 102/2020 of 19 November 2020 rendered by the Court of Appeal Craiova – Criminal Division in the file no. 586/54/2020/a7

[3] Corneliu Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole.Vol.I. Drepturi şi libertăţi* (Bucharest: All Beck, 2005), 295.

302/2004 are incident, in the sense that the requesting judicial authorities have the possibility to issue a new European arrest warrant, based on the same offenses. Thus, even if the measure of arrest has been revoked for reasons other than exceeding the maximum time limits for surrender, without the person concerned being received by the issuing State, this is not a reason for refusing to execute a new European arrest warrant.

CONCLUSIONS

Finally, we underline the importance of amending Law 302/2004, in the sense of regulating new procedures leading to overcoming the difficulties created by the restrictions imposed in the field of transport due to the SARS-CoV-2 virus, so as to respect the balance between the rights of the requested persons and the principle of pre-eminence of international law regulated by art. 4 paragraph 1 of Law no. 302/2004, according to which, Romania must comply with and execute the obligations provided in the norms contained in the treaties and conventions to which it is a party.

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CORONAVIRUS VACCINATION AND THE NEW EUROPEAN LEGAL FRAMEWORK

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Abstract:

The pandemic that appeared at the beginning of 2020 brought several challenges from the perspective of legal framework. An entire ensemble of normative acts has appeared in recent months and the challenges they have brought have had important consequences in terms of public law. Among these legal debates, one stood out, namely that of vaccination. Our text had in mind the legal aspects of this operation in the national and European space.

Key words: *Vaccination; Legal framework; European legislation; National legislation; Legal imitation.*

INTRODUCTION

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.

In all the appreciated variants, there is no room for poverty or sufferance brought by different diseases. However, both phenomena are fully manifested, although the different ideological orientations seek to capitalize in the public debate mainly on the issue of poverty. In reality, if a significant percentage of the planet can escape poverty, it is not the same with the medical problems that accompany each person during life until the life's end.

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Even if the suffering due to poor governance or various forms of disease has not disappeared, we cannot fail to see the progress those last hundred years technologies have brought. As result, when vulnerable populations around the world are faced with the most challenging issues surrounding diseases, epidemics, and high mortality rates in children and mothers, there is an increasing awareness of the role that technology and legislation play in the advancement of public and global health.

1. Just over 10 years after the global economic crisis we had to face, another crisis – this time of a medical nature – has emerged, and its effects are difficult to control legally and administratively.

More important than the idea of controlling this medical crisis was its surprising aspect, because the developments in science in recent decades promised a comfortable and healthy enough life for those who would not overdo it or come from very financially vulnerable families. From cosmetic surgery to sex change, from cancer treatment to increasing the life expectancy of incurable bumps, everything was on an upward slope of medical technology, and the effect of these developments was seen in the overall increase in life expectancy before the Coronavirus pandemic at a global level of over 73 years[1] – related to 46 years in 1950[2].

The immediate result of the Coronavirus crisis was that of remembering the pandemic of 1918 – 1920 and the public debate of this century was divided into several parts, the most important of which was that of our lives after the end of this difficult time. As medical technologies of the last century have created useful serums for life, vaccination with such a pandemic product has become one of the fastest ways to achieve the desired goal.

Even though serums seem to be one of the most important solutions that modern medicine offers in combating the pandemic, traditional prevention measures and strict hygiene bring an increase in resistance against a hard-to-control virus. However, this combination is

[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 14th of May 2021.

[2] M. Roser, Es. Ortiz-Ospina and H. Ritchie, *Life Expectancy*, available at https://ourworldindata.org/life-expectancy, consulted at 14th of May 2021.

not easily accessible in every country in the world, because the costs of the serums used to fight the pandemic are high – more precisely, they are high for some countries, usually the most incompetently governed. Because of this, the idea of vaccination will be – as have been all medical technologies in history – rather the prerogative of strong financial and educational countries, and then of others.

Thus, everyone noticed that the success of vaccines in the last century has come to threaten the very idea of public health. Anti-vaccine ideas are not new, but the force with which they have manifested themselves in the last decade is a consequence of medical education for the population declining models. Without denying that all medical procedures can lead in some cases to negative results for certain people, it cannot be contradicted that in the last 70 years the increase in life expectancy globally has been almost 30 years. Or, in the absence of a medical assistance improvement at the level of each country, this progress would not have been possible and the legislation adopted in the field of public health constituted an instrument to strengthen this branch of public action.

2. The first effect that the Coronovirus crisis brought was the separation of spaces. More specifically, the differences in economic and technological strength[1] have made the responses to the pandemic different, in relation to each continent and country, but between these two spaces have necessarily prevailed: North America and Europe. This situation was reached because the two areas are the largest areas of economic development, related also to the size of their territory and demography. The two great forces of East Asia – Korea and Japan – impress with their achievements, but their territorial size does not give them the prospect of a major global influence.

This separation of spaces was accompanied by the two major facets of the pandemic issue: the first is the ability of laboratories to create technologies and serums to block the virus, and the second is the cultural, educational and democratic space of the North American and

[1] For a larger discussion see UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *TECHNOLOGY AND INNOVATION REPORT 2021. Catching technological waves Innovation with equity*, available at https://unctad.org/system/files/official-document/tir2020_en.pdf, consulted at 14th may 2021.

European world, which is at the forefront of all global rankings in the field of democratic[1] and coherent action within its own borders.

The need to respect the principles of legality and democracy emerges especially in times of crisis, because dictatorial regimes succeed better than others in limiting certain negative aspects of society through brutal means, which, however, do not grow form a long term the citizen's loyalty. Or, it is necessary that the principles of law be active even in the situation of exceptional circumstances, so that the societies do not sink into the abyss of state terror. After all, human beings values freedom, even if the impression of many is the opposite, and the fact that migration directions are only from countries with dictatorial political regimes to those that defend the freedom of individuals sharply reveals this feature of human behaviour.

Thus, the whole world looks with legal, economic and medical interest both at the result of the virus variations scientific researches, but also at the legal and administrative typologies that the countries from Europe and North America adopt in this situation. It is obvious that most countries in the world will copy some of these legal and administrative measures, according with the national political regime's interests and – obviously – the financial and administrative capacity to implement.

It should be noted that the political specificities of each country may make a unique example of the administrative response adopted globally or continental impossible, but some organizations – such as the European Union – may increase the closeness between practices and legal acts used in resolving the Coronavirus crisis.

3. Europe is a continent that contains several types of countries, most of which are grouped in a strong economic space and in which the tourism industry plays an important role, the most visited countries in the world being from this political-geographical area. In this sense, it is a major interest of millions of people dependent on the global tourist flow to find ways to bring tourists from around the world, because demographically the European Union represents less than 10% of the world's population. For these reasons, the implicit economic force of European countries will

[1] From the first 30 countries in the Rule of law index for 2020, 21 are from Europe and North America – see The World Justice Project, *Rule of Law Index, 2020*, p. 16, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf, consulted at 14th May 2021.

prove to have a major global weight in terms of imposing vaccination and international passports who confirm this medical operation.

There are various opinions in any democratic country on various topics of social debate. Obviously, the idea of vaccination could not be an exception to this rule, and the freedom of public debate must not hide the fact that at the level of no country there is unanimity of opinion on this subject.

Besides the legal issue of an important part of the population vaccination, two other aspects derived from it were found. The first concerns labour law and refers to the possibility that an employer may have against an employee, more precisely in the sense of forcing him to be vaccinated. The second situation that legislators must take into account refers to the access of foreign citizens on the territory of a European country, especially in the situation where they could not be vaccinated – because the financial strength of the states is different and the first buyers of the long-awaited serums were governments with significant financial capacity.

We must underline that medicine was from the 19th century an important topic of international agreements, because of wars and – in the last decades – because only in such framework governments can obtain an effective control of viruses and other diseases. We must note The International Health Regulations (2005), who were established to facilitate cooperation in mounting an effective public health response to the international spread of disease. This objective was reaffirmed in the Declaration of Astana (2018) where States reiterated commitments to effective development cooperation and to sharing knowledge and good practices (while fully respecting human rights) in order to prevent, detect and respond to infectious diseases and outbreaks.

The most important debate is that of workers who may or may not be forced by employers to get vaccinated. The discussion is fundamental, because they represent the active population which carries on its shoulders the functioning of the entire administrative system and, to a large extent, the private economy. Although equality of rights is a principle of law, in exceptional situations there is a certain order of priority, and a government that does not have financial comfort will be forced to prioritize active labour to the detriment of retirees.

Discussions can occur in the situation where an employee may not want to be vaccinated in any form, and in this situation the employer

is forced to keep in mind that among the principles governing the organization of work is the safety of work. Thus, as long as there are no legal standards regarding the number of employees per company, the employer must be granted the right to dispense with persons who through their behaviour may prove dangerous to the health and / or physical integrity of persons. It must be keep in mind that a long period of illness means for a person the diminution or loss of work capacity, and if there is a human source that has caused these shortcomings, its patrimonial responsibility will be attracted.

The same arguments will be used in the situation of civil servants – and in general of all persons paid from public budgets. The obligatory nature of vaccination is imposed in this matter by the fact that the daily destination of the public administration is direct work with the citizen, and a medical problem that affects the smooth running of a public institution can lead to serious disruptions in the activity of many citizens and private law entities.

In conclusion, in terms of the freedom that employees have to refuse vaccination, we will find consistent limitations, based on the fact that active people must perform work in order to live. The only category of people who could refuse vaccination would be retirees who continue to work after moving into this category of persons, but that does not mean that employers have an obligation to keep them in office. Thus, the refusal of vaccination will affect only partially the income of the person who refuses the vaccination and his job can be released to bring a young person who meets the legal conditions to perform paid work.

However, the problem of access for citizens who are not vaccinated into European countries is more difficult to solve, because the major differences in living standards between the countries affect the chances of billions of people to avoid the negative effects of the Coronavirus crisis.

In short, each day of delayed global vaccination strengthens the power of countries that have the capacity to buy the sera needed for the operation, but decreases the development opportunities of poor countries. In addition, each day of delayed vaccination can bring new variations of the virus, which are – again – most likely to occur in the same poor countries. It is not about ideologies – because the left is demanding that patents be made available free of charge to all countries – but about the actual production of vaccines. Because there is no single, universal serum

that can be produced in a week or two in sufficient doses for the entire population of the planet, it is obvious that there will be differences between states. The consequence of this differentiation is that states that can immunize their population in significant proportions will seek to protect it from the appearance of other people who could bring new variants of the virus, and in this sense governments will impose both visa restrictions and other documents from which it follows that external visitors meet reasonable medical conditions in the face of this disease.

The fact that European countries are the majority at the forefront of the global economy makes this process of protection by introducing passports seem discriminatory, but all international treaties affirm the right of any state to protect itself from all dangers coming from outside. Even if the Coronavirus crisis will have as a major effect the economic consolidation of the differences between countries, it must be objectively observed that there is no way to prevent the realization of this gap. Obligations of mutual support between states cannot replace the protection of their own citizens, and some crises must have the effect of "awakening to reality" the political class in poor countries, which must take measures for development, and not complain of pity because they fail to take the most useful steps for their own economic growth.

CONCLUSIONS

An objective analysis of this medical crisis that law historians will make in the 22nd century will once again emphasize the power that reality has over beautiful words. Basically, in the face of the ideals of living in a perfect world different crises arise, which force the limits of governments and citizens in different forms, mostly based on their accumulated economic power.

The legal framework that European countries create in these years is a rational and predictable one, because it is based on indisputable realities: certain medical capacities, certain technological capacities, the financial capacity to buy on time the products necessary for the protection of the population, etc.

Discussions on vaccination have a different nature than the legal one, but legislators must take into account the fact that the country's protection is sometimes done through measures that impose obligations, and

not just rights. This paradigm must include the legal conditions that states will impose on the inhabitants of other countries to travel – the major disruptions to the economy and public life that a single person can bring justify the emergence of these documents and restrictions.

We agree that we want a perfect world, in which all the benefits of technology are instantly used by all the inhabitants of our planet. However, the realities are different, and the legal framework must first respond to reality, and not to the projections of the perfect world. For these reasons, vaccination will be required in European countries and other countries will copy this type of legal measures, because the adoption of good practices brings benefits in most places where they are implemented.

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CARRIER'S LIABILITY FOR LUGGAGE, SHORT SENDING TO AIR TRANSPORT RESPONSIBILITY

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Abstract:

The legal situation of the carriage of luggage is different from that of the carriage of goods because the luggage does not represent goods, but objects, personal goods or personal use of the passenger. The carrier is only liable for damage, loss or deterioration to luggage if the event that caused the damage occurred during the journey.

The regime of compensation of the carrier in case of liability is also the one applicable to the transport of goods, specifying that the amount of compensation for luggage is limited at a certain maximum that the shipper accepts through the contract concluded with the carrier.

Key words: *luggage; goods; liability.*

INTRODUCTION

Transport is one of the main branches in today's society, which has many advantages in support of the community and is known to be of several categories: air, naval, underground, rail, road. The importance of the transport sector in all its forms, whether it is the transport of people or the transport of goods, is indisputable.

Air transport[2], both freight and passenger, developed especially after the Second World War. The plane initially appeared in the military due to its maneuverability, which made it difficult to catch on target of enemies. Due to the special advantages of the aircraft, speed,

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[2] Miruna Tudorascu, „Contractul de transport aerian", in *Annales Universitatis Apulensis, Series Jurisprudentia* 11 (2008): 269-272.

convertibility, opportunity and efficiency, flight safety and convenience, it has also established itself in the civilian field, being used for both freight and passenger transport.

Air transport has undergone a spectacular evolution in a short time: the capacity of ships has grown rapidly for both cargo and passengers, the number of flights has exploded, territory served has covered virtually all land. Because it was imposed very quickly in the civil field, of course, it was necessary the intervention of the legislator to regulate this field, respectively to create a legal framework to ensure the smooth running of the relations that were to arise.

Currently, the main regulation, the general law in the field of air transport is represented by the Air Code[1], but also the Civil Code[2] that regulates the Transport Contract[3]. Any relationship, regardless of the field to which we refer, arises under a convention, in our case it is the transport agreement.

According to art. 1955 C.civ. a contract of carriage is defined as an agreement whereby a party, called a carrier, undertakes, principally, to transport a person or goods from one place to another in exchange for a price at which the passenger, consignor or consignee obliges him to pay it at the agreed time and place.

LUGGAGE TRANSPORT CONTRACT

This study focuses only on the development and analysis of the legal regime applicable to only one of the varieties of the transport contract, namely the luggage transport contract. The contract of carriage of passengers and luggage is considered concluded once the parties have reached an agreement of will on all the essential clauses of the contract. However, the conclusion of the contract is distinguished by certain features.

First of all, the movement of passengers is done by public transport, which also shows the public nature of the contract. Secondly,

[1] Published in the Official Gazette of Romania no. 222 of March 19, 2020; for military flights, the Regulation of January 24, 2021 for military aviation flight published in the Official Gazette of Romania no. 148 of February 12, 2021.

[2] The Civil Code of July 17, 2009 and Law no. 287/2009 for the implementation of the Civil Code, published in the Official Gazette of Romania no. 511/24 July 2009, republished in 2011

[3] Chapter VIII, art. 1955- 2008

according to the specifics of the conclusion, the passenger transport contract is part of the category of accession contracts: its clauses are drawn up in standard form and approved by the Ministry of Transport and Infrastructure or the local public administration body, as appropriate, and can be accepted by the passenger only by way of adherence to the contract.

The terms of the contract of carriage shall be laid down in the regulations for each type of carriage and shall then be displayed inside the vehicle and at the ticket offices. In such situations, it is presumed that before buying the ticket, season ticket or token, the passenger first reads the contractual conditions, after which he accepts the public offer by paying the travel tax. From the moment the payment is made, the transport contract is considered concluded. The degree of freedom of the passenger in relation to the transport undertaking is practically equal to zero, because the passenger is obliged to accept the price, the point of destination and other conditions of transport among those proposed to him. In this way, the passenger adheres to the carrier's schedule and is subject to the rules established by it[1]. As the legislation does not specify, the doctrine is controversial with regard to the legal nature of the air passenger and luggage contract.

In the specialized doctrine there were several opinions according to which the luggage transport contract has an autonomous existence, and in the case of passenger and luggage transport two contracts are concluded, different according to their legal nature[2]. Even if the legislation is not exposed, there is no denying that these contracts could have a separate existence.

First, by buying the plane ticket, the passenger concludes a single contract, that of passengers, and pays a double price, which also includes the movement of his luggage in the luggage compartment (aircraft hold), and his decision to take the luggage with him in salon and refuse the hold service, does not oblige the airline to reimburse the cost difference for the place left vacant in the hold of the aircraft. Thus, the passenger has to pay the place reserved for hold baggage, but the decision to conclude the second contract, luggage, belongs exclusively to him, being still at the

[1] Iurie Mihalache, *Dreptul transporturilor* (Chisinau: Europress, 2012), 11
[2] F. Făiniși, *Dreptul transporturilor* (Bucharest: Fundația România de mâine, 2011), 44

check-in counter, before boarding. Consequently, the air passenger contract always precedes the luggage contract.[1]

Secondly, at the check-in counter the luggage is weighed, checked and an identification label is affixed to it, which confirms the conclusion of the luggage contract. From this moment, we see that the passenger has two contracts: the passenger contract, which becomes the main contract, and the luggage contract - accessory, both having a separate existence.

