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OPEN STATEHOOD AND CONSTITUTIONAL CHANGE – SOME BASIC REFLECTIONS

Rainer ARNOLD[1]

Abstract:

Constitutions are normative units that generally aim to regulate the fundamental conditions in a social organization, traditionally in a State, for an indefinite period of time. They are basic orders which can only assert their claim to effective regulation of the fundamental conditions of this organization if they have primacy in the hierarchy of norms. Some basic considerations in the filed of constitutional changes will be made on the basis of this significant development; reference will be made to the example of the current development of the German constitution.

Key words: *chenges; concstitutions; open statehood.*

INTRODUCTION

1.THE PROBLEM: NORMATIVE REGULATION AND THE TIME-BOUND NATURE OF THE CONSTITUTION

Constitutions are normative units that generally aim to regulate the fundamental conditions in a social organization, traditionally in a State, for an indefinite period of time. They are basic orders which can

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only assert their claim to effective regulation of the fundamental conditions of this organization if they have primacy in the hierarchy of norms.

Such basic regulations stand in time, they are time-bound. The question that arises is: is the normative content of the basic constitutional order changing? What is "change" in this sense anyway?

Is the change of constitutional norms already excluded from the outset, because a constitution as a unit of norms is supposed to regulate, i.e. has a reality-determining effect? Is the constitution, because of its regulative character, fixed in its normative command, fixed in its content to the will of the constitution-maker as it was at the time of its enactment? Does it always remain the same, as long as the normative unit of the constitution exists formally? Or is this normative unit functionally open, is its response to the social reality it has to regulate variable, at least relatively variable?

This question should be posed here in a specific context, in relation to a dynamic process that particularly characterizes the world of states today:

The opening of the state towards the community of states, i.e. the emergence of "open statehood" leads to an inter- and, in the area of the EU, to a supranationalization of national constitutional orders.[1]

In other words, has the constitution changed and is it still changing as a result of this process, which is taking place externally, outside the state, but with its participation? Is this a phenomenon of "constitutional change", which has long been a topic of discussion in constitutional theory. [2] Some basic considerations will be made on the basis of this significant development; reference will be made to the example of the current development of the German constitution.

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[1] See R. Geiger, Grundgesetz und Völkerrecht, 6th ed., 2013, 1-3.

[2] See for Germany R.Zippelius /Th. Würtenberger, Deutsches Staatsrecht, 33rd ed.,2018, p.71-73; E.-W. Böckenförde, Anmerkungen zum Begriff Verfassungswandel, Festschrift P. Lerche, 1993, 3-14; A. Voßkuhle,Gibt es und wozu nutzt eine Lehre vom Verfassungswandel? In: Der Staat 43 (2004), 450-459.

2. INTER- AND SUPRANATIONALIZATION AND THE EMERGENCE OF “OPEN STATEHOOD”

The process of transnational cooperation between states, which began particularly in the second half of the 20th century and is currently intensifying, is a necessary reaction to the increasingly intensive international interdependence of the essential tasks of the state. This process is of utmost importance for all areas of life: politics, economy, culture, science and so on. This has manifold effects on the law and is also particularly reflected in the development of constitutional law. Therefore, there is often talk of the tendency towards internationalization and, in relation to European integration, the supranationalization of the constitutional law. In the Germany, the concept of "open statehood" has emerged, which describes the state as "not closed, nationally introverted" but as open, turned towards international law, as "friendly to international as well as to EU law"[1], a state that also actively participates in the idea of European integration. The transfer of sovereign rights to the European Communities has, as the German Federal Constitutional Court (FCC) has put it[2], "opened up" the legal order in such a way that European law, i.e. the law of the EU, becomes an integral part of the national legal order.

The modern, contemporary stage of open statehood is steadily advancing and exerts a formative input on the content of the national constitution.

The question that arises here is whether the progressive development of open statehood has also brought about constitutional change without a formal reform process.

Some basic considerations on these questions will be made in the following.

[1] FCC vol. 111, 307,317/318; vol.123, 267, 347.

[2] FCC vol. 37, 271, 280.

I. HOW A CONSTITUTION CHANGES

1. THE CONSTITUTIONA AS A "FUNCTIONAL UNIT"

A normative system such as the constitution is a functional unit. It is composed of necessary elements and can also contain non-necessary elements.