Thirdly, the luggage with identification tag is transported in the luggage compartment of the aircraft. At transit points it can be transferred from one aircraft to another, and for security reasons, it can be delivered even with another flight, while the passenger, together with his hand luggage, is in the aircraft lounge, and has no knowledge about the fate of his luggage than at the destination airport.[2]

The seat of the matter regarding the obligations incumbent on the parties involved in the legal report subject to our analysis is constituted by the provisions of art. 2002 and the following Civil Code. According to art. 2003 of the Civil Code, under the contract of carriage, the carrier is obliged to the passenger:

a) to provide him with a place corresponding to his travel card;

b) to transport children traveling with him, free of charge or at a reduced rate, under the conditions of the special law;

c) to transport his luggage without another payment, in the quantity and conditions provided by the provisions of the special law.

From this rule established by the Civil Code, there are exceptions regulated by the special law by which cases of refusal or acceptance conditioned on transport have been established[3]. Thus, according to the Civil Aviation Code, the carrier has the right to control, for reasons of flight safety, passengers and their luggage. Baggage can also be checked in the absence of the passenger, when he is not present so that an authorization can be requested, hence the right of the carrier to refuse luggage that does not meet the transport requirements, while passengers

[1] Gh. Stancu, *Dreptul transporturilor. Partea generală* (Bucharest: Lumina Lex, 2003), 51

[2] Mihalache, *Dreptul transporturilor*, 528

[3] Fl. Baias, E. Chelaru and co. *Noul Cod civil. Comentariu pe articole* (Bucharest: C.H. Beck, 2012), 1558.

who refuse to submit to control, will not be admitted when boarding the aircraft.[1]

Transportation of luggage in excess of the amount allowed free of charge is subject to charges. Likewise, in exchange for an additional fee, passengers can make a special declaration of interest on the luggage, and if they have been harmed, they will be compensated at the amount declared.[2]

LIABILITY OF THE LUGGAGE TRANSPORT OPERATOR

According to art. 2005 C.civ., the carrier is liable for the loss or damage of the luggage or other goods of the passenger, if it is not proved that the damage was caused by their defect, the fault of the passenger or force majeure. For carry-on luggage or other goods which the passenger carries with him, the carrier shall be liable only if the intention or fault of the latter with regard to their loss or damage is proved. The carrier is liable for the loss or damage of luggage or other goods of the passenger within the declared value or, if the value has not been declared, in relation to their nature, their usual contents and other such elements, as the case may be. Unless otherwise provided in this Article, the provisions of Section 2 of this Chapter shall apply mutatis mutandis to the carriage of luggage and other goods carried by the passenger, regardless of whether they were or not were handed over to the carrier.

It should be emphasized that the legal situation of the carriage of luggage is different from that of the carriage of goods, as luggage is not a commodity, but objects, personal belongings or personal use of the passenger.

Luggage means those goods intended for the use of the traveler or those objects intended for travel purposes, contained in trunks, suitcases, baskets, suitcases, travel bags, boxes, packaging. Luggage is personal belongings and other items[3] that a person takes with them on the trip. They are classified into:

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[1] Mihalache, *Dreptul transporturilor,* 530

[2] I. Mihalache, „Unele aspecte referitoare la declararea valorii încărcăturii la încheierea contractelor de transport aerian de mărfuri și pasageri", în *Revista Naţională de Drept* nr.10 (2008): 54.

[3] A.T. Stanescu, *Dreptul transporturilor. Contracte specifice activitatii de transport* (Bucharest: Hamangiu, 2018), 28

a) unregistered (hand) luggage, guarded by the passenger,
b) checked luggage, which is transmitted to the operator and transported separately by the passenger in the baggage compartment of the means of transport.

Unregistered luggage, also called hand luggage, is that which, due to its low volume or light weight, remains in the passenger's possession while traveling and is transported free of charge within the limits provided by law[1]. In other words, as long as the luggage has not been checked in, it is not in the care of the carrier and he does not have to answer.

Unlike unchecked luggage, checked baggage forms the material object of the contract of carriage. The carrier is responsible for the destruction, loss or damage of luggage only if the event that caused the damage occurred during the air journey.[2]

Air travel means the period during which the luggage is guarded by the carrier: at the aerodrome, on board the aircraft or in other places, such as landing situations outside the aerodrome. Therefore, the carrier is responsible for luggage not only when it is on board the aircraft, but also during all embarkation, disembarkation, storage operations, from the time the luggage is handed over to the carrier and until it is returned to the owner.[3]

The liability of the carrier is limited, as required by the Montreal Convention. The carrier shall be liable for damage resulting from the destruction, loss or damage of checked luggage, provided that the event which caused the destruction, loss or damage occurred on board the aircraft or during the period in which the carrier took care of the checked luggage[4]. Therefore, the legislator addresses the situation of liability for destruction, loss or damage. On the contrary, the analyzed text does not regulate the liability of the carrier for the delay of his luggage or other goods (for example, if the luggage is loaded in a means of transport other than that which ensures the movement of the passenger and, therefore, at late destination). The non-inclusion of the delay of the luggage or other goods of the passenger in the scope of application of art. 2005 NCC is

[1] Mihalache, *Dreptul transporturilor,* 555
[2] O. Căpățână and Gh. Stancu, *Dreptul transporturilor* (Bucharest: Lumina Lex, 2003), 551
[3] Gh. Piperea, *Dreptul transporturilor ed.2* (Bucharest: All Beck,2005), 218
[4] Stanescu, *Dreptul transporturilor. Contracte specifice activitatii de transport,* 32

not equivalent to the exoneration of liability of the carrier for the mentioned hypothesis[1], this situation falling under the incidence of the provisions of art.

The carrier will not be liable if the damage has occurred due to a defect in the luggage, its quality or its defect. The liability of the carrier towards the passenger shall arise from the contract of carriage of passengers and only upon presentation of the luggage ticket, the only proof of the delivery of the luggage during transport. With regard to unchecked baggage, there is a presumption of innocence of the air carrier, and in order to be held liable, the passenger must prove the fault of the carrier or his agents.

According to the majority opinions, set out in the doctrine and jurisprudence, due to the fact that hand luggage always remains at the disposal and in the care of the passenger, the liability for any loss or degradation is criminal[2] and not contractual. An example is the case when the luggage of a passenger burns due to another passenger who introduced flammable materials in the lounge, and the carrier will be liable, because he negligently did not prevent the introduction of those dangerous substances in the means of transport.

The amount of compensation due by the carrier relates mainly to the declared value of the passenger's luggage or other goods and, in the alternative (in the absence of a declared value), in relation to their nature, their usual contents and other such elements, according to the circumstances, according to art. 2005 para. (3) NCC. Regarding the first mentioned criterion, it should be noted that, according to art. 1987 NCC, if the declared value is higher than the real value of the good at the place and time of delivery, the compensation is calculated in relation to the latter value.

The most frequent claims made by passengers in connection with the delay, loss or damage of luggage, in addition to claims for compensation for material damage, are those of financial compensation for withdrawals and mental suffering.

For the most part, the plaintiffs claim exaggerated sums as non-pecuniary damage, motivating their actions by the stress and disappointment they subsequently experienced. Through court decisions, the amounts are essentially reduced, taking into account the nature and

[1] Baias, Chelaru and co., *Noul Cod civil*, 1561
[2] Căpăţînă and Stancu, *Dreptul transporturilor*, 225

severity of the mental suffering of passengers, their social status, but also the nationality of airlines.

The regime of compensation of the carrier in case of liability is also the one applicable to the transport of goods, specifying that the amount of compensation for luggage is capped at a certain maximum that the shipper accepts through the contract concluded with the carrier[1].

The Court of Justice of the European Union has ruled[2] in a case that a passenger may claim compensation from the air carrier for the loss of his belongings when they are in luggage registered in the name of another passenger of the same flight , the passengers concerned are required to provide proof of this circumstance.

Thus, in its judgment of 22 November 2012, the Court of Justice of the European Union notes that a passenger may claim compensation from the air carrier for the loss of his belongings in luggage registered in the name of another passenger.

In other words, compensation must be paid not only to the passenger who checked in individually, but also to the passenger whose belongings were in the luggage checked by another passenger who took the same flight.

However, it is for the passengers concerned, under the control of the national court, to prove that the luggage registered in the name of another passenger actually contained the objects of another passenger who took the same flight. In that regard, the national court may take into account the fact that those passengers are members of the same family, bought their tickets together or registered at the same time, which are considered hypotheses which may give rise to the presumption that the luggage was grouped together a single piece of luggage, declared in the name of a single person.

The Court adds that this interpretation cannot be called into question by the fact that air carriers are required to issue passengers with an identification label for each item of checked baggage. Thus, the Montreal Convention merely imposes an identification obligation on the air carrier and does not allow it to be inferred that the right to compensation in the event of loss of luggage applies only to the passenger who checked in one or more pieces of luggage.

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[1] D. Marcel Gavriș, G. Răducan și colaboratorii, *Noul Cod civil. Comentarii, doctrină și jurisprudență* (Bucharest: Hamangiu, 2012), 360

[2] C-410/11 Pedro Espada Sánchez şi alţii/ Iberia Líneas Aéreas de Espana SA

This conclusion is further confirmed by the objectives pursued by the Montreal Convention, which seeks to ensure the protection of consumers' interests in international air transport and to provide them with fair compensation based on the principle of reparation.

The Montreal Convention stipulates that the air carrier must pay each passenger compensation capped at 1,000 special drawing rights ("DST") in the event of loss of luggage during the flight or while the carrier was in charge. the respective luggage. The carrier must issue an identification label to the passenger for each item of checked baggage.[1]

Mr Espada Sánchez, Ms Oviedo Gonzáles and their two minor children boarded an Iberia flight between Barcelona and Paris on 1 August 2008. The luggage of this family of four was divided into two suitcases. These were lost during the flight and have not been recovered. For this reason, the four passengers claimed damages from Iberia in the amount of 4,400 euros, which correspond to 4,000 DST (meaning 1,000 DST for each passenger).

The Spanish court, seised of this dispute, has asked the Court of Justice to determine whether the air carrier is obliged to compensate only the passenger who has obtained the baggage identification label or must also compensate the passenger claiming compensation for lost luggage, registered in the name of another passenger.

CONCLUSIONS

The general regulations on the liability of the luggage carrier provide that it is liable for the loss or damage of luggage or other goods of the passenger, within the declared value or if not declared, in relation to content, nature or other elements, depending on the circumstances. Liability is also involved in the situation in which the luggage transport was delayed. The general provisions are completed with the provisions of the special law in the matter.

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PERSONAL NUMERICAL CODE – INDIVIDUAL IDENTIFICATION ATTRIBUTE?

Ramona DUMINICĂ[1]
Andreea DRĂGHICI[2]

Abstract:

Today's society is characterized by an unprecedented development of information and communication technology. Today, the computer is used in all areas of social life. Informatic systems are used not only in banking and financial systems, but also in the field of population records. Thus, there have been difficulties from a technical point of view in the field of identification and registration of the natural person in the situation where, for example, there are two or more persons within the same locality who have the same last name and first name or reside in the same locality. These have imposed the need to create a new element of differentiation of individuals: the personal numerical code.

Starting from these considerations, the current paper aims to debate the procedure for granting the CNP and tries to answer the question if this can or cannot be considered as an attribute for identification of the natural person together with the name, domicile and civil status.

Key words: *identification; natural person; personal numerical code; assigning the personal numerical code.*

INTRODUCTION

In general, the notion of "means of identification", "elements of identification" or "attributes of identification" is used in two senses.

In one meaning, by "means of identification" are designated those attributes or qualities, enshrined by law by which the individualization of

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man in the legal relations in which he enters is achieved. In the civil law, these attributes of identification of the natural person are: the name, domicile and marital status.

In a second sense, "means of identification" refer to those means of proving the attributes or qualities that individualize the individual (usually documents). Included in this category are: the identity card, civil status documents (birth certificate, marriage certificate, death certificate), as well as court decisions.

If under the legislation prior to the actual Civil Code there was not a general regulation for the identification of the natural person which shall comprise all its elements, currently, the common law in this area is represented by Chapter 3 "The identification of the natural person" (Art 82-103) of Title 2 "Natural person" of the 1st Part "Persons" of the Civil Code[1]. In this chapter, the legislator has gathered all three attributes of identification of the natural person: name (Art 82-85), domicile or residence (Art 86-97) and the marital status of the individual (Art 98-103) after having previously made an enumeration of them in Art 59 of Chapter 2 "Respect for human beings and their inherent rights".

The provisions stated by the Civil Code in this area are completed by other normative documents: Law No. 119/1996 on civil status documents[2], Law No. 272/2004 on the protection and promotion of the rights of the child, Government Ordinance No. 41/2003 on the acquisition and administrative change of the persons names, G.E.O No. 97/2005 on records, domicile, residence and identity documents of Romanian citizens, as well as by the international and European treaties in the area of human rights ratified by our country: the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Convention on the Rights of the Child, the EU Charter on Fundamental Rights etc.[3].

[1] Adopted by the Law No 287/2009 and republished in the Official Gazette No. 505/12 July 2011, as it has been modified and amended by the Law No. 71/2011 for the implementation of the new Civil Code.

[2] Republished in the Official Gazette of Romania, Part 1, No. 339/18 May 2002 with subsequent modifications and amendments

[3] Andreea Drăghici and Ramona Duminică, *Stare civilă* (Craiova: Sitech, 2013), 11-12

1. THE NOTION, GENERATION, ALLOCATION, REGISTRATION, MANAGEMENT AND ADMINISTRATION OF THE P.N.C

The G.E.O No. 97/2005 on records, domicile, residence and identity documents of Romanian citizens[1] defines the personal numerical code as a significant number that individualizes a natural person and is the only identifier for all computer systems that process personal data on the natural person. Every natural person has the right to be individualized by the CNP from the moment of birth. It is registered in the civil status documents and certificates and is taken over in the other official documents, issued in the name of the respective person, as well as in the National Register of Population Records.

According to Art 18 of the Methodological Norms of 2021 for unitary application of the provisions of the G.E.O No. 97/2005 regarding the evidence, domicile, residence and identity documents of Romanian citizens[2], the CNP consists of 13 digits, structured in three parts: significant, sequential and a control digit.

The significant part consists of 7 digits, which expresses the sex, century and date of birth, in the form SAALLZZ. The "S" represents the sex and century in which the person was born and can be: a) 1 for male persons born between 1900-1999; b) 2 for female persons born between 1900-1999; c) 3 for male persons born between 1800-1899; d) for female persons born between 1800-1899; e) 5 for male persons born between 2000-2099; f) 6 for female persons born between 2000-2099. "AALLZZ" represents the date of birth and includes the last two digits of the year of birth (AA), the month of birth, with values between 01 and 12 (LL), and the day of birth, with values between 01 and 28, 29, 30 or 31, as the case may be (ZZ).

The sequential part comprises 5 digits under the form of JJNNN, with the following meaning: a) JJ represents the sequence assigned to the county or sector in which the person was born or in which he had his domicile or residence at the time of granting the JJ represents the sequence assigned to the county or sector in which the person was born or in which he had his domicile or residence at the time of granting the CNP; b) NNN represents a sequence number (between 001 and 999),

[1] Republished in the Official Gazette of Romania, Part 1, No. 719/12 October 2021
[2] Published in the Official Gazette of Romania, Part 1, No. 312/29 March 2021

distributed on assignment points, which differentiates people of the same sex, born in the same place and with the same date of birth (year, month, day). The control digit (C) is assigned by the computer and allows the detection of possible errors of replacement or reversal of the digits in the CNP.

A new CNP can be attributed to the same person in one of the following cases: a) the birth certificate has been rectified, being modified the data that enter the structure of the CNP; b) the column in the birth certificate in which the CNP was completed incorrectly; c) CNP was incorrectly assigned; d) the applicant has changed his sex; e) there are inconsistencies regarding the CNP.

The generation, assignment, registration, management and administration of the CNP is carried out under the conditions established by the Methodology on the unitary application of the civil status provisions of 2011[1].

According to Art 113 of the Methodology, the CNPs are generated and managed, through informatic means, by the Directorate for Persons Record and Databases Management (DEPABD). It issues and distributes annually to the County Community Public Services for the Registration of Persons (SPCJEP), to the General Directorate of Population Records of the Municipality (DGEPM) Bucharest, as well as to the Ministry of Foreign Affairs – Consular Department (MAE – DC) lists containing the pre-calculated personal numerical codes for the current year. From these lists, the civil status officers assign a CNP to every person. In the case of persons born prior to the year in which the birth is registered, the CNP is assigned from the lists corresponding to the year of birth, and if this possibility does not exist, it is requested, through the Local Community Public Services for the Registration of Persons (SPCLEP.), from the territorial structure of the DEPABD.

For Romanian citizens born abroad between January 1st, 1980 and December 31st, 2003, the CNP is assigned by the D.S.C. – Sector 1 if the birth was registered at the diplomatic missions or at the Romanian career consular offices abroad. For persons born abroad before 1980, whose birth documents have been transcribed in the Romanian civil status registers, the allocation of the CNP shall be operated by the DEPABD through the County Office for Persons Record and Databases

[1] Approved by Government Decision No. 64/2011, with subsequent modifications and amendments.

(BJABDEP) at the request of the structure for civil status from the SPCJEP. Finally, the allocation of the CNP shall be operated by the SPCLEP or, where appropriate, by the civil status officer within the mayor's office of the administrative-territorial unit where the birth certificate is transcribed, regardless of whether it is a Romanian citizen residing in the country or a Romanian citizen residing abroad.

In the case of children born abroad starting with January 1st, 2004, their CNP is registered in the documents and birth certificates from the list distributed for each diplomatic mission and career consular office of Romania. If it is ascertained that the CNP of a person registered in his birth certificate is identical with the one of another person, in order to maintain the coherence of the databases regarding the person's records, the person holding a passport, driving license, respectively identity card shall keep the CNP, and for the other person the SPCLEP shall issue another CNP.

Romanian citizens abroad who have not been received a CNP upon registration of the birth or upon transcription/registration of the foreign birth certificate may submit an application for the award of the CNP to the diplomatic mission or career consular office of Romania with competence for the state of residence, which will submit for settlement to the DEPABD. The application shall be accompanied by copies of the document proving the Romanian citizenship and of the Romanian birth certificate, as stated by Art 135 Para 5 of the Methodology for the unitary application of the provisions in civil status matters.

2. THE LEGAL NATURE OF THE PERSONAL NUMERICAL CODE

Regarding the nature of the CNP, the legal literature[1] has stated that besides the name, domicile and civil status, the CNP represents a means of identification of the natural persons. Indeed, at a practical level, it is used more and more, and its usefulness in the field of population records cannot be disputed, but we cannot add it to the legal attributes of identifying the natural person in the family and society, but represent, as the legal provisions otherwise expressly qualify it, only a unique

[1] O. D. Lupu, "Codul numeric personal, atribut de identificare a persoanei fizice", in *Dreptul* no. 9 (1997): 51-52 ; Pețu Paraschiv, "Codul numeric personal (CNP) – atribut de identificare a persoanei fizice", in *Pandectele Romane* no. 6(2018): 78-92

identifier for all computer systems that process personal data concerning the individual. Moreover, if the legislator would have wanted to give it such quality, it would have enshrined it in the Civil Code among the other attributes.

The use of numbers for the individualization of the person entails a dehumanization which is not consisted with the legal spirit and technique. Although numbers are used in all modern societies, it is still difficult to accept that a person is individualized in the family and the society to which he belongs by an identification number as it can lead to loss of consciousness of one's identity, which is not desired.

Therefore, we adhere to the opinion according to which the CNP is a modern, fast and safe mean of identification of the natural person in an informatic system, but not in society or family[1].

CONCLUSIONS

As a conclusion, even if it is mentioned by the civil status documents, the CNP is not part of a person's marital status, being an independent identifier. The provisions of the Methodology for the application of the Law 119/1996 are relevant in supporting this statement, because the modification of the CNP wrongly assigned or entered in the civil status documents is made, at the request of the person concerned or his legal representative or *ex officio*, only with the approval of the SPCLEP which rounds the locality of residence and with the approval of the mayor. The approval is given on the basis of the report of finding the error, drawn up by the civil status officer, from which it results that the modification of the CNP is made by administrative means, and not by judicial means.

[1] S. Cercel, "Codul numeric personal şi rolul său în domeniul identificării persoanei fizice şi evidenţei populaţiei", in *Revista de studii socio-umane* no. 6 (2004): 48-50; S. Cercel and L. Dumitrescu, "Termes et symboles dans le domaine juridique. L'identification de la personne physique par chiffres", in *Studii şi cercetări de onomastică şi lexicologie* (SCOL), anul V, no. 1-2(2012): 99-109

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PARTICULAR ASPECTS OF THE PROVISIONAL PROTECTION ORDER

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Abstract:

Domestic violence is a constantly expanding phenomenon, determined by the multiple shortcomings that we can register at the family level. Superior protection against this type of violence could be obtained in the old regulation of the special law through the protection order. However, the capture of the factual elements that could lead to the proof of the reason for ordering the issuance of that order by the court was difficult to achieve. By extending the competence of the police in the sense of immediate intervention, by virtue of the provisional protection order, an important step was taken for a better practice in the field. We will try to capture in the present research the main advantages obtained as a result of the changes produced by this change.

Key words: *domestic violence; protection order; provisional protection order.*

INTRODUCTION

Law 217 of 2003 for the prevention and combating of domestic violence introduced in the Romanian legislation the provisional protection order for victims of domestic violence starting with July 2018. However, the implementation of this institution was done only from the beginning of 2019, as it was necessary a detail of the procedure by order of the Ministry of Affairs and Interior of December 28, 2018.

The adoption of the new possibility of intervention of the authorities was determined by the registration of a substantial number of acts of domestic violence in 2018, compared to the reality given by previous years.

A last-minute proposal, which was adopted by the first notified chamber of the Romanian Parliament, also ruled on facilitating the

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monitoring of the behavior of individuals who are the object of the measure of the provisional protection order.

We will try to highlight in the following the evolution registered in the application of this instrument for the prevention of the recurrence of the act of domestic violence by reference to the official statistics, emphasizing at the same time the specificity of the procedure to be followed.

The existence of social values considered superior when it concerns the family environment has led the state to adopt a much more drastic protective reaction if they are put at risk. We can exemplify here the crime of violence (any of the forms established by the Criminal Code) committed on a family member, where the penalty limits end up being increased by a quarter in relation to the criminal act committed on a third party (art.199 Criminal Code).

Although this positioning of the importance of this kind of social relations would also have required the finding of an intervention by the state with practical effect, in reality things had until recently become derisory, motivated by the impossibility of capturing concrete indications enabling the establishment of a protective measure. The surprise of minimal elements leading to the conclusion that we are in the presence of a real danger by which the victim is threatened was difficult to achieve, given that in most cases the generation of conflict and the immediate occurrence of the injury took place within the perimeter of the house.

The term violence referred to the special normative act aimed at preventing and combating domestic violence- Law 217/2003 with subsequent amendments covers all forms that we can encounter in concrete terms, starting from physical violence (here one can more easily estimate the potential risk that the abuser creates, on the basis of forensic findings) and reaching psychological, verbal, social or spiritual violence.

The latter expressions of the notion of violence have such a context in which they occur that they do not determine a record from the perspective of the risk they might determine on the victim's person, so that their diligence is often the only way to remove exposure again to possible trauma. The investigation of court rulings handed down at national level in cases concerning the issuance of a victim protection order has shown that in most cases, the courts interpret differently the notion of violence and, above all, the idea of relative risk regarding the

possible consequences to which victims might be exposed. Those assessments were made solely in the light of the evidence which had been administered in question.

It is no less true that some courts have wrongly held that verbal violence is not such as to justify the issue of measures such as the one mentioned earlier. Highlighting in the law objective criteria necessary to construct a scale of risk could remove arbitrariness from such decisions.

From the point of view of the venue of public space/private space it is found that 81% of intra-family crimes are carried out in the home. Only 2647 victims out of a total of 23,001 are more distant relatives, leading to the conclusion that 88% of the victims are spouses/concubines/sons/parents. ("Violence against women, 28 January 2019, page 1").

The fact that the house is a place not exposed to the public, at most it is frequented by relatives of the family in question, often leads to the impossibility of producing a minimum of clues or data that entails successfully obtaining the establishment of a preventive measure. With the emergence of the intra-family conflict and this small group of people will have limited access to the facts. Moreover, at the initiative of the aggressor it is even possible to end any contact with the external environment. Thus the perpetuation of the state of affairs, the permanent interaction between the aggressor and the victim within the limits established by the area where the dwelling is located, the isolation from the external environment creates the premises of the repetition of the initial conflict. It is also necessary to analyse another notion, namely that of a family member. The concept used in the text of Article 5 of Law No. 217/2003 in addition to the common meaning of the term, namely the biological family and the human relations which can be equated with them, namely those between concubines or persons living in the same location. This extrapolation is carried out precisely in the idea of being able to create a real protection for those who have faced this problem. The attempt to prevent the perpetuation of this tense situation and which did not foreshadow an internal solution, at the level of the family concerned was represented by an emergency court decision taking immediate and necessary measures to protect the physical and mental integrity of the victim of an act of intra-family violence, i.e. the protection order.

However, as I have pointed out earlier, the conviction of the court in that summary procedure establishing the victim protection order is quite difficult to obtain. As proof stand the small number of solutions for admission of such an application. For example, according to a national study, 406 applications were accepted between 2012 and 2013, out of a total of 1009 made (approximately 40%). At the same time, it should be noted that about 10% of the claims made directly by female injured persons - probably also for fear of negative court resolutions - have been dropped. ("National study on the impinger of the protection order, 2013, page 7-8").

In another smaller research carried out at Bucharest level, it was concluded that in 2014 there was a substantial increase in the protection orders admitted compared to the previous year by about 64%, but this time the same predilection of the court to admit limited applications with which it was invested (only 12.35% of the number of referrals submitted to local police stations were subsequently converted into protection orders). ("Domestic violence. Best Practice Manual for Magistrates and Police Workers, 2016, page 12").

Since 2017 there has been a trend towards an increase in the number of cases of domestic violence reported to the authorities. The reaction of the institutions is much more vigorous, the number of protection orders issued in 2018 being more than 4 times higher than 3 years ago. ("Throw with flashmob shadow for the prevention of domestic violence, 24 May 2018, page 1").

At the same time, the reaction time in which a prevention solution was ordered was not one consistent with the principle of celerity, specific to this procedure. On average, it was one month from the time of the application to the adoption of the solution on the victim protection order, which also made it a departure from the intended purpose. If the measure is taken late, it will no longer regain its effectiveness.

On the other hand, even when the court found the need for the protection order, it was not always possible for it to be respected by the aggressor. By way of example, there were 1011 cases in 2017 where the court order ended up being violated. ("1011 protection orders were violated in 2017 . How to apply these restrictions.", 30 January 2018, page 1).

In order to better administer the judiciary, under such special conditions in which acts of intra-family violence are committed, two

amending acts on Law No 217/2003 were adopted, namely Law No 174/2020, which added a new possibility of protecting victims - the provisional protection order and respectively Law No 183/2020 which resulted in the counselling of the victim and increasing the penalty limits for non-compliance with the restrictions of the protection order.

Police officers who, in the performance of their duties, find that there is an imminent risk that a person's life, physical integrity or freedom will be endangered by an act of domestic violence may issue the provisional protection order in order to lessor this risk (Article 22 Law 217/2003 and Article 7 Order 146/2578/2018). The contents of the security measures that can be established by issuing the order include: the eviction from the dwelling of the person who committed the act of domestic violence, the reintegration of the victim into the home or the obligation of the aggressor to keep a distance from the victim. This possibility within the reach of the police officer is likely to create safety for the victim when such a solution is ordered.

Procedurally, the taking of such a measure is not conditional on the existence in advance of another form of violence already exercised by the argesor; there is no need for this risk to be one of a certain gravity, and it is sufficient that we have only an unremoveable risk in question; the assessment of the police officer is one of an objective nature, determined by the fact that the criteria to be considered are foreshadowed. Furthermore, the requirement that the provisional protection order be confirmed by the competent public prosecutor's office and that the party concerned may consist of that measure in court constitute genuine guarantees relating to the rights of the person subject to the proceedings.

However, in the period immediately following the adoption of this legislative provision, the authorities in this field demonstrated that they did not master the content of this protection measure (e.g., prosecutors refuted provisional protection orders issued by the police because they did not find sufficient evidence to initiate a criminal investigation or because the victim's prior complaint was missing). The provisional protection order is an administrative act whose main purpose is not to serve as a probative means in a criminal or civil trial, but to protect the victim of domestic violence. ("Model of procedure for assistance and administrative resolution of citizens' complaints about

abuses and irregularities for an authority in the judicial system", 2019 ,page 7).

However, in the first 9 months of 2020, the police issued almost 6,500 provisional protection orders, about half of which were converted into protection orders by the courts, according to the General Inspectorate of the Romanian Police. ("Police have issued 6500 provisional protection orders against domestic violence cases this year," 17 October 2020, page 1).

The latest legislative amendment to the special law which has implications for the way in which the level of protection of the victim is ensured has established the obligation of legal assistance dedicated to it as well as ensuring the free ness of this support. Until that amendment, the guarantee of free access to justice and the rights of the defence was carried out solely for the benefit of the aggressor and the victim had to wait for the application to establish the protection measure to be made by the competent authorities, otherwise he would have had sufficient financial resources to do so.

Collaterally, the same rules increased the penalty limits set for situations where the obligations imposed on the aggressor were not respected, including when the provisional protection order was concerned. On this occasion, the statistical indicators that I mentioned earlier in the paper were also taken into account, expressing the lack of practical effectiveness of the measures. In the same vein, it must be said that an element of novelty is the adoption of draft law plx nr. 129/2020 by the Chamber of Deputies- decision-making forum, whereby electronic surveillance systems will become operationalised, including the monitoring of the aggressor subject to the provisional protection order.

CONCLUSIONS

The evolution of the legal provisions on the protection of people who have fallen prey to violence has seen a continuous adaptation to the challenges generated by their applicative side. Although there are still a number of inaccuracies encountered in practical terms that put your mark on the critical situation in which the victims find themselves, they are premises that they will be taken away step by step.

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THE INSTITUTION OF MARRIAGE AND THE STATUS OF WOMEN IN THE SEVENTEENTH CENTURY MEDIEVAL LEGISLATION

Elena GHEORGHE[1]

Abstract

The institution of marriage in the 17th century, more precisely its legal definition, determines the woman's status. In a century when the sources reflect a mainly male world, the girl has no other alternative than marriage or convent, regardless of her social status. Marriage is full of consequences for women: it places them under the domination of the husband; it gives them his identity and social rank, and in many regards, transforms their lives.

Romanian laws have made marriage into a contract, concluded and dissolved by the authority of the church in a public way, in a precise ceremony. Prejudices, traditions and laws give women inferior roles, in all the social ranks. Regarding the everyday life, the household i.e. the intimate area where men can retire, compose themselves, relax by giving up the shell protecting them in the outside world, is the place where men's power clashes with women's power.

Key words*: marriage; engagement; woman; family; gifts; dowary.*

INTRODUCTION

The work tries to recall the presence and role of women in the society of Wallachia and Moldavia in the seventeenth century, a century in which the first representations of them appear theologically or in law, but only to portray them in an inferior and humiliated manner by the society.

Marriage, respectively the family, is an institution recommended to all Christians, being administered for centuries by the church. The act of marriage represents the moment when the most important social group

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of a society is created. The family is the place where all the rules of conduct, to which the whole community group refers, must be implemented.

The community celebrates through marriage the victory over time, intervening, through various regulatory mechanisms, in the lives of individuals on the occasion of marriage.

In turn, through its spiritual role, the church has assumed and extended its authority over the behavior of all members of the community. In light of Christian perceptions, marriage is the most important moment in a family's life.

The lack of complete information regarding the family, in general, and marriage, in particular, in the old Romanian law, is mainly due to the fact that this right was largely an unwritten one. The written laws that appeared in the XVI-XVII centuries make numerous references to the family, but most of them refer to texts borrowed from Byzantine legislation[1].

ENGAGEMENT

Defined by Antim Ivireanu as "a union of a man with a woman to the fulfillment of that divine word: Grow and multiply"[2], marriage is preceded by an engagement that has the value of a marriage promise, with legal effects both in terms of the situation of young people and and on the goods advanced on this occasion. It has the same status as the wedding and takes place in the house of the little in-laws.

In the popular system, the engagement usually takes place on the occasion of the match-making, when it is agreed on the future marriage. The matchmaker is a relative, friend, neighbor of one of the two families and intervenes among parents, he or she proposes the realization of the alliance, participates in the negotiation of the dowry, introduces the young people to each other. He or she also has the role of warrant in the realization of the alliance and in terms of the honor of the two; they assume responsibility for this relationship, the sons-in-law and parents in-laws not hesitating to hold them accountable when misunderstandings occur.

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[1] P.P. Panaitescu, "The Beginnings of Writing in Romanian", in *Studies and Materials of Medieval History* IV, (1960): 181-83

[2] Antim Ivireanu, *Works* (Bucharest: Minerva, 1972), 374

The initiative of the petition must belong to the boy, for a girl being considered that it is shameful to "take steps" to get married. Dimitrie Cantemir mentions in the work "Letter of Moldova" some aspects characteristic of the time regarding this aspect: Moldovans marry their children at the age at which, according to church laws, the wedding must take place. But it is considered shameful if a virgin asks for a man, while the custom of the country has established that the lads must choose their wives themselves and not be chosen by their daughter-in-law's parents "[1].