Both types, the necessary as well as the non-necessary elements, can be (and usually are) further specified by normative details in the constitution and also in ordinary legislation or even in regulatory norms such as the standing orders of a state institution.

a. ***The necessary elements of the constitution***

The necessary elements of a constitution are three core values which constitute the "anthropocentric value order": *dignity*, *freedom* (which includes *democracy* as political freedom) and *equality*. Fundamental rights are written or unwritten specifications of freedom, the constitutional core element which guarantees a substantially and functionally efficient protection of the individual.[1]

The *rule of law* makes the basic values binding for the institutions of the state, thus has a "bridging function", represents the bridge between values and institutions that exert their public authority on the individuals in concrete terms. The rule of law is also one of the necessary core elements of the constitution; it is indispensable because it connects the two basic purposes of a constitution, the establishment of a basic institutional and instrumental structure that enables the exercise of public power, and the determination of the human-oriented system of core values.

This presupposes that a necessary element of the constitution is also the institutional system of the state, insofar as it is necessary for the

[1] See R. Arnold, „Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus", in: Max-Emanuel Geis, Markus Winkler, Christian Bickenbach, *Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag* (C.H. Beck, 2015) 3 – 10.

functional exercise of state power and corresponds to the core values of the constitution: the institution articulating the will of the people, i.e. regularly the parliament, the executive as the institution concretizing the will of the people expressed in the law (including the government as the planning institution), the courts as institutions securing law and freedom.

b. ***Necessary and variable specifications of necessary core elements***

Necessary core elements can have specifications that are necessarily linked to the essence of the core elements, and those that can have variable content but functionally correspond to the core element.

For example, democracy as the expression of political freedom which itself is an essential element of human dignity is specified by electoral equality. This is a specification which is indispensable for democracy and therefore linked to its essence; it a necessary specification of democracy.

However, the specifications can also be variable. It is important that they are, despite their variability, conform with the functional dimension of the necessary core element. An example is the form in which democracy is realized as an essential core element of a constitution. This is possible in a strictly representative form, as in Germany, or, as in many other countries, in a hybrid representative-plebiscitary form.

Both forms, provided they are effective and are also based on a democratic context (i.e. they are framed by the indispensable democratic conditions such as freedom of expression, especially a free press and the like), are efficient specifications of the fundamental value of democracy as an expression of freedom.

c. ***The variability of non-necessary elements***

Elements that do not belong to the realm of the anthropocentric basic order, such as norms on the territorial organization of the state, are variable; thus, to remain with the example, a state can be organized federally, regionally or unitarily. These are important provisions in a constitution, but they are not necessary in the sense explained here, but can vary according to tradition (such as the federal status in Germany) or

even by political expediency. They are therefore variable. However, they must not contradict the anthropocentric basic values.

It should be noted, however, that "not necessary" does not mean that such regulations are not significant in the constitutional text. Regulations, e.g. on the territorial organization of the state, are important, but they are not necessarily required by the anthropocentric character of the constitution. Certainly, territorial differentiation also means division of powers, i.e. a contribution to securing freedom. The right of municipalities to self-government is a generally accepted principle today. This, too, is an aspect of the separation of powers and thus the safeguarding of freedom that should not be underestimated. Nevertheless, such regulations are primarily administrative in nature and therefore, in our context, are not directly required by the concept of constitutional anthropocentrism.[1]

2. THE NORMATIVE PRESENCE OF THE BASIC VALUE ORDER IN A CONSTITUTION – THE WRITTEN AND UNWRITTEN PARTS OF CONSTITUTIONAL LAW

a. *The normative completeness of the anthropocentric basic order in the constitution - its expression in written and unwritten constitutional law*

The core elements of the constitution, which define the anthropocentric basic value order consisting of dignity, freedom and equality, are normatively in existence, because they are intrinsic to the system. These values are functionally connected each to the other.

[1] See for the structure of a constitution and the distinction of necessary and non-necessary elements of the constitution as well as to the anthropocentric basic value order R. Arnold, "Contemporary Constitutionalism and the anthropocentric value order – on the modernity of the 1921 Constitution of Georgia", in: *Journal of Constitutional Law, Special Edition*: The 1921 Constitution of the Democratic Republic of Georgia, Vol. 1-2 (2021): 11- 46.

They can be written in full, in part or (in seldom cases) not at all, but they always exist normatively though possibly unexpressed in the text of the constitution.

As far as they are hidden, because they are unwritten, they must be made visible through interpretation.