On the occasion of the matchmaking, a real show takes place in which the protagonists are the petitoner and the parents of the girl who presents to the groom and his relatives an elderly woman dressed in poor clothes as a fiancée. The refusal of the guests is followed by the presentation of the real fiancée and the exchange of rings in the presence of the priest or the elders of the respective community[2]. At that time, after the dowry is negotiated, the date of marriage is set and gifts are exchanged between young people and their parents. The same happened on October 22, 1661 when Pană Geim gave a record, in the presence of 12 witnesses, about his daughter, Chiraţa and his son-in-law, Crăstea, for the goods given as a dowry at the engagement worth 200 ughi - half of the Mătăsari estates and Cretuleşti with half a vineyard[3]. Foreign travelers who visited the Romanian countries during this period were amazed by the custom by which "the bride is the one who endows the son-in-law (...) The bride's father writes her a dowry with estates, peasants, servants, vineyards, etc., according to his powers. If she has children, these goods will return to her husband; but if she dies without children, then the whole dowry returns to her father."[4]

The engagement is therefore a solemn bound involving obligations and commitments on both sides. In the legislation of the time, it has religious power, like the wedding, if it was done in compliance with certain stages: "the earnest" (a sort of payment in advance), "exchange of rings" and "kissing the bride and groom". Their observance

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[1] Dimitrie Cantemir, *Letter of Moldavia*, II (Iași: Adolf Bermann, 1868), 258

[2] Cantemir, *Letter of Moldavia*, II, 259-60

[3] Grina-Mihaela Rafailă, "Catalog of Grigore I Ghica documents in the collections of the Museum of Bucharest", in *Materials of History and Museography*, XXX, no. 37 (2016): 155

[4] *Foreign travelers about the Romanian Lands*, VI (Bucharest: Scientific and Encyclopedic, 1976), 210

offers legal value to the engagement as opposed to the engagement made through "letter connections" considered worthless[1]. This information provides an essential feature of seventeenth-century society in which the importance of the social act takes precedence over the written document, and the presence of witnesses becomes the only way to confirm or refute events. Orality, which others can tell, is much more important than writing.

However, the engagement becomes official only after the reading of the "holy worship", after the religious ceremony.

From a social point of view, the partners belong to the same environment. The girl can hope to choose a partner one-step higher in the social hierarchy, while the man chooses his partner either from the same social environment or from a lower one. The girl marries a man who has the job or social position of her father or the father-in-law has the same job and social position as her father. The choice of a partner from a religious background other than the Orthodox one was forbidden by the Orthodox Church in Wallachia.[2]

We can exemplify with the interesting information about the custom and tradition of concluding an engagement and celebrating the wedding of Janusz Radziwiłł, prince of Lithuania, with Maria, daughter of Vasile Lupu, which took place in 1645. The former, "after receiving the consent of his mother […] and the King of Poland Vladislav […] sent two of the most trusted nobles from the court, named Sienicky and Ottenhausen […] to Moldova to begin the process.[3] The king's agreement was very important. The wedding, at the level of a princely house with a person close to the royal court, obviously had a political significance. At that time, a marriage like the present one was part of the system of international relations and could not be carried out without the permission of the highest courts.

The age for engagement is 14 for boys and at least 12 for girls. The rules do not allow a very large age difference between the two spouses - for example, the man is 50 years old and the girl 15 or vice versa, but they stipulate that the man must always be older, if not the same age. [4]

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[1] *The correction of the1652 law* (Bucharest: Romanian Academy, 1885), 197
[2] *Law Correction*, 179-80
[3] *Foreign travelers about the Romanian Countries*, V (Bucharest: Scientific, 1973), 644
[4] *Law Correction*, 209

However, the documents of the time never mention the date of birth or the age of the spouses at the time of the marriage, being impossible to know when the society considered that the two young people are ready for a married life. We have an exception for the daughters of Prince Constantin Brâncoveanu who were married as follows: Stanca, Smaranda and Ilinca at 16 while her husband, Scarlat Mavrocordat at 20, Maria and Bălașa at 15, Safta at 14 and Ancuța at 13 years old. The boys' marriage age was 23, for Constantin and Radu and 24 years old for Ștefan.[1]

However, the consent of all those involved is required, and in case of misunderstanding, the father's opinion counted. Both sons and daughters need the blessing of their parents because they have full economic power; passing over their consent can lead to disinheritance - in the case of boys and lack of endowment - in the case of girls. The marriage agreement between the young people, without the consent of the parents, is considered null and void. Given the great importance of parental consent, the rules allowed the termination of the engagement if "the elder of the place, that is, the lord or other ruler will force the parents of the man or woman and trouble them, and they will not want and will make a forced engagement ".[2]

None of the fiancés could marry someone else, the marriage of a man to an engaged woman being considered a criminal offense and the guilty one was tried as an "adulterer".[3] The kidnapper of a betrothed woman was punished with death,[4] and an offended fiancée could be defended in court by her fiancé. The lack of full mental faculties was an impediment to the conclusion of the engagement, but not the cause for its subsequent dissolution. The legislation considers the bond thus created to be able to give the right of action to the fiancé or future father-in-law in order to defend the fiancée from slander. The documents mention various situations related to this aspect that concerns the mental health of the girl. Testimony is the statement of the priest Gherghe from Săcuiani who found out from Uncle Dragu, when he, being ill, confessed according to the Christian custom, that after endowing and marrying his daughter,

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[1] Radu Greceanu, *History of the reign of Constantin Basarab Brâncoveanu Voievod (1688-1714)*, (Bucharest: Minerva, 1984), 100
[2] *Law Correction*, 198
[3] *Law Correction*, 197
[4] *Romanian textbook of learning 1646* (Bucharest: Romanian Academy, 1885), 27

Cherana, he reneged on her because she was "crazy, shameful, in her madness."[1]

Until the marriage was completed, it was customary for the fiancés to visit each other, to have different discussions, the dowry was presented. The future husband had to show what his fortune was, and if he was in division, his brothers had to show him what part of the land he deserved.[2]

The time between engagement and wedding is set according to the conditions imposed by the wedding. Usually a small time difference is practiced, used in order to respect certain customs and traditions. During this period, gifts are made from the fiancés and guests are invited.

THE WEDDING GIFTS

Although gifts before the wedding or engagement gifts are very often mentioned, they are rarely mentioned in the documents of the time, being mentioned especially during the debate on inheritances or restitutions. As a first step, they can be considered a way to bring future spouses and their families closer, being present at all levels of society. They have a legal aspect, their purpose not being to enrich the two, but to facilitate their "love of the body". They consisted of "chains, earrings, rings, clothes"[3] and were worn by the bride on the wedding day to better mark the prestige of the family. They reached the bride through the "colțuni", a name due to the fact that among all these gifts were the bride's shoes, which were also called *colțuni*.

Returning to the description of the events that preceded the marriage of Lithuanian Prince Janusz Radziwiłł to Maria, daughter of Vasile Lupu, we find that after the first message, which confirmed the agreement of the Moldovan prince to give his daughter in marriage, the prince sends a second message with gifts for the bride. and her whole family: "Then the prince sent Mr. Mirski General of the Grand Duchy of Lithuania together with Mr. Mierzinski, the prince's secret adviser who took and gave the princess the engagement ring along with many other precious gifts. And to Mr. […] a golden sword or javelin, some cleverly

[1] Mirela Comănescu, Laura Niculescu and Ileana Dincă, *Catalog of the documents of Wallachia from the National Archives*, IX (1657 - 1659), (Bucharest, 2012), 452-53
[2] Vladimir Hanga, *History of Romanian Law*, I (Bucharest: Academiei, 1980), 506
[3] *Law Correction*, 248

crafted rifles and various masterpieces of watchmaking. Miss (Maria) received all kinds of expensive jewels, also various kinds of agate objects, such as cassettes, all kinds of vessels and mirrors; then she was honored with rich gifts as well as the lady (Ecaterina, Vasile Lupu's second wife) and the young cocoon, each according to his rank and birth […] after committing the engagement with the royal ceremony, to their good return they brought the face or the portrait of the young princely bride ". [1]Immediately after the engagement was concluded on behalf of the groom in Moldova, Vasile Lupu sent envoys of honor to Janusz Radziwiłł to have the engagement officially confirmed by the bride as well: "They were soon followed by two messengers sent by the lord of Moldavia, namely Mr. Catargi the treasurer (which means the great treasurer) and Mr. Ioanovici the backer, the bearer of the lordly sword. After the handing over of the engagement ring and many other expensive rarities and gifts, the engagement was concluded on behalf of the royal bride. After this was done, the prince was assured (that the wedding would take place).[2] The fragment is significant because it presents the important moments that take place in the pre-marriage period: gifts from the bride, the exchange of rings, which confirmed the engagement and the wedding schedule.

In their turn, Constantin Brâncoveanu's sons, Constantin and Ștefan, gave their wives three dresses (brocade, expensive wool and silk fabric), a long ceremony coat made of expensive wool fabric and sable collar, a traditional blouse (*ie*) sewn with pearls, pearl shoes and emerald; the jewelry far exceeded the beauty of the clothes: two rings, two pairs of earrings, two bracelets - all adorned with large pink diamonds, zloty beads, gold chains and necklaces and ornaments with sapphires, rubies and emeralds.[3]

In turn, the wife donates a fully equipped horse, with a richly ornamented harness. To this gift are added shirts and handkerchiefs specially woven and sewn for him. The two gifts are always provided in the dowry sheet, but it is not specified in what period between the engagement and the wedding they are given. The foreigner Paul of Aleppo, describing this custom in his notes, presents the wedding

[1] *Foreign travelers about the Romanian Lands*, V, 644-45
[2] *Foreign travelers about the Romanian Lands*, 645
[3] Constanța Ghițulescu, "Family and society in Wallachia (17th century)" in *Studies and materials of middle history*, XX (2002): 95-6

procession of the boyar from Poiana seen by himself, "riding a horse that had been given to him by his father-in-law, as is the custom here, with saddle and all the additional equippment. And he wore a white gown on his head, as is customary for sons-in-law. The bride was in a carriage, followed by other carriages full of the boyars' wives; her brother accompanied her. Behind her were two carriages which were full of things ... "[1]The wife has the right to keep all these gifts after the death of the husband, as well as in case of divorce; but they were lost in the case of adultery.[2]

Very important, during this period, was the choice of the godfather of the wedding. A spiritual connection was established between the godfather and the godson, endowed with a power similar to blood ties and which allowed the widening of the circle of alliances. Due to the importance and role he had in the lives of young married people, the godfather, chosen from the social category of the fiancés, had to be a person able to help materially and morally the two young people.[3] He also baptized them and the firstborn called "godson (*fin*) or goddaughter, the word seems to derive its origin from the Latin affinis."[4] We see that the institution of the god -parenting plays an important role in the community of a parish. The godfather, if he baptizes a boy, has the obligation to marry him in terms of organizing the religious ceremony; only he can finally free him from the habit and only with his consent can the groom take another godfather. Because this custom was not always respected, conflicts arose between godparents and godchildren. This was, it seems, the reason why Antim Ivireanu asks the priests to inform the parishioners that the godfather of baptism does not necessarily have to be the godfather of the wedding, this spiritual task can be assumed by another person[5]. When the lord of the country was the godfather of the wedding, the feast was held at the royal court, and the groom received from him a sable hat and a horse.[6]

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[1] *Foreign travelers about the Romanian Lands*, VI, 209
[2] *Law Correction*, 223
[3] Nicolae Iorga, *Romanian history in images and icons* (Bucharest Institute of Graphic Arts "Minerva", 1905), 176
[4] Anton Maria del Chiaro, *Revolutions of Wallachia* (Iași: Viaţa Românească, 1929), 22
[5] Ivireanu, *Works*, 382
[6] Cantemir, *Letter of Moldova*, 266

THE MARRIAGE

Naturally, on the date set for the engagement, the wedding took place. If the law forbade marriage to a partner from a religious background other than Orthodox, it allowed, instead, marriage to a partner of another ethnicity, but with the same religion. The problem raised by these marriages was the impossibility of controlling the marital status of those who came from neighboring countries. Because of this, Metropolitan Antim obliged the parish priests to ask them for "a letter of testimony from the priest of their place" and to investigate, in parallel, whether the future couple are not relatives, if they are of the right age and especially if they are at fourth marriage, all of which are forbidden by the church[1]. The punishment of those who committed such crimes was "investigation according to the will of the judge" and consisted either in "confinement in the dungeon" or in walking naked, on a donkey, through the fair; in both cases all the goods were confiscated in favor of the lord "since he has lost his honor and is a disgrace."[2]

For a marriage to be considered legal by the law of the time it was not to take place between relatives. By kinship relations is meant the connection that exists between two persons through the descent of one from the other or from the third person with whom there are kinship ties. The reason for preventing marriage between relatives has both biological and physiological considerations, but also moral reasons. Kinship is divided into blood kinship, which goes up to the seventh descendant, incarnation and spiritual - baptism, adoption.[3]

Those who married as relatives committed the crime of "mixing blood" and everything was annulled. The rules punished, in this case, according to the degree of kinship, as follows: up to second-degree relatives - the death penalty, while the case for more distant relatives remained at the discretion of the judge. If we consider the social status, then we see that the boyar was expelled from the diocese of the judge, while the common man was first beaten and then expelled[4]. The property

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[1] Ivireanu, *Works*, 378-79

[2] *Correction Law*, 226-27; *Romanian textbook*, 33

[3] Anicuța Popescu, "The institution of marriage and the legal condition of women in Wallachia and Moldova in the 17th century", in *Studies. History Magazine*, 23, no. 1 (1970): 66-7

[4] *Correction Law*, 219; *Romanian textbook*, 51

of those who committed this crime was confiscated by the lord and given to the children from previous marriages, if any. Those who married without knowing that they were relatives, and when they found out about this, demanded the dissolution of the marriage, they were not punished.[1] Also, two children baptized by the same godfather cannot marry, being considered brothers, having the same spiritual father.[2]

If there were no impediments and all the legal conditions were met, the wedding was held in public, with witnesses and the whole church ceremony. The legislation provided that a secret marriage was not recognized by the Orthodox Church, being considered null and void.[3] In 1642, the "The Orthodox confession" strengthened in the conscience of all believers the fact that "Honest marriage is made first by the will between man and woman, without any obstacle. This agreement is considered an agreement for the true wedding only when they themselves confess to each other their promise before the priest and when they shake hands, showing that they will keep one another's faith, honor, love in marriage for the rest of their lives and they will not leave each other in any danger. This will and promise of theirs is then strengthened and blessed by the priest. "[4]

We see that the new couple starts their life only after the religious wedding. It is a celebration for the families and relatives of the two, but also for the community they belonged to. The Romanian village is in the 17th century a small community, with a small number of families, so that everyone participates in such an event - either as direct guests or as spectators. As the daily events at that time were not so frequent, the interest of the public increased. In the absence of written documents, the marriage remains in the collective memory of the entire community who can testify to it at different times in the couple's life.

The wedding involves preparations and expenses that differ with the financial strength of each family. They were directly interested in promoting the event, in giving it as much pomp as possible. Between the families of the boyar's birth, there is a real competition, each side

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[1] *Correction Law, Romanian textbook* , 52

[2]ConstanţaVintilă-Ghiţulescu, *In Turkish trousers and furcoat. Church, sexuality, marriage and divorce in the Romanian Country of the 18th century* (Bucharest: Humanitas, 2011), 133

[3] *Correction of the law*, 217

[4]*Confession of Faith of the Orthodox Church (1642)*, (Bucharest: Biblical and Mission Institute of the Romanian Orthodox Church, 1981), 103

wanting to eclipse the other and especially the guests. Even poor families sought to exceed their level by investing in such events as much as they could. We can say that all this also had another purpose, that of the newly founded family to have a good start in life.

In November 1700 Vlad the Chancellor spent an important sum of money for the marriage of his nephew Badea, detailed as follows: 50 thalers for "the expense of the wife, on tights and a number of kerchiefs", 12 thalers for the godparents' carpet and another 4 thalers for wired kerchiefs ", 90.33 plates for the preparation of the wedding feast - fresh fish, flour, barley, 10 rams, 1 fat cow, 40 turkeys and geese, 64 chickens and ducks, cabbage and other vegetables. It seems that the party was a success if we take into account the fact that the wine cost 36 thalers, and that it was enlivened by fiddlers for whom 8 thalers were paid.[1]

For the wedding of Istratie, son of the treasurer Stoian, from January 25, 1696, Constantin Brâncoveanu, lord of Wallachia spent a total of 508 thalers on gifts which consisted of: a piece of expensive woolen cloth, a piece of cloth, two pieces of atlas , for different clothes, two carpets, a bridal veil, the brocade that is put on the bride's head after the veil is taken off, the expensive fur hat for the son-in-law, polished candles and a carpet that is laid in the church, money for the priest's payment, change for throwing in the church, money for preparing the meal (200 thalers)[2]. There was a strict difference in the expenses made by the king on the occasion of weddings, depending on the social rank of the families in question. Thus, the boyars were divided into three categories, their sons, when they got married, each receiving 246.50 thalers, 118 thalers, and 51.30 thalers, respectively; the boyar servants were divided into four ranks and received gifts between 43.30 and 5 thalers[3]. The least was given on the occasion of the marriage of a "gypsy slave" - 1.42 thalers, of which 42 were used to buy candles for the church and the priest was paid, and from the rest "two buckets of wine" were bought.[4]

From the analysis of the presented documents, the typology of the expenses necessary to organize a wedding in the respective period is

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[1] Nicolae Iorga, *Studies and Documents on the History of the Romanians*, XIV, (Bucharest: Atelierele grafice Socec & Comp. Stock Society, 1907), 258-59

[2] Dinu C. Giurescu, "Mother Register. The order book of Constantin Brâncoveanu's treasury ", in *Studies and materials of medieval history*, V, (1962): 455

[3] Giurescu, "Mother Register", 482

[4] Giurescu, "Mother Register", 482

emphasized, but also the specific customs of this event that have been preserved until today.

The wedding show is told by foreign travelers in a picturesque way. Among the narrative sources regarding weddings, the notes of Brâncoveanu's Florentine secretary stand out through the value of the information held, qualitatively and quantitatively. A good connoisseur of Romanian traditions, he participated in several weddings and sought to understand the importance of the main moments of the ceremony: "On Sunday, the wedding day, in the morning, the road from the groom's house to the bride's and then to the church, is adorned with fir branches (...). In the church, the in-laws hold lighted candles in their hands, and the priest, after the prayers according to the Orthodox rite, joins the hands of the bride and groom in the shape of a cross and puts a crown on their heads. Then they throw money through the church, and if the bride and groom are in a more modest condition, they throw nuts, hazelnuts, chestnuts. Once the wedding is over in the church, the bride is led to her husband's house, where the people sit at a richly dished table, except for the newlyweds, who retire; each in a different room, accompanied by relatives. At the weddings of the most needy and even at merchants, when the steak is served at the table, it is customary to distribute to the guests a headscarf that is placed on their shoulder. Then each participant throws a sum of money on his plate, which the groom's father then gathers in a tied headscarf and entrusts to the bride, who is brought to the dining room, with her face covered and where she kisses the hand of the groom's father. She then returns to her room, being always joined by her mother-in-law (...) towards evening, when the fun still continues, the bride's dowry, bed linen, clothes, lingerie, jewelry and others are brought. At the last dish, the guests return home, and the bride sleeps for the first time in the groom's house. " [1]

So we see that the wedding ends with gifts made by guests at the party. Gifts are part of a social rite known, accepted and practiced by all, regardless of social category or economic power. They receive, after the wedding, legal significance and are divided between the two spouses. At the boyar weddings in Banat it was customary for "all the money that had been collected to be put in a napkin and sealed" and then given to the bride "along with all the keys to her husband's chest and the houses and cellars where pickles and wines are kept, all < the keys> being hung by a

[1] Maria del Chiaro, *The Wallachian Revolutions*, 21

silver chain, for in this country the wife is the keeper of her husband's wealth and the keys always hang from her belt. She is always at the head of the table and her husband to her right, as I have often seen in many circumstances".[1]

The events related to the marriage continue in the week following the event and begin with the groom's visit to the godfather, "before lunch, also with processions, where he is received with all his companions and honoured with liquor, cake and jam, after which he returns home where he is expected with the table set, at which only the spouses and parents take part. The wife has her face uncovered and for the first time she wears a kerchief on her head, the sign of the married woman in Wallachia. During this intimate lunch, servants arrive in a procession, joined by musicians on behalf of the father-in-law and loaded with the rest of the dowry, with silverware, glassware, tableware, copper vessels in all sizes, full of dishes, bottles of wine and others (...). "[2]

THE DOWRY

Del Chiaro's account reinforces the custom that although the dowry sheet was made on the day of the engagement, its actual transfer took place only after the wedding, when the girl moved to the new house.

The dowry is the part of the parental fortune that a girl receives at the time of marriage[3]. A woman cannot marry without a dowry, which means that the family must make economic efforts to procure it.

The father is the one who takes care of the elaboration and writing of a dowry sheet, his absence being replaced by the brother or uncle of the girl who is to be endowed. As the marriage age approaches, in parallel with the search for a partner for his daughter, the father also procures what he thinks can give as dowry, so that the situation is convenient for both the girl and the son-in-law. This is what happened on April 27, 1629, when Ion and other free peasants confess of the dowry received by Sora, in Zeletin, at her engagement[4]; on February 12, 1631, Stroe from Cheia endowed his daughter Oprea with several places "when

[1] *Foreign travelers about the Romanian Lands*, VI, 211
[2] Maria del Chiaro, *The Wallachian Revolutions*, 21
[3] *The law correction*, 250
[4] *Documenta Romaniae Historica. Series B.Wallachia*, 22 (1628-1629), (Bucharest: Academiei, 1969), 490

he married her with Toma from Bărbătești."[1]; on November 15, 1633 Ivașco, the administrator of the royal court, left dowries to his daughter Vlădaia, part of Rătești village, gypsies, cattle, hives[2], etc .; on May 11, 1634 Vintilă from Bucu gave dowries to his daughter Tudora the land in Pupezeni and in Bucu[3]; on March 2, 1635, Iova endowed her daughter, Petriia, with an estate to Gioroc[4]; on July 4, 1652, Pope Vlad gave dowries to his daughter, Visai and his son-in-law, Stanciu, four acres of land in Jugurani, Buzau County[5] and the examples can continue.

If for various reasons the father fails to marry and endow his daughters during his life, then he transmits this obligation to his sons, the rightful heirs of the entire fortune. This is the case of Leca, the high dignitary bearing the sword at the Lord's Court, who on July 17, 1657, after falling ill, "let (...) after his death, his son, Fiera, be master of his house and his provisions" having the obligation to endow his two sisters thus: "Despa, the third part of the Găvăneștii de Jos estate, Teleorman county", Varvara, inheriting "a gypsy house". It is very important the statement that strengthens the father's decision and that is represeted by the curse for those who will oppose it: "Being weak from illness and powerless, he taught his son, Mihalcea, orally, what to write, because he could not write because of his illness, but his mind and nature were <his head, sane>".[6]

In the will, the father expresses his last wishes and tries to ensure the future of all family members. Thus, in March 1658 "Uncle Stoica Ghidiul, gives, while he is alive, to his daughter, Anca, and to his son-in-law, Zaharia, half of his estate, because he did not give them another dowry, and the other half he leaves to his son, Lepădat (...) He also leaves to his daughter, Vlada, an estate, which he had bought from Mușetescu, belonging to Holomocii family, as well as 2 mares and a cow, to be her

[1] *Documenta Romaniae Historica. Series B.Wallachia*, 23 (1630-1632), (Bucharest: Academiei, 1969), 336
[2] *Documenta Romaniae Historica.Series B.Wallachia*, 24 (1633-1634), (Bucharest: Academiei, 1974), 212-13
[3] *Documenta Romaniae Historica.Series B.Wallachia*, 24, 357-58
[4] *Documenta Romaniae Historica.Series B.Wallachia*, 25 (1635-1636), (Bucharest: Academiei, 1985), 35
[5] *Documenta Romaniae Historica. Series B. Wallachia*, 37 (1652), (Bucharest: Academiei, 2006), 206
[6] Mirela Comanescu, *Catalog*, 134-35

dowry. So he set them with his word, and whoever would rise up against his word, let him be accursed. "[1]

From the analysis of the two documents we see that the heir of the parental home receives, along with the fortune, the care of the younger sisters. Their content highlights three principles: the legislative principle - by which the father must endow his daughters, the customary principle - by which the brother has the obligation to take care of the girls' marriage and the last, which refers to the wishes of the deceased to be shared with the family, in the presence of witnesses; on the verge of death.

With regard to witnesses, it should be noted that, during the reference period, their presence was indispensable for the validity of that act. Antim Ivireanu, the Metropolitan, establishes the manner of writing the dowry sheets, the entire responsibility being assigned to the priest. He must take care of both their form and their credibility, his presence giving the necessary authority to the act: "to be the priest of the village together with three witnesses signatory on the sheet to further strengthen the truth."[2] Witnesses have a threefold function: they give credibility to the document, participate in the engagement party and guarantee the seriousness of the two families to be related. They also guarantee, both by their physical presence and by the signature on the act, that the dowry is written on the sheet and that the two families will assume their obligations on the day of the engagement. In order to avoid quarrels over the goods inscribed in the dowry sheet, Antim Ivireanu establishes that anything "parents will have to endure, to give their daughter silver, gold, clothes, animals, or other similar objects and to put the right price on each".[3]

In the seventeenth century, the dowry enjoyed a special status. It is protected by the creditors of the father or the husband, it cannot be sold or mortgaged, and the husband has only the right of usufruct. In the event of the death of the husband, if she has children, the widow is considered an heir on behalf of her children. She can stay in the house and manage the common property.

Things get complicated in the absence of the heirs, in this situation she has the right to her dowry and to a third of the goods

[1] Comanescu, *Catalog*, 220-21
[2] Ivireanu, Works, 393
[3] Ivireanu, Works, 393

gathered together.[1] However, she lost her dowry if she was proved to be in a marital relationship with another man during the year of mourning.[2] As for the gifts that the couple made to each other during marriage, they were lost by the husband if he did not take care of his wife's health[3], if he was proved to be slandering his wife for the purpose of owning her dowry[4], if in the first year after his wife's death led to a life of debauchery[5] or if he beat his wife fiercely for "a little guilt."[6]

THE EFFECTS OF MARRIAGE

In addition to the patrimonial relations, which have in their center the gifts and the dowry, the marriage also produces effects regarding the personal relations between the two spouses. The legislation of this period establishes as mutual obligations of the couple the fidelity, the care of the parents towards the children and the children towards the parents and the moral support.

Marital fidelity was a moral and civil obligation, its non-compliance being a reason for divorce and at the same time a crime.

Foreign travelers speak in their notes about the "women and young girls of Wallachia" known to everyone as "chaste, righteous and virtuous." If any act of shame becomes known, the men are condemned to prison forever, in the dungeons, where there is no escape, and the women are condemned to be drowned[7]. " However, the statement of Paul of Aleppo is not confirmed by documents, in 1695 the royal treasury collected a tax for those who proved unfaithful[8]. The situation seems to be quite serious in Moldova, among the Catholic population where "if the wife does not love her husband, she may become schismatic, or be re-baptized" allowing him "to take another wife while the first is alive, against the divine law". The big problem stems from the fact that if they

[1] Constanța Ghițulescu, "The dowry between norm and practice. Wallachia in the 17th century (I) "in Studies and materials of medieval history, XVIII, (2000): 221
[2] Correction of the law, 222
[3] Correction of the law, 230
[4] Correction of the law, 222
[5]Correction of the law, 222
[6] Correction of the law, 202
[7] *Foreign travelers about the Romanian Lands*, VI, 123
[8] Giurescu, *Mother Register*, 432-33

are not allowed to do this, "they renounce their faith, do not want to live without a wife, and therefore run to the judgment of the Orthodox[1]".

In the legislation of the seventeenth century, the adultery of the man was not considered as serious as that of the woman, due to the fact that the adulterous woman could bring children, out of wedlock, with the right to inherit her husband. For non-compliance with the obligation of fidelity on the part of the wife, the loss of dowry, gifts, common goods and the right of maintenance were provided as punishments[2], going as far as murder in the case of the flagrant crime of adultery[3]; in the case of the flagrant, the woman could also kill her husband and his concubine, without being punished[4]. Also, being considered "more stupid and easier to fall than the man", the woman is investigated less severely when she finds herself in an adulterous situation with a relative[5]. An unusual decision for the Bucharest community, however, was adopted by Metropolitan Theodosius, who, on December 3, 1691, tried a divorce case between Vlad, the Chancellor, and his wife Nasta. She admits her adultery and the fact that when she separated from her husband she received her dowry back. She willingly came to court to give the man the opportunity to remarry. Contrary to the legislative provisions, the two are recognized as parting and it is established that "neither Vlad, the dignitary, should have anything to take from Nasta, nor Nasta from Vlad"[6].

The care of parents towards children and children towards parents, as an effect of marriage, is regulated on the basis of obligations of love and mutual assistance. The legislation obliges parents to support them until the age of maturity, otherwise they are accused of hating their children[7].

There are many documents in which, after the death of one of the spouses, the surviving parent makes his children or other relatives owners of his wealth in order to take care of him in his old age. Hârja Fărcășoaia and Farcaș Ioanaș did the same, who on July 18, 1638 bequeathed all the fortune to their niece Anița, whom they had adopted at the age of two and

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[1] *Foreign travelers about the Romanian Lands*, VII, (Bucharest: Scientific, 1980), 54
[2] *Correction Law*, 221-23; *Romanian textbook*, 33-4
[3] *Correction Law*, 229-30; *Romanian textbook*, 27
[4] *Correction Law*, 233-34
[5] *Correction Law*, 219
[6] Iorga, *Studies and documents*, 243-44
[7] *Correction Law*, 252

a half[1]. Having no children, on February 23, 1625, Singlitichia, the widow of the Court administrator, Bilă, gave to her nephew Dumitrașcu Ștefan, the Great Chancellor, the village of Roznov in Neamț and the village of Cămilești in Tecuci.[2]

In the same situations was also "Grăjdana, Leca the lordly sword bearer's mistress", who, being a widow, bequeaths to her nephew Preda "her estates from Leurdeni, Ciumernic, Stâpenii de Sus and Cătun, with vineyards, mills, Romanians and gypsies as servants."[3] The care for the children determined, on May 6, 1632, Stoica, the lordly sword bearer, to leave all the fortune to his sons Pătru, Dumitru and Pădure[4], while on April 15, 1649, the spouses and children shared the fortune of Dumitru Fililașanu, great steward.[5]

Spouses, during marriage, are bound by moral support. Due to the woman's weak possibility of defending herself, the husband is obliged to help her, and may even kill the one who would harm to his wife; instead, the wife has to help her husband if he is attacked by someone.[6]

As an effect of marriage, this moral support must also be seen as a norm of conduct in the family that implies mutual respect, honor, and care of children towards their parents. Time documents show different relationships and attitudes between spouses. Thus, if Lucoci had a happy marriage with Stanca who determined him in April 1625 to leave her the entire fortune, having the certainty that "he will remember me well"[7], Vasile the lordly sword bearer, bribing the witnesses "in the days of Leon the Prince, on the time when Father Macarie was there, too, "he managed to break up with Maria and own her dowry, accusing her "of being a bad and unwise woman". Bringing into question the curse for those who lied, on January 10, 1635, Matei Basarab re-judged the trial and

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[1] *Documenta Romaniae Historica. Series A, Moldova*, 24 (1637-1638), (Bucharest: Academiei, 1998), 418

[2] *Documenta Romaniae Historica. Series A, Moldova*, 18 (1623-1625), (Bucharest: Academiei, 2006), 353

[3] *Documenta Romaniae Historica. Series B. Wallachia*, 23 (1630-1632), 229-30

[4] *Documenta Romaniae Historica. Series B. Wallachia*, 23, 371

[5] *Documenta Romaniae Historica. Series B.Wallachia*, 34 (1649), (Bucharest: Academiei, 2002), 63

[6] *Correction Law*, 236; *Romanian textbook*, 29

[7] *Documenta Romaniae Historica, A. Moldova*, 18 (1623-1625), 389

"commissioned" to the mistress Maria and her daughters all the wealth of her husband.[1]

Marriage also involves a series of unilateral obligations, either on the part of the wife or on the part of the husband. They often highlight the inferior position of the woman in relation to her husband, who loses her full legal capacity with marriage.

Thus, in exchange for the husband's obligation of support and protection, the wife owes obedience, otherwise she risks being beaten and scolded, according to the law: "for her fault (...) the man can beat his wife in moderation"[2]. By beating "without measure" and "with enmity" is meant the beating with "the club" until it breaks, the causing of injuries and bleeds or when "he hits her with the wood in the cheek or head." It is not called "enmity" when he hits her with his fist or palm because the legislation grants him the right to correct his wife "as much and as often".[3]

Out of the respect that a woman must have for her husband and for the superiority he enjoys in the family, the wife has no right to raise her hand over the husband, even if he is guilty.[4] She is also obliged to live with him and follow him for the welfare of the family or if he runs away "for a great mistake of which he is guilty and is afraid of judgment."[5]

The documents depict a dynamic society, in which each family lives its own destiny, with its joys or dramas. There are times when husbands break up "for the disgust they had together" and then "reconcile and live together, from then until now"[6] and there are times when the husband's flight leads to economic degradation of the family, such as was the case of Stanca, Paraschiva's wife from Surdești, who together with her daughter Sorca sell an estate to pay the tribute[7].

However, the wife is forced to wait for her husband even if he leaves her and lives elsewhere with another woman. The stories of foreign travelers refer to a Greek named "Astamaty - agent of the Turks,

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[1] *Documenta Romaniae Historica. Series B. Wallachia*, 25 (1635-1636), 7-8
[2] Correction Law, 202; Romanian Teaching Book, 38-9
[3] Correction Law, 202; Romanian Teaching Book, 38-9
[4] Correction of the law, 224
[5] Correction of the law, 204; Romanian Teaching Book 40
[6] Documenta Romaniae Historica. Series A, Moldova, 25 (1639-1640), (Bucharest: Academiei, 2003), 473
[7] Documenta Romaniae Historica.Series B.Wallachia, 34 (1649), 197

sent to Ukraine (...) a bad man, who left his wife in Iasi and took another from Ismail, with whom he lives and has children.[1]" The woman is obliged to wait for her husband in the following situations: when he is away in the army until she receives certain news that he is dead; for three years when he lives with another woman or for five years in case she is abandoned, she has no news from him and is without any help.[2]

Another unilateral obligation, but this time from the husband is to provide medical care in case of illness. If the wife is ill, the husband must call the doctor "where he will find", in case of death losing the gifts and dowry[3]. All expenses necessary for the recovery of the wife are borne by the husband, who is not entitled to take anything from the dowry; the funeral expenses are borne by the parents of the deceased wife, because they took back their dowry[4]. The story of Pătru Epure is shocking, who in September 1657, gives the priest Neguțu some "apples, planted by his hand" to commemorate his wife and the two unbaptized children who died of the plague. Due to the very precarious financial situation, he could not give anything else for alms[5]. From all the previous examples, it emerges the idea that in the formation, survival and dismemberment of a couple, an important role is played by the economic potential.