Specifications of a core element can be written and thus manifest, they can be unwritten but already exist normatively at present, or they can only emerge normatively over time. Let us take fundamental rights as an example. These are specifications of the core element of freedom, which in turn is rooted as a principle in human dignity.

If certain dangerous situations exist that require protection under fundamental rights, and if this protection under fundamental rights is not explicitly anchored in the constitutional text, then the core element of freedom intervenes, from which the protection is derived. Jurisprudence ultimately establishes the fundamental rights protection, even if this is not explicitly written into the text, but can be derived from the core element of freedom. If it is the case law of the highest courts, especially the Constitutional Court, and if this case law is constant, the unwritten specification of fundamental rights protection is made manifest.

Dangerous situations that require fundamental rights protection can also develop over time, especially due to new technological developments. This may prompt the legislature amending the constitution to explicitly incorporate this new specification of fundamental rights protection into the constitution. If this does not happen, as is often the case, it is the task of case law, especially constitutional case law, to express and manifest this new specification of protection. This is in turn derived from the core element freedom.

If we look at the German constitution, at the time of its creation the necessity of data protection was not yet known, at least not in the particularly dangerous way of digital data collection. Technological development has created the need to protect against this new danger. The concretization of the fundamental principle of freedom is provided by the case law of the FCC. [1]This newly recognized aspect of the principle of

[1] FCC vol. 65,1 (1983).

freedom is now specifically named and thus made visible through judicial interpretation.

The derivation of these new specifications of the protection of fundamental rights from the core element of freedom is possible because this element aims at a comprehensive protection of the sphere of freedom of the human being and, according to its function, wants to guarantee the safeguarding of freedom as such in a constitutional order. This is a general constitutional principle that is expressed, for example, in German law in Article 2 (1) of the Basic Law, but also in other numerous constitutions. Irrespective of whether this general principle of freedom is laid down in writing, it must be assumed that it is a basic principle inherent in the constitution, flowing from human dignity. It can thus be seen that the newly developing specifications of freedom are directly connected to the principle of freedom that exists in a constitution from the outset.

b. *The difference between determined and (relative) open specification areas*

However, there is another important aspect to be mentioned here: In the *value area* of the constitution there is a self-contained basic value order, as has already been emphasized repeatedly. The basic values are clear as such, precise because they relate to the very essence of the human being. The specifications of these values can, as pointed out, develop further in the course of time, receive new accentuations, and also bring further aspects with them, but in principle they must adhere to the basic values and cannot break away from their functional core. Specifications of this kind belong therefore to the determined area of values.

The *institutional sphere* of a constitution differs from the sphere of values in important respects.

On the one hand, there is a connection between values and institutions insofar as the values must be realized institutionally and therefore the actions of the institutions must be guided by the values and must also

reflect the values in the structure. The rule of law principle transfers the values of the constitution to the sphere of institutions.

Secondly, the constitutional norms on institutions are considerably more concrete. While the values are formulated in general terms, have an open and developmental conceptual content and, as a rule, also have the character of principles, the institutional regulations of the constitution are often more specific, more technical and have a concrete regulatory character. Consequently, their further development usually takes place through formal constitutional reform.

In the areas where institutions make political decisions, the regulations of the constitution are usually more open, not conclusively determined. Examples in German constitutional law are the question of confidence by the Federal Chancellor, the role of the opposition in the Federal Parliament, the right of the Federal President to review the substantive constitutionality of legislation before its promulgation and others. It is clear that constitutional regulation cannot restrict the political process in its political dimension; constitutional law establishes the legal limitation of the political process, but cannot itself regulate it in its design.

A relatively open field is the area of *open statehood* mentioned at the beginning. In German law, internationalization and the special form of supranationalization have their ideal origin in the principles and clauses of the Basic Law, which cause the opening of the state in favour of the international community and the idea of European supranational unification. In this respect, this process, which is developing so dynamically today in Germany and in other states, is predetermined, but because of the dynamics of these developments, it is not determined in detail by the constitutional text. However, a certain development can be seen in the fact that the central integration norm, which allows the transfer of sovereign rights, namely Article 24 (1) of the Basic Law, was tightened up after about 45 years of the constitution's existence, and thus this provision, due to the development of the case law of the FCC. Various precautionary limitations have been included in the transfer authorization.