CONCLUSIONS

The condition of women is built according to the dominance of society. In the legislation of the seventeenth century, the woman, as a person, does not exist at all. The place occupied in the social hierarchy and her legal situation are determined by that of the father or the husband. Lawyers, in full agreement with theologians, share the same prejudices asserting the inferiority of women. Her physiology, her psychology, make her a weak being from a physical and intellectual point of view, therefore irresponsible, like a child. This eternal minor can never be considered equal to the man.

In order to impose a new conception on the family, a new orientation must be given to the conjugal relations, to the duties and

[1] Foreign travelers about the Romanian Lands, VII, 353-54
[2] *Correction of the law*, 226
[3] *Correction of the law*, 229-30
[4] *Correction of the law*, 247
[5] *Catalog of the documents of Wallachia from the National Archives*, 164

rights of the two spouses and to establish the dignity of the woman. But, this new dignity is granted to her on one condition: to conform to the model of wife and mother that guarantees the stability of the family cell necessary for the stability of the state.

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AUDIOVISUAL TRANSLATION AND LEGAL PROVISIONS IN ROMANIA

Bianca DABU[1]

Abstract:

In using the term audiovisual in this article we have to consider its approach on two directions. On the one hand, we have the linguistic direction related to the audiovisual text that is, the information we receive via visual and acoustic channels. This involves a co-existence of verbal and non-verbal messages in the same context with a succession of images in movement. the circulation and transfer of the messages and ideas from one language to another becomes, thus a challenge for the audiovisual translator whose task is to determine the role and importance of the visual component in the audiovisual text being translated, establish the relation between the visual and the verbal, and adjust the translation techniques accordingly. This omnipresence of various types of messages challenges the research in translation studies to approach audiovisual translations (AVT) either as a very general type of translation or a very specific one. On the other hand, we have the legal direction related to all legal provisions that have to be stipulated by the state laws in accordance with international laws. But this approach may be fulfilled through specific language related to the concept of audiovisual. That is why, in terms of audiovisual legislation we find an interference of the two directions, in the sense that in the main Romanian law governing the audiovisual activity, right from the start in Chapter I, General Provisions, there is a display of terms and definitions regarding semantic and legal meaning of the terms used.

Key words: *audiovisual; dubbing; subtitling; deaf and hard-to-hearing persons.*

INTRODUCTION

Over a century after the invention of moving pictures, their cultural and social role has evolved, transformed and acquired new importance in transmitting visual messages. Nowadays, social

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environment is based heavily on the omnipresence of television sets, computers, portable DVD players, and more recently mobile phones and even TV street advertising signs. "We spend a fair amount of time watching screens and consuming audiovisual programmes to carry out our work, to develop and enhance our professional and academic careers, to enjoy ourselves and to obtain information. It would not be an exaggeration to talk of the ubiquity of images in this age, and to state that their power is here to stay and live on via screens"[1].

In using the term *audiovisual* in this article we have to consider its approach on two directions.

On the one hand, we have the linguistic direction related to the *audiovisual text* that is, the information we receive via visual and acoustic channels[2]. This involves a co-existence of verbal and non-verbal messages in the same context with a succession of images in movement. the circulation and transfer of the messages and ideas from one language to another becomes, thus a challenge for the audiovisual translator whose task is to determine the role and importance of the visual component in the audiovisual text being translated, establish the relation between the visual and the verbal, and adjust the translation techniques accordingly. This omnipresence of various types of messages challenges the research in translation studies to approach audiovisual translations (AVT) either as a very general type of translation or a very specific one. At the same time, "the very concept of *mass media* is changing; technology is now allowing masses to be broken down into smaller groups and products are tailor-made to the expectations and the needs of defined sub-groups."[3]

On the other hand, we have the legal direction related to all legal provisions that have to be stipulated by the state laws in accordance with international laws. But this approach may be fulfilled through specific language related to the concept of *audiovisual*. That is why, in terms of audiovisual legislation we find an interference of the two directions, in the sense that in the main Romanian law governing the audiovisual

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[1] Diaz Cintas, Jorge. „Introduction: Audiovisual translation comes of age", Chapter · January (2008):1, DOI: 10.1075/btl.78.02dia, available at https://www.researchgate.net/publication/300855510_

[2] Bartrina, Francesca. „The Challenge of Research in Audiovisual Translation" in *Typologies in Audiovisual Translations*, vol 56. Philadelphia: Benjamins (2004): 157.

[3] Neves, Joselia. "Interlingual subtitling for the deaf and hard-of-hearing" , in: Díaz-Cintas and Anderman (eds.), *Audiovisual Translation: Language Transfer on Screen*, 151. Basingstoke: Palgrave Macmillan (2009).

activity, right from the start in Chapter I, *General Provisions*, there is a display of terms and definitions regarding semantic and legal meaning of the terms used.

AVT AND LEGAL PROVISIONS

One of the most important researchers in the field of AVT, Yves Gambier points out that various types of AVT do not translate in the same way, using the same codes: "Some emphasize the oral dimension (dubbing, interpreting, voice-over and free commentary); others are a switch from oral to written (interlingual, intralingual, live subtitlingand surtitling), or from written to written (scenario translation), or from pictures tooral (audio description), or from written to oral (sight translation, audio subtitling)"[1]. Gambier provides therefore, the entire range of translation options for audiovisual material considering as well the groups and sub-groups of audience. For a better understanding and a more accurate understanding of the concepts we are providing the definitions of the following terms which are the most currently employed in Romanian legal documents:

Subtiling[2] describes standard interlingual subtitling written in a language different from the language of the original audiovisual product. At the same time, same language subtitling was thought of as a tool to enable deaf and hard of hearing viewers to access audiovisual products.

Dubbing[3] is a type of interlinguistic audiovisual translation which presupposes complete change of the sound track in the source language

[1] Gambier, Yves. „The Position of Audiovisual Translation" in *The Routledge Handbook of Translation Studies*, 45-58, C. Millán and F. Bartrina.(ed.), Taylor and Francis Group (2013): 51-52. Gambier, „The Position of Audiovisual Translation", 49-51 makes an accurate description of two the main groups of Audiovisual Translation: the translation between codes and the translation between languages. The distinction in fact is that the oral or written codes are mostly used for translations within the same language, while the second category of translation implies the transfer between two different languages. Some of them can be intra or interlingual and can be part of either of the two groups.

[2] Perego, Elisa and Silvia Bruti. *Subtitling Today* (Newcastle upon Tyne: Cambridge Scholars, 2015), 2

[3] Matkivska, Natalia. „Audiovisual Translation: Conception, Types, Characters' Speech and Translation Strategies Applied", 25 nr., ISSN 1648-2824 Kalbų Studijos (2014): 39. Studies about languages. No. 25 http://dx.doi.org/10.5755/j01.sal.0.25.8516

into soundtrack of the target language with the aim of broadcasting in countries where the original language is not their mother tongue.

A new era of technologies allow both dubbing and subtitling to be included in the same product (DVD, Blu-ray, Internet, digital broadcasting) so that audiences can choose how they wish to view a foreign product[1]. The distinction between the two processes have both advantages and constraints.

Subtitling is arguably the most widespread for the simple reasons that it is cheap and fast[2]. The availability of free subtitling and video-editing programs online has also contributed substantially to its surge in popularity.

The goal of every subtitle is to be noticed by the viewer but not to distract his/hers attention from the programme while rendering the message available through translation. Subtitling for Diaz Cintas and Remael[3] represent "the translation practice during which translation appears in written form in the lower part of the screen". Relying on this definititon, Kostopoulou tackles on the elements that have to be considered as components of the translation process that are not given any credit at first sight: "This practice renders not only the original dialogues, in a condensed way, but also other elements such as letters, signs, graffiti that are present on the screen. It also takes into consideration the soundtrack of the film or voices that are not seen on screen. From this definition it is evident that audiovisual works, such as films, have three important components: image, the dialogues of the original soundtrack and the subtitles"[4].

Subtitling is the preferred AVT in Romania even during the communist era "as, when coupled with content deletion and textual alteration, "interference of the 'original' [was] kept at a minimum"[5]. In fact, Romania is among the countries belonging to the community of

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[1] Chaume, Frederic. „Research Paths" in *Audiovisual Translation-The Case of Dubbing, The Routledge Handbook of Translation Studies*. (2013): 296.

[2] Diaz-Cintas, „Introduction: Audiovisual translation comes of age", 274

[3] Diaz Cintas, Jorge and Aline Remael. *Audiovisual Translation: Subtitling*. (Manchester and Kinderhook: St. Jerome, 2007), 8.

[4] Kostopoulou, Loukia. "Translating culture-specific items in films: the case of interlingual and intersemiotic translation", *Punctum* 1(2) (2015): 53-54, DOI: 10.18680/hss.2015.0016.

[5] Martin, Anca-Simina. "I couldn't help but Wonder: Does Fan Subbing or Official Subtitling Do More Justice to S.A.T.C. Bawdy Puns?", in *Transilvania* 8 (2018): 32.

subtitling countries together with Netherlands, Norway, Sweden, Denmark, Greece, Slovenia, Croatia or Portugal while countries as Germany, Spain or Italy preferred dubbing.[1]

After the Revolution in 1989, Romania had to design a new way in many fields of activity among which television.

In 1992 the Law No. 48 was adopted under the name *The Audiovisual La*w and after its abrogation, it was replaced by the Law 504/2002. The second Law of the Audiovisual is a better version of the Law No 48, in the sense that in Chapter I, *General Dispositions*, it displays a wide range of definitions concerning all types of elements associated to the idea of audiovisual activities and their functioning. The updated text of this Law was published in the Official Gazette of Romania, Part I, on 19th November 2009[2].

In art. 3 of the Law 504/2002 there is a clear disposition about "(1) Political and social pluralism, lutural, linguistic and religious diversity, information, education and public entertainment are accomplished and ensured by the broadcasting and retransmission of program services with the observance of the freedoms and fundamental right of the person. (2) All audiovisual media services providers must ensure the objective information of the public by correctly presenting the facts and events and they must favour the free formation of opinions."

The only provision related to the idea of access to information in a certain language targeting a certain category of language users, is in Chapter V, art. 82, par. 4[3] that states: "In those areas where a national minority represents more than 20% of the population, distributors shall also provide for the free reception of programs in the language of the respective minority."

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[1] *The Routledge Encyclopaedia of Translation Studies*, 1998, 18

[2] The basic document Law 504/2002 was further modified and completed by the following documents: Law No.591/2002, Law No.402/2003, Law No.510/2004, Law No.127/2006, Law No.564/2007, Law No.216/2008, Law No.330/2009, Law No.333/2009, Law No.187/2012, Law No.95/2014, Law No.103/2014, Law No.211/2015, Law No.345/2015, Law No.187/2016, Law No.66/2017, Law No.246/2018, Law No.52/2019, Law No.209/2019 as well as Government Emergency Decree No.123/2005, Government Emergency Decree No.3/2006, Government Emergency Decree No.181/2008, Government Emergency Decree No.19/2011, Government Emergency Decree No.25/2013, Government Emergency Decree No.18/2015,

[3] In the 2009 version of the Law 504/2002 (revised) the provision is in par. 3.

An important chapter of the Law[1] concers the National Audiovisual Council – hereinafter called the Council - which is defined as the "unique regulatory authority in the field of audiovisual media services" (art. 10, par. 2), and "the warrantor of the public interest in the field of audiovisual communication" (art. 10, par.3). According to the definitions above and by observing the legal provisions in force, the Council has the competence to provide for various actions[2] in the public interest, such as: "the protection of the Romanian culture and language, as well as of the culture and languages of national ethnic minorities" (f); encouragement of co-regulation and self-regulation in the audiovisual field (j); encouragement of audiovisual services providers with a view to ensuring conditions that provided services are available to persons with hearing or seeing disabilities (k).

It is important to notice that the Law No 504/2002 includes among the beneficiaries of the provisions all all the groups and sub-groups (ethnic minorities or disabled people) that could benefit from the audiovisual services.

a. Given its legal authority and according to the provisions in the Audiovisual Law referred to (*supra*), the Council issued a decision (Decision No 14/1999) stating that the provisions of the Decision are related to the necessity of ensuring the unrestricted right to any type of public information as stated in art. 31, par. 1 in Romania's Constitution and art. 25, par. 2 in the Law No.48/ 1992 replaced by the Law 504/2002 revised and modified. The content of this decision is important as its five articles display the actions stipulated with a view to the process of translation:

b. Art. 1 "Television programs broadcast according to their authorised licence issued by the National Audiovisual Council, on air or satelite, throughout Romanian territory as well as programs broadcast in other languages except Romanian within the categories of the services stipulated in art. 21/ b-c in Law No. 48/1992 shall be subtitled or translated into Romanian language.

Art.2 Feature-length films and series shall be subtitled or dubbed into Romanain language.

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[1] We refer to Chapter II of the Law 504/2002, modified and completed by the aforementioned laws.

[2] The responsibilities and actions that the National Audiovisual Council is liable for are enumerated in Art. 10, par. 3 a-l.

Art. 3 Documentaries (scientific, educational or art films), programs targeting children and other programs recorded through various means may be translated entailing both subtitling and uttering the translated text by a speaker (voice off).
Art. 4 Interviews, talk-shows and other programs broadcast directly in another language, shall be translated into Romanian thoroughly, between sentences, paragraphs or speeches, as appropriate.
Art. 5 Exceptions to the provisions stipulated in Art. 3 are music videos and that parts in foreign languages courses, which through their learning concepts need not be translated.
Art. 6 Exceptions to the provisions stipulated in Art. 4 are the news broadcast within the programs targeting national minorities, written in the program grids as per task book and considered an integral part of the audiovisual licence.**"**

According to the provisions, Romanian language is the target language of a content provided from a foreign language. The transfer is ensured through the process of subtitling that is a shift of the two language transfer modes (from speech to writing and from soundtrack to written subtitles). Additionally, the term *voice off* (art. 3) synonym with voice-over "presupposes putting a sound track of the target text over the muffled soundtrack of the original text. In this type of audiovisual translation regional dialects, accents or peculiarities of the speaker are not taken into consideration"[1]. At the same time, the stipulations regarding materials that may be sources for learning foreign languages entail the idea of exceptions to the provisions.

The text of the Decision No 14/1999 was in force since 2nd March 1999 till 2nd March 1999, when it was abrogated and replaced by the Decision NO.23/1999 which sums up into 3 articles the following content:
Art. 1 "Television programs broadcast according to their authorised licence, on air or satelite, throughout Romanian territory and received throughout Romania's territory in other languages than Romanian language, shall be translated into Romanian. The translation shall be performed as subtitling, dubbing or simultaneous translation. This provision is applicable to the audiovisual services provided by cable, stipulated in Art. 21 b-c in Law No 48/1992 (repeated audiovisual

[1] Matkivska , „Audiovisual Translation: Conception, Types, Characters' Speech and Translation Strategies Applied", 39

broadcasts recorded through various means and broadcasting of on-demand audiovisual services).
Art. 2 The programs broadcast in a different language than Romanian, according to the program grid as per the task book, that may be altered in their fluency by the translation, will be broadcast again with Romanian subtitling, should they be resumed.
Art. 3 Exceptions to the provisions stipulated in Art. 1 are music videos and that parts in foreign languages courses, which through their learning concepts need not be translated."

In the text above, the references to *voice-over* were replaced by *dubbing* or *simultaneous translation*. Linguists make the difference between dubbing and voice-over in how they are approached. Thus, dubbing may be defined as "the replacement of the original speech by a voice track which attempts to follow as closely as possible the timing, phrasing and lip-movements of the original dialogue"[1] while voice-over, also called *half dubbing* is a type of audiovisual translation which happens when "a movie,an interview or a documentary is translated and broadcast almost simultaneously by a journalist or an actor who can dub many characters"[2].

An important modification and addition of the Law No 408/2002 was the adoption of the Law No 103/2014[3] concerning the protection of deaf and hard-of-hearing persons. The content of the provisions refer to programs aired on national and local televisions that must provide sign translation and sync subtitles for at least 30 minutes of programs (news, political debates, economic analysis). At the same time warning signs with the message "Attention! This program is dedicated to deaf and hard-to-hearing persons."

These types of techniques entailing sign translation and sync subtitles rely on linguistic theories about translation between codes and

[1] Chiaro, C. Delia. "Issues in Audiovisual Translation", in *Companion to Translation Studies*, J. Munday (ed.). Routledge: Francis&Taylor, 2009, 144.
[2] Gambier, „The Position of Audiovisual Translation", 51
[3] Law No 103/2014 modifies and completes the Law No 408/2002 (with further modification and completitions) as follows: after Chapter IIÎ^3 an new chapter is introduced Chapter IIÎ^4 with the following title: *The Protection of the deaf and hard-to-hearing persons.* The provisions of Art. I in Law No 103/2014 are introduced as provisions in Law No408/2002 Chapter IIÎ^4 starting with Art. 42.

translation between languages[1]. For deaf and hard-of-hearing persons, as a sub-group of beneficiaries of these legal provisions, the best solution of message transfer is subtitling and not dubbing. For Baker and Hochel[2] (1998:74) subtitling is visual, involving the superimposition of a written text onto the screen. Dubbing, on the other hand, is oral; it is one of a number of translation methods which makes use of the acoustic channel in screen translation. That is why the deaf and hard-of-hearing persons are advantaged by subtitling and not by dubbing techniques.

In fact, the initiative taken by the deputy Victor Socaciu in 2011 to replace subtitling with dubbing met a very heavy criticism. Although he argued that Romanian language was overburdened by English borrowings, public voice stood up for subtitling as a means for enhancing the learning of foreign languages. On the other hand, it would be very difficult for deaf and hard-of-hearing persons to access dubbed programs. In order to makes things even, in 2018 the president signed a new law amending the Audiovisual Law concerning the subtitling of the Romanian films for deaf and hard-of-hearing persons in order to ensure their access to audiovisual services. Technically speaking, this type of intralingual subtitling is in favour of the sub-category including people with hearing impairment.

The deputy Adriana Saftoiu who was the initiator of the law motivated that the proposal was in accordance with the steps taken by the Romanian state to apply the provisions of UNO Convention regarding the rights of disabled persons, ratified by Romania in 2011, in order to ensure their autonomy, social and professional integration as well as their participation to the life of the communities.

CONCLUSIONS

In Romania, there are a series of laws concerning the audiovisual issues relying on linguistic concepts, and translation methods and techniques. The main Audiovisual Law was modified and completed by a

[1] Gambier, „The Position of Audiovisual Translation", 49-51 makes a accurate description of two the main groups of Audiovisual Translation: the translation between codes and the translation between languages. The distinction in fact is that the oral or written codes are mostly used for translations within the same language, while the second category of translation implies the transfer between two different languages. Some of them can be intra or interlingual and can be part of either of the two groups.

[2] Baker, Mona and B. Hochel. *Dubbing. London* (London: Routledge, 1998), 74

series of other legal documents and the decisions issued by the National Audiovisual Council clear up the terms related to subtitling and dubbing as techniques used. Further legal provisions would have to cover aspects related to other categories of sub-groups targeted by these techniques (such as translation procedures for blind people).

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THEORETICAL AND PRACTICAL VALENCIES OF THE SANCTION OF LEGAL NULLITY OF THE ADMINISTRATIVE ACT OF ESTABLISHING THE TERMINATION OF WORK RELATIONSHIPS OF THE PUBLIC SERVANT

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Abstract:

The stability of the work legal relationship and the lawfulness that should govern any administrative act, are elements that, depending on their damage, entail the dispossession of legal effects of the act deciding or establishing the termination of the work relationship of the public servant. Consequently, an analysis of the provisions of the Administrative Code on the institution of the legal nullity of the administrative act of termination of work relationships is meant to point out the significant importance of complying with the substantive and formal issues of the administrative act with individual character by which the legal work relationships of the public servant cease.

Keywords: *sanction; legal nullity; administrative act.*

INTRODUCTION

The appointment in public offices, amendment, suspension or termination of work relationships shall be made by administrative act issued within the terms and conditions of the law by the chief of unit or of the public institution. The administrative act shall be concluded in writing and shall be effective as follows: from the date expressly mentioned in the administrative act, provided it is previously communicated to the public servant; from the date of communication of

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the administrative act, in case on the administrative act, it is not expressly mentioned the date when it becomes effective legally, or in case the communication is made subsequently the date expressly mentioned in the administrative act; within the specific terms expressly mentioned by the law. In case of evidentiary administrative acts of findings, the legal effects start from the date of establishing the occurrence of the situation provided by the law, based on justifying documents. The administrative code contains in detail all the compulsory elements that need to be present in the contents of the administrative acts of appointment, amendment, suspension or termination of work relationships.

The purpose of the present legal procedure is to identify the importance of such elements and the relation with the sanction of dispossession of legal effects of an administrative act of termination of work relationships, with formal vices.

1. THE COMPULSORY ELEMENTS OF THE CONTENTS OF THE ADMINISTRATIVE ACT OF TERMINATION OF WORK RELATIONSHIPS OF THE PUBLIC SERVANT.

In accordance with the provisions of art. 533 of Administrative Code, administrative act of termination of work relationships of public servants must contain the following elements:

a) the legal ground of termination of work relationships, identified by the incident legal decision, as well as the justifying documents for compliance with the legal provisions;

b) the name and surname of the public servant

b) the name of the public office, individualised by category, class and, if any, professional level;

c) the date on which the work relationships of the public servant cease;

d) the term established for application of provisions of art. 524 para.(1);

e) the term in which the administrative act can be appealed, as well as the competent administrative court.

In case of termination of work relationships by dismissal from civil service, the administrative act of dismissal from civil service must also contain the duration of notice period.

Out of the six compulsory elements that must be included in the contents of the administrative act to assure its lawfulness and validity,

only three of them generate some difficulties, namely: the legalground, the term established for delivery of works and the term in which it can be appealed, as well as the competent administrative court.

1.1. **The legal ground of termination of the work relationships, identified by the incident legal provision, as well as the justifying documents for the compliance with the legal provisions.**

The institution of termination of work relationships is regulated in several provisions of the Administrative Code, provisions that we will present, for the purpose of a correct application of the requirement imposed by art. 533 para.(1) "a".

The termination of work relationships of public servants takes places in the following conditions, established by art. 516 of Administrative Code: de jure; by mutual agreement, taken down in writing; by dismissal from public service; by removal from public service; by resignation.

In accordance with the provisions of art. 517 of Administrative Code, the work relationship is lawfully terminated:

- on the date of death of the public servant;
- on the date when the court decision to declare the death of the public service is final;
- if the public servant does no longer have the domicile address in Romania, is no longer a Romanian citizen or he loses his ability to exercise a public office;
- on the date of cumulative accomplishment of the standard age condition and the minimum pension contribution quota, if the person who has the competence of appointment in a public office does not decide the application of the provisions;
- on the date of issue of the medical certificate on the work ability in case of 1st or 2nd degree invalidity, if the public servant's work ability is irreversibly affected;
- as a result of establishing the absolute nullity of the administrative act of appointment in the public office, from the date the nullity was established by final court decision;
- when by a final court decision, it was decided the conviction for crimes against humanity, against the state or against the authority, corruption or work-related offences, offences preventing the enforcement of justice, forgery offences or offences committed with malicious intent, that would

render it incompatible with the exercise of the public service, except the case where rehabilitation, post-conviction amnesty or decriminalization of the deed occurred, or it was decided the application of a prison punishment, from the date when the conviction decision is final, regardless of the way of individualization of the punishment;
- as a result of banning the exercise of the right to occupy a public office or to occupy the position, to exercise the profession or the job or to carry out the activity that he/she used to commit the offence, as complementary punishments, or as a result of banning to occupy a position or to exercise a profession, as a safety measure, from the date when the court decision deciding the interdiction is final;
- as a result of establishing that the public office was occupied by failure to comply with the legal provisions by a person who was executing at the date of appointment in the public office a complementary punishment of banning the exercise of the right to occupy an office involving the exercise of the state authority;
- as a result of establishing that the public office was occupied by failure to comply with the legal provisions by a person was worked for or was a collaborator of the Security Service, based on the final court decision; at the date of expiry of the term when the public office was occupied for a determined period of time;
- other cases expressly mentioned by the law.

Consequently, in order to accomplish the requirement imposed by the law, the legal ground of termination of the individual work relationship of the public servant must include all the incident legal provisions, not being enough to indicate only one of the cases mentioned in art. 517 of Administrative Code.

1.2 The term in which the public servant has the obligation to deliver the works and the goods entrusted to him in order to exercise his/her work duties.

In accordance with the provisions of art. 524 para.(1) of Administrative Code, for the amendment, suspension and termination of the work relationship, the public servant has the obligation to deliver the works and the goods entrusted to him/her in order to exercise the work duties, by complying with the conditions and procedures established in this regard at the level of the public institution or authority.

To apply such legal provisions, we have to mention that, at the level of each public institution, they should devise procedures containing clear and objective terms. The legal requirement is not accomplished if the term established is a subjective one, and it is not supported within an internal procedure notified to public servant prior to the issuance of the administrative act in which such term is contained.

Also, the term needs to be within the execution of the work relationship, and not subsequent to it. The public servant has the obligation to deliver the works and the goods while in this capacity, while the work relationship has not ceased.

1.3 The term in which the administrative act can be appealed, as well as the competent administrative court.

In accordance with the provisions of art. 527 para.(1) of Administrative Code, in case the work relationship ceased for reasons considered by the public servant as ungrounded and illegal, he/sje can request to the administrative court to cancel the administrative act establishing or deciding the termination of the work relationship, within the conditions and terms provided by the administrative court law, as well as the payment by the public authority or institution issuing the administrative act, of a compensation equal to the difference between the incomes obtained during that period and the quantum of the indexed salaries, increased and re-calculated with the other rights that the public servant would have benefited from.

As in the Administrative Code there are no special mentions regarding the term in which one can file the appeal against the administrative act of termination of work relationships, it means that the procedure of settlement of requests regulated by Law 554/2004 on administrative issues becomes applicable. Therefore, in accordance with the provisions of art. 7 from this law, before going to the competent administrative court, the persons who considers as being damaged in one of his/her rights or legitimate interest through an individual administrative act addressed to him/her, must request from the issuing public authority or from the higher authority, if any, within 30 days from communication of the act, the revocation, totally or in part, of such act. For grounded reasons, the damaged party, the receiver of the document, can file a preliminary complaint in case of unilateral administrative acts, also after the term mentioned in paragraph (1), but not later than six (6)

months from its issue date. The preliminary complaint must be settled within 30 days from its registration.

Art. 7 para.(5) also states exceptions from carrying out the stage of preliminary complaint in case of actions against administrative acts that cannot be revoked because they entered the civil circuit and became effective.

The provisions of art. 8 (1) of Law 554/2004 regulate the procedure following the preliminary complaint, establishing that the damaged person in a right recognised by law or in a legitimate interest, through an unilateral administrative act, not satisfied with the answer received to the preliminary complaint or not receiving any answer within the 30-day term, can go to the competent administrative court to request the total or partial annulment of the act, compensations for the damage caused and, eventually, compensations for moral damage.

Pursuant to art. 11, the requests asking for annulment of an individual administrative act, of an administrative agreement, the recognition of the claimed right and compensation of the damage caused, can be filed within six (6) months from:

a) date of communication of the answer to the preliminary complaint;

b) date of communication of unjustified refusal to settle the request;

c) date of expiry of the term of settlement for preliminary complaint, respectively the date of expiry of the legal term for settlement of the request;

For grounded reasons, in case of the individual administrative act, the request can be filed after the six-month term, too, but not later than a year from communication of the act.

Considering this procedure established by the law, it must be specified in the contents of the administrative act of termination of work relationships the term, the procedure to follow and the competent court to settle the action in administrative matters.

The materially competent court is established by art. 536 of Administrative Code, namely the administrative and fiscal court of the county court, except for the situations where the competence of other courts is expressly established by law. The territorial competence is established in accordance with the provisions of art. 10 of Law 554/2004, being the court from the plaintiff's domicile address, regardless of the level of the public authority issuing the act of termination of the work relationships.

2. THE LEGAL NULLITY OF ADMINISTRATIVE ACT OF TERMINATION OF WORK RELATIONSHIPS.

a. The administrative acts drawn up not complying with the provisions regarding their compulsory contents, shall be null and void. The nullity is established by the competent administrative court, according to the law.

b. The importance of the elements that should be included in the contents of an individual administrative act deciding the termination of work relationships, was established by the lawmaker which decided the application of the sanction of legal nullity, respectively of dispossession of its legal effects. The court of law is entitled to establish this nullity, related to the principle of lawfulness that should govern the administrative acts. Only by indicating all the incident legal provisions and the documents for compliance with the law, the administrative act accomplishes the condition of lawfulness and of motivation. In absence of such elements, the administrative act remains ungrounded and it is obviously illegal, being issued by an abuse of power on behalf of the authority.

c. By indicating the term in which the administrative act can be appealed and the competent administrative court, it is assured the absolute access to justice of the public servant whose work relationship was terminated. An administrative act which does not assure by its contents, the elements necessary to be subjected to the control of lawfulness that only the court of law is entitled to achieve, is null and void.

Indicating only one of the cases mentioned in art. 517 of Administrative Code is not enough. For instance, the case mentioned in art. 517 para.91) "g" of OUG (government emergency ordinance) 57/2019 imposes the addition with one of the hypotheses mentioned in art. 465 para.(1) "h". To have complied with the provisions of art. 533 para.(1), in the contents of the provision, we should find mentioned one of the hypotheses mentioned in art. 465 para.(1) "h", which are many, namely: crimes against humanity, against the state or against the authority, corruption or work-related offences, offences preventing the enforcement of justice, forgery offences or offences committed with malicious intent, that would render it incompatible with the exercise of

the public service, except the case where rehabilitation, post-conviction amnesty or decriminalization of the deed occurred.

CONCLUSIONS

The administrative acts of termination of work relationships are acts issued under regime of public power. Consequently, they enjoy the presumption of lawfulness, credibleness and authenticity. The presumption of lawfulness though is defeated by the formal vices of the administrative act. An administrative act of termination of the work relationship which does not contain the compulsory elements required by law, is null and void, nullity that can be appealed only by the competent administrative court, respectively by the administrative panel (of judges) from the county court where the territory of the claimant's domicile address is. The administrative court does not only decide on the nullity.

The sanction is applied regardless of the lawfulness and grounds of the reasons causing the issuance of the administrative act. The solution of the lawmaker is beneficial, it is included in the principle of lawfulness of the administrative act, lawfulness which includes its correct and complete motivation and the notification of the receiver regarding the filing of the action in the administrative court.

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CONTRACT ASSIGNMENT, A LEGALLY REGULATED LEGAL OPERATION UNDER THE PRESSURE OF CONTRACTUAL PRACTICE

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Abstract:

Prior to the entrance into force of the Civil Code in 2009, the assignment of the contract was not legally stated. The varied needs of legal life have required in contractual practice the creation of various particular applications of contract assignment. In the law of special civil contracts was created the operation of assignment of the lease contract or the assignment of pre-contracts for the sale of residential spaces that real estate developers undertook to build or vice versa, the assignment of contracts by real estate developers.

In the field of business, Law No. 31/1990 organizes the division and merger of companies, as operations through which the transfer of activities between companies is carried out (Art 238 Para. 2) and the contractual business practice has created the operation of transfer of assets (also called transfer of goodwill or transfer of business) through which a production section or a certain economic activity is transferred to another company.

Key words: *assignment; transfer of obligations; assignment of claims; general regime of contracts.*

1. THE CONTRACTUAL PRACTICE AND PARTICULAR REGULATIONS OF CONTRACTS' ASSIGNMENT PRIOR TO THE ENTRANCE INTO FORCE OF THE NEW CIVIL CODE

1.1. Contractual practice

Prior to the entrance into force of the Civil Code in 2009, the assignment of the contract was not legally stated. The varied needs of legal life have required in contractual practice the creation of various

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particular applications of contract assignment. In the law of special civil contracts was created the operation of assignment of the lease contract or the assignment of pre-contracts for the sale of residential spaces that real estate developers undertook to build or vice versa, the assignment of contracts by real estate developers.

Similarly, the first house contracts, partially subsidized by the state, were transferred when the debtors could no longer financially execute the contracts[1].

Later, the development of the credit market, such as that of real estate mortgages, was the ground on which the banks developed the practice of assigning contracts considered non-performing for them because debtors were bad payers being taken over by companies that specialized in debt collection. from the debtors shown, these companies being a new category of professionals that appeared in our country.

1.2. Particular regulations of contract assignment. Applications.

In the field of business, Law No. 31/1990 organizes the division and merger of companies, as operations through which the transfer of activities between companies is carried out (Art 238 Para. 2) and the contractual business practice has created the operation of transfer of assets (also called transfer of goodwill or transfer of business) through which a production section or a certain economic activity is transferred to another company. In the application of the text shown, in contractual practice some companies are transferred in the form of a merger by absorption. In connection with this operation we notice in everyday life that one retailer is taken over by another. For instance, "Billa" supermarkets were taken over by the "Carrefour" Groupe.

In order to protect the jobs of the employees in these transfer operations, it imposed the obligation on the transferee company to take over the existing jobs at the transferring company (Art 7-8 of the Law No 67/2009)[2]. In order to establish the area of application of this obligation, the national legislator has transposed the Directive 2001/23/EC defining

[1] Ioan Popa, "Cesiunea contractului", *Dreptul* 10/2006; Juanita Goicovici, "Cesiunea convențională a contractului", *Dreptul* 1/2007, Juanita Goicovici, "Cesiunea contractului în reglementarea art. 1315-1320 din Noul cod civil", *Curierul judiciar* 5/2010: 266-269

[2] Law No 67/2006 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, published in the Official Gazette, No 276/28 March 2006

the transfer of an undertaking as the operation of transferring from the property of the transferor into that of the transferee of the undertaking, business or part of the undertaking or busines, having as purpose the continuation of the main or secondary activity, when the transfer is made through a fusion or conventional assignment (Art 1-2 and 4 of the Law No 67/2006).

Also, in the area of insurances, through normative acts of the central public administration has been stated the contract assignment between insurance companies. Thus, based on Art 1-2 of the Norm on the transfer of portfolio between insurers[1], the transferor assigning to the transferee the insurance portfolio consisting in the transfer of the rights and obligations resulting from the insurance contracts concluded by the transferor. It is the same for the assignment of the insurance contract with the transfer of the insured asset.