Despite this and other adaptations of the Basic Law through formal reform, the space for further constitutional development is particularly open in the context of open statehood. It is precisely here that transformations, changes of the constitution are conceivable, made possible by common European developments brought to the state from outside.

c. *The time-related characteristics of a constitution: a ”living instrument ”, evolutionary, dynamic, prospective*

A constitution is a basic document that is intended to regulate the foundations of a state, its institutionalized structure and its set of values, for the duration of the constitution's existence, i.e. for an indefinite period of time. The state, the organized and value-oriented society, are involved in the historical process; they stand in time. A basic legal order such as the constitution cannot deny the time-bound nature of the state and of its legal basis, the constitution.

It is the aim of the constitution to assign the foundations of the state in a binding manner. In principle, this should be done in perpetuity. The functional goal of the constitutional norms shall be achieved throughout the existence of the constitution. However, the ways to achieve this and the mechanisms to be used must be adapted to changing situations.

A constitution is characterized by the tension between regulation and flexibility to adapt the regulation to developments due to actual changes in the normative prerequisites.

Various terms are used to characterize the Constitution as "living instrument"[1], as evolutive, as dynamic. What do these terms want to express?

[1] Originally developed on the international level (see G. Letsas , The ECHR as a living instrument: its meaning and legitimacy, Cambridge UP online publ. 2013, https://www.cambridge.org/core/books/constituting-europe/echr-as-a-living-instrument-its-meaning-and-legitimacy/ED7EA3F99CC8DB88BF2691FF9B44C25B),but transferable to constitutional law

The statement that the Constitution is alive, that is, not static, as if to say that it continues to evolve in the course of its existence. The same or similar is expressed by the term "evolutive". The term dynamic is also intended to emphasize the contrast to static.

These terms ultimately mean two things: on the one hand, the substantive aspect, that the constitution evolves, that its (relatively) open normativity enables changes in the normative content. As already emphasized, there is a tension between the constitution's claim to regulation and the possible changes in the preconditions and consequences of the regulation.

In addition, there is a methodological-instrumental aspect, namely the necessity to determine the meaning of the constitutional norm as it appears at the time of interpretation, and not as it was to be understood at the time of the constitution's creation.

The interpretation represents the objective will of the norm giver, i.e. not the subjective-individual will of the norm giver at the time of the new creation, but the will of the abstracted norm giver, as it is to be understood objectively. Today, it is widely established that this objective will is to be determined at the time of interpretation.

That the constitution is a "living instrument" is generally accepted, even if there are still a few voices that regard the constitution as a temporally fixed, cemented document that can only unfold its effect from the perspective of the historical point in time of the constitution's creation. However, this view, which is held by some in the USA[1], must be considered outdated. It does not take into account the constitution's task of creating a reality-based normativity.

Law, especially constitutional law, will regulate reality. This reference to reality in the norm is twofold: In the *norm motive*, the reason why the norm has been enacted, and the *norm target*, the legal effect that the norm seeks to achieve. The third aspect in this context is the *norm modality*, how the norm is shaped, as a rule or a principle, in a strict

[1] See Ilan Wurman, *A debt against the living. An introduction to originalism* (Cambridge University Press, 2017)

wording or with open terms. This is indirectly linked to reality in that it must be designed in such a way that the norm's target is best realized.

This pattern applies to rules with a clear conditionality. But this reference is also present in norms that realize goals, such as principles, albeit in a more open form. Clear, precisely defined norm formulations determine this reference more strictly; general concepts in norms, on the other hand, are open from the outset and more easily accessible to change.

d. *On the notion of "constitutional change" - Some reflections on the conceptual delimitations*

In order to consider the term "constitutional change" more closely, it is necessary to clarify a few aspects of what it *cannot* be.

It is quite obvious that a formal constitutional reform cannot be equated with constitutional change in our context. Formal constitutional reform is a constitutionally legitimized process that takes certain forms. The further development of the constitution is clearly determined within the framework of such a process and can be traced back to the constitution-maker. The fact that the constitutional reformer is as a rule bound to aggravated preconditions is based on the idea that the will of the people, as expressed in the constitutional text, should only be normatively developed further if there is a broad consensus in society.

The term "constitutional change" also does not include some other processes that make statements beyond the written text of the constitution. A few comments need to be made on this.

(1)If unwritten constitutional norms are made visible through jurisprudence, these are norms that necessarily result from norms or norm concepts already expressed in the text.

This means that they do not fall under the category of constitutional change. They are already determined by the constitution (and therefore not a new part of the constitution created by change) insofar as they are a necessary, but not textually expressed part of a written constitutional norm or a written or constitutionally immanent constitutional concept (such as the anthropocentric basic order).

(2)If the normative concept is given, such as the anthropocentric basic value system, its elements missing in the written text are to be made visible as necessary elements of the constitutional system through judicial interpretation. This is a necessary supplementation of an already existing, but textually incompletely expressed system.

Specifications of necessary elements of such a system, e.g. the interpretative adoption of special fundamental rights not yet expressed in the text, be it as a detailing of protection in an already existing area of danger, be it in a newly created area of danger, are not changes of the constitution, but refinements, additions, clarifications, etc. Their functional scope is already determined by the existing concept of norms, within the framework of which this takes place.

We can therefore state that a *normative determination* already existing in the constitution (through an already existing normative concept or also through a single norm) precludes qualifying a specification, addition, etc. that takes place within this framework as a constitutional change.

It should be recalled here once again that the anthropocentric basic order of values oriented towards human beings is the necessary characteristic of a genuine constitution and that specifications connected with it are therefore determined by this basic order, i.e. they cannot be results of constitutional change.

In addition, it should also be noted that a normative concept can be relativized or even essentially changed by constitutional change. However, this is not possible with the above-mentioned basic order of values, since otherwise the character of a genuine constitution would be lost.

As already stated above, the basic values of the constitution also have an impact on the institutional sphere; the institutions must structurally adapt to these values and observe them in their activities. In this respect, the same principles apply to the specifications in the field of institutions as those that apply to the values order. In so far as the institutional structure and activity are a necessary expression of the basic value system, the latter determines the specifications in the institutional area; these specifications are therefore not the result of an institutional

constitutional change. However, where this is not the case in the institutional sphere, i.e. where there is no predetermination by the basic value order but openness for the political process, a constitutional change can certainly take place.

(3)A particularly open area is that of international relations. Certainly, Here, too, there are constitutional definitions, often framework or concrete, which, however, leave a wide scope for the political development process and are also open to external influences from the inter- and supranational level. Thus, to take the example of the German constitution, the commitment to participation in the international community and to European integration are provided for as fundamental constitutional obligations, which are concretized by far-reaching provisions such as the authorization to transfer national sovereign rights to intergovernmental institutions and the adoption of the general principles of international law in the internal legal sphere.

However, this is only a partial determination of the constitutional concept, which leaves a great deal of space for further developments that are also reflected in constitutional law. It is therefore only a *relative determination*, while the rest is largely open. Since international processes and especially European integration, which is designed to evolve, are highly dynamic, there is ample room for constitutional change.

This will now be shown in the following, using the example of the German constitutional order, in the required brevity.

II. OPEN STATEHOOD AS A FIELD FOR CONSTITUTIONAL CHANGE

What are important developments in the inter-and supranational sphere that have significance for constitutional law? Some of the most important of them should be mentioned here:

(1)The formation and intensification of international human rights protection, also at the regional level, in particular through the European Convention of Human Rights (ECHR), has exerted a significant impact

on the interpretation of national constitutional norms for the protection of fundamental rights. This is a process that is also clearly evident in the supranational sphere: the fundamental rights of the EU, laid down in the Charter of Fundamental Rights, are also exposed to international interpretation, which in turn has an impact on the understanding of fundamental rights in the EU Member States. By way of interpretation this leads to a growing convergence of human and fundamental rights protection. This happens conceptually, without formal-normative connection, not hindered by the existence of separated legal systems, which remain autonomous as such. The often cited judicial dialogue is based on this phenomenon of conceptual transnationality. On the whole, the phenomenon described expresses the tendency to overcome the separate spaces in the field of law, limited by political borders, and to reach a transnationality, even universality of concepts, especially in the field of values.

(2) In the supranational sphere of the EU, whose structures are similar to those of a state, an even stronger influence on national constitutional law can be observed compared to the international sphere.

This supranationalization effect is, however, anchored in national constitutional law, albeit in the very general form of constitutional admissibility of the transfer of national competences and, as some constitutions put it, the limitation of national sovereignty. It is then left to case law to determine the extent and intensity of the influence of supranational law.

However, national jurisdiction is thereby essentially bound to supranational jurisdiction. This results mainly from the fact that the last-instance national courts must submit questions of interpretation of EU law to the EU Court of Justice, which