In addition, certain cases of assignment were stated as legal obligations, being mandatory, without being necessary the transferor's consent. It is the case of the contracts related to a transferred asset, which in law is also known as *propter in rem* or *scripta in rem* obligation. It was, being provided today, the assignment of the lease concluded before the date of transfer of the leased property, the transfer of real rights, for example, an easement, with the transfer of the property on which the indicated task is pressed, etc.

1.3. Definition

It is the legal operation by which a person, the transferor, as part of a contract, with the consent of the other party, the transferee, assigns his place in the contract to a third party, the assignee.

Through the contract assignment, the transferor assigns to the third party his quality as part of the contract, with all the rights and obligations[2].

[1] Norm on the transfer of portfolio between insurers issued by the Financial Supervisory Authority, published in the Official Gazette, No 299/26 April 2006

[2] Ionuț Florin Popa, "Cesiunea de contract în reglementarea noului Cod civil", in *Revista Română de Dreptul Afacerilor* 2 (2013): 85-87.

2. LEGAL NATURE

The contract assignment is now a named contract, the Civil Code regulating its regime by organizing: the condition of form and the translational and opposability effect, including the fate of the guarantees in the contract that is the object of the assignment. Taking into consideration the object and effect of this contract, the transfer to a third party of the place of one of the parties, the assignment of the contract is a translative agreement, by its effects transferring the rights and obligations towards the assignee, being very close to the regime of assignment of debt or obligations through the technique of debt collection, all these species being translational conventions. In fact, the very name indicates the translational nature of this contract: "assignment". Some authors dispute the translational nature of the assignment of the contract, considering it a contract to replace parts of the contract[1].

The contract assignment is a compromise between the supporters of the impossibility of transferring the obligations because of their feature as liaison with a personal touch and the objective theory of obligations, which sees them as an asset and thus as transferable.

Given that the assignment of the contract transfers both the active side, the assignment of the claim and the passive side, this legal figure was first imposed in contractual practice, as a useful operation primarily for economic activity, such as the assignment of employment contracts once with the change at the level of the employer, or by the assignment of these contracts as well as of all the other contracts in case of merger, being relevant especially the one by absorption, the assignment of goodwill or business, etc.

2.1. The assignment of the contract should not be confused with subcontracting – first of all the object of the assignment being the transfer of the quality attached to the party transferring his contractual place. Secondly, the part of a contract, the transferor, concludes an agreement with a third party, the sub-contractor, to whom he assigns the partial or complete performance of the obligations emerged from the first contract. For example, in the matter of lease, the Civil Code regulates the assignment or sublease made by the lessee, called, for this reason, assignments or legal sublease. In the first case, the tenant assigns his

[1] Paul Vasilescu, *Drept civil. Obligații* (Bucharest: Hamangiu, 2017), 48

quality as tenant, his place being taken under contract by the new tenants; and in the second case the sublease is the contract by which the lessee, part of the lease, sublet in whole or in part the leased property, he still remaining a tenant but being in turn a lessor to the sublease, with the consent, express or, as appropriate, presumed, of the lessor (Art 1805-1808 Civil Code).

2.2. Also, the assignment of the contract should not be confused with successive contracts of the same nature on the same good, for example, the successive sale of a good. In the latter case, the sub-acquirer does not take the place of the first acquirer in the purchase contract concluded by the latter but concludes another contract with him by which he in turn acquires the respective good. For instance, the sale of the litigious rights, regulated as a prohibition for judges, prosecutors, etc., according to Art 1653 of the Civil Code, is not an assignment of a contract, but an assignment of a claim. However, a disputed right can also be a contract as a whole, so that a transfer of a contract may also fall within the scope of the prohibition on the transfer of the disputed rights shown.

3. THE LEGAL REGIME OF CONTRACT ASSIGNMENT

The contract assignment was not regulated by the former Civil Code, considering that through such an operation the obligations are also transmitted, an effect that is difficult to admit even in law today. However, the assignment of the contract was used in contractual practice and even legally recognized, as shown above.

By Art 1315-1320 of the Civil Code, the legislator has recognized the licit feature (admissibility) of this operation and has stated the common regime of contract assignment. Through special rules the legislator organizes different species of the contract assignment, some of them being already above mentioned.

A novelty is the judicial assignment stated by the old law on insolvency (Law No. 85/2006) the syndic judge being empowered to approve a reorganization plan which proposes: either the transfer of all or some of the assets of the debtor's property to one or more natural or legal persons (Art 95 Para 6 letter c) or the merger of the debtor company (Art 95 Para 6 letter d).

4. AREA OF APPLICATION

The principle of the contractual freedom allows the freedom of the party to a contract to assign his place to another person. However, not every contract can be assigned. Some contracts may be inalienable by nature.

From the *a contrario* interpretation of Art 1315 Para 1 of the Civil Code, it results that in principle the synallagmatic contracts with successive or continuous or continued execution can be assigned, provided that they have not been fully executed. Contracts with instant execution may not be the subject of the assignment, unless its essential effects have not been performed. Unilateral contracts, even unexecuted ones, cannot be the object of the assignment because such an operation would be by its effects either an assignment of a claim or an obligation, in principle prohibited or, as the case may be, restricted.

Also, from the literal interpretation of Art 1315 Para 2 of the Civil Code it results that the law or the parties may restrict this assignment. By their nature, the *intuitu personae* contracts, due to their personal feature cannot be assigned. However, nothing prevents the assignee from agreeing to the assignment in such a contract as well. Otherwise, if the law does not prohibit or restrict any kind of contract, may be transferred. For example, the law restricts the assignment of the lease contract (Art 1805 of the Civil Code) or of the insurance contract by the insurer (Art 2212 of the Civil Code), and for some contracts, for example, for the alienation of the insured property, the assignment takes place by right, if it has not been expressly removed by the parties (Art 2220 Civil Code).

If the principle of contractual freedom leaves the faculty to cede the place in a contract, the law conditions this faculty also by fulfilling certain conditions.

5. CONDITIONS FOR CONTRACT ASSIGNMENT

5.1. The need for the agreement of the other parties to the contract, the assignment. Tripartite contract

Taking into consideration that the contract assignment comprises the transfer of the transferor's obligations, this effect requires by its nature the existence of the assignee's agreement and in principle the

maintenance in the form of a guarantee of the assignor's obligation to the assignee.

The contract is not in the opinion of the legislator of the Civil Code an objective good that can be transferred by assignment, like any good, without the need for the consent of the other party to the contract. As it results from the definition given above, the effectiveness of the assignment is conditioned by the prior agreement of the assignee.

The contract assignment is a tripartite contract. This condition is rational because, in principle, the contract concluded with a person has legal force between those parties so that the transferor cannot exempt himself from the mandatory effect of the contract by assigning his place in the contract to another person. Only the agreement of the other party may release it from the contractual relationship and be replaced by the assignee.

If the party to a contract, the assignor, assigns his place in the contract by an agreement with the third party, the assignee, this contract is opposable to the assignee only as a legal fact, which cannot oblige him to release assignor of the legal force of the contract between them. Consequently, the prior consent of the assignee is required for the effectiveness of the assignment of the contract.

5.2. Substantive conditions of contract assignment

As above mentioned, the assignment is an application of the contract of sale, very close to the assignment of the claim and the debt collection agreement. Consequently, the substantive conditions relating to the rights and obligations conferred by the contract subject to the transfer must be fulfilled: a lease, a pre-contract, for example an option agreement, etc.

5.3. Formal conditions of contract assignment

Both the agreement of the transferor, as well as the contract between transferor and transferee shall fulfil the formal conditions of the assigned contract (Art 1316 Civil Code).

6. THE EFFECTS OF CONTRACT ASSIGNMENT

6.1. The translative effect

By contract, the contractual position of the assignor is transferred to the assignee, who takes the place of the assignor, becoming a party to the contract instead of the latter. He may require the assignee to perform his obligations and vice versa.

Correlatively, the assignor is released from the obligations under the contract and also loses the rights he was to benefit from the assigned contract.

If the assignor has not been released from the obligations of the assigned contract, the assignee authorizing or accepting the assignment without releasing the assignor of obligations, he remains bound in the subsidiary by the performance of the contract, the assignee may request performance if the assignee does not perform the contract, provided under the sanction of forfeiture of the right of recourse against the assignor, to notify him, within 15 days from the date of non-execution or from the date on which he knew the non-execution (Art 1318 paragraph 2 of the Civil Code).

6.2. Opposability of the translative effect towards the assignor

If he has given his prior consent, the assignment of the contract shall take effect on the date on which it was notified to him. If the agreement was given with the conclusion of the assignment contract, its effects occur from the date of conclusion of the assignment.

6.3. The opposability of exceptions

Like the assignment of a debt or the taking over of a debt, the assignment of the contract is subject to the principle of opposability of exceptions. The transferee may thus oppose to the creditors the exceptions inherent in the obligations of the contract, for example, the exception of non-performance, as well as the exceptions which are personal to him. On the other hand, the transferee cannot be opposed to the transferor's personal exceptions, such as consent defects or other defenses or exceptions arising from his relations with the transferor, unless he reserved this right when he consented to the substitution (Art 1319 of the Civil Code). However, the transferor retains all the exceptions in the contract, which he had before the transfer.

6.4. The regime of guarantees of the assigned contract

The assignor guarantees the validity of the contract (Art 1320 Para 1 of the Civil Code). If the assignor guarantees the performance of the contract, he shall be held as fidejussor for the assigned contractual obligations (Art 1320 Para 2 of the Civil Code).

CONCLUSIONS

We consider that the solution chosen by the legislator to legislate the assignment of the contract is welcome, thus consecrating the evolution of the contractual practice, approved by the judicial practice, through which beyond the legal species of assignment of the contract generalized in time the application of the assignment special contracts. It should also be noted that the assignment of the contract was regulated in part as regards the regime of the contract and not in the regime of obligations, together with the institution of assignment of the claim and that of taking over the obligations. The choice of the regulation in the shown part is rational and in this framework being inserted within the effects of the contract.

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SCIENTIFIC RESEARCH AND THE PRESENT EU CRISES CHALLENGES

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Abstract:

The paper aims to emphasize the strategy that Europe has to follow in order to face nowadays challenges in what scientific research is concerned. We can also observe the efforts made by the EU institutions so that all the objectives set years ago can be met. The field of scientific research is affected by the current challenges that we have to face so the need for solutions is obvious.

Key words: *scientific research; EU; crisis; challenges.*

INTRODUCTION

The Horizon 2020 framework program, which was originally presented in 2011 for the period 2014-2020, aimed to reduce the gap between research and the market, with this approach aiming at building partnerships with the private sector and Member States to exploit the necessary resources. Three main pillars underlying this program have been identified: scientific excellence, leadership in the industrial sector and societal challenges.

It can be said that Horizon 2020 has had a great impact on the best research institutes and has attracted the best researchers in the world, supporting the EU's qualified human capital through important scientific advances, often generated by scientific publications within Horizon 2020 projects.

Over time, European policy in the field of scientific research has played an important role in European Union law. If we look at the first Community Treaties, we see the importance of this policy in the

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development of European legislation in most areas, which has been extended by the adoption of a European framework program for research activities since the early 1980s.

These framework programs are still an important part of research in the EU and are gradually becoming increasingly important as the scope expands.

After 2014, this European policy was found in the Horizon 2020 program, which represents the eighth research and innovation framework program[1], being the largest so far, due to the impressive budget allocated.

For the next period 2021-2027, in June 2018, the Horizon Europe Regulation[2] was adopted, establishing the EU Framework Program for Research and Innovation for this period and setting out the objectives, budget, forms of EU funding and rules for the provision of such research and innovation funding.

1. CHANGES THAT OCCURED OVER TIME IN THE FIELD OF SCIENTIFIC RESEARCH AT EU LEVEL

A particularly important moment in the evolution of European research policy is the establishment in 2002 of the European Research Area Network, aiming at coordination and collaboration on national and regional research programs and to intensify the coordination of programs carried out in the Member States and associated countries through network contacts, including through the "mutual opening" of programs and the implementation of joint activities.

In 2000, with the Lisbon Strategy, the European Research Area was set up to address the fragmentation of the EU's research and innovation system and to establish a common scientific and technological area for the EU, to create a single market for research and innovation, to promote the free movement of researchers, scientific knowledge and innovation and to encourage a more competitive European industry. Following the entry into force of the Treaty on the Functioning of the European Union,

[1] The first research framework program was developed in 1983, which was established for a period of 4 years, as opposed to the following programs which had a longer duration. Duration is not the only change that has occurred over time. The objectives of these programs have also improved over time. Thus, it has gone from supporting cross-border collaboration in the field of research and technology, to encouraging genuine coordination at European level of activities and policies.

[2] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52018PC0435

through Article 179, the development of the European Research Area has become one of the objectives of the Treaty.

In 2008, the European Institute of Innovation and Technology[1] was created, with the aim of stimulating and producing world-leading innovations by creating well-integrated communities of knowledge and innovation, bringing together representatives from higher education, research and the environment, business and entrepreneurship. Thus, the European Institute of Innovation and Technology is a real support for businesses, educational institutions and research bodies that it helps to work together to create an environment conducive to innovation and entrepreneurship in Europe.

As mentioned above, for the period 2021-2027, in June 2018, the Regulation on the Europe Horizon program was proposed, which sets out its objectives and highlights the three pillars underlying this framework program: scientific excellence, global challenges and European industrial competitiveness and innovative Europe. This proposal for a regulation has undergone changes due to current challenges, in particular the Covid-19 crisis forcing the European institutions to rethink their research and innovation strategy.

2. SCIENTIFIC RESEARCH UNDER THE CURRENT CHALLENGES

We are currently facing a time of crisis for which European legislation in the field of research and innovation was not ready at the time of the adoption of the Regulation establishing the Framework Program for Research and Innovation[2]. At this time, we need to see it should meet new needs and provide answers to the questions raised by the Covid-19 pandemic.

Thus, we can see that all these challenges lead to the identification of the need to turn excellent scientific results into innovations that have a

[1] In the context of the Covid-19 crisis, the European Institute of Innovation and Technology is providing additional funding of € 60 million to help innovators generate high-impact solutions to address the unprecedented challenges of the crisis. https://europa.eu/european-union/about-eu/agencies/eit_ro

[2] Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013

real impact on today's society. In order to achieve this goal and to highlight the good results of the previous Framework Program, Horizon Europe aims to continue to support the whole cycle of research and innovation in an integrated way.

As mentioned above, with a structure based on three pillars, Horizon Europe aims to develop the European Research Area by interconnecting the three pillars. The first pillar, Open Science, aims to support scientific excellence in order to strengthen the European Union's leading position in science through the European Research Council, which promotes world-class frontier research and research infrastructures.

The second pillar, Global Challenges and Industrial Competitiveness, creates 5 clusters: Health, A safe and inclusive society, Digital development and industry, Climate, energy and mobility and Food and natural resources whose main objective will be cooperation and competitiveness. With the support of the Joint Research Centre, which is the Commission's internal scientific service, this pillar will provide scientific knowledge and technical support for EU policy-making.

The third pillar, Innovative Europe, is about open innovation, which will focus mainly on expanding revolutionary and market-creating innovation. In part, this goal seems to be fulfilled by setting up a European Innovation Council, which will support the work of the European Institute of Innovation and Technology and by collaborating with and between national and regional innovation agencies.

We believe that the way in which the first pillar of the framework program is implemented will have an effect on the other two as well. Thus, Open Science aims to increase the quality and impact of science, providing free access to scientific publications and research data, thus developing knowledge, helping to solve the challenges facing today's society. In support of this goal, the European Open Science Cloud (EOSC) aims to maximize the growth potential of the European digital economy, enabling the scientific community to store, exchange and reuse scientific data and results.

The efforts of the European Union Conference of Research Ministers on the European Research Area of 20 October 2020 were also directed in this direction. At this ministerial conference, the Bonn

Declaration on Freedom of Scientific Research[1], which establishes the freedom comprehensive and ongoing development of scientific research was adopted and is intended to defend and protect this freedom, in order to lay the foundations for Europe's future progress and well-being[2].

The Declaration mentions important principles of scientific research. Freedom of scientific research is seen as a universal public good, governed by the Charter of Fundamental Rights of the European Union and has constitutional status in most Member States, and is therefore considered a pillar of any democracy. Thus, research and the freedom to conduct scientific research are indispensable conditions for social, political and economic progress, especially in this challenging period for the whole of society, which is moving towards science for possible solutions.

CONCLUSIONS

The coming years will probably be the digital age of Europe, with the COVID-19 pandemic highlighting the importance of digital technologies for rescuing and developing scientific research and society.

In this context, the freedom of scientific research is a *sine qua non* of cooperation in research that is based on trust, openness and efficiency.

Facing many challenges, the European Union institutions are making considerable efforts to keep up with society's new needs and greater attention is needed to developing a policy that promotes research and innovation in Europe more broadly and supports sustainable development.

[1] On 20 October 2020 at the Ministerial Conference on the European Research Area (ERA), the EU research ministers and the European Commissioner for Innovation, Research, Culture, Education and Youth adopted the Bonn Declaration on Freedom of Scientific Research, thereby reaffirming the protection of freedom of scientific research within the EU

[2] For more information on the implementation of the Bonn Declaration on Freedom of Scientific Research in International Cooperation in Research and Innovation, as adopted via written procedure on 13 July 2021, see
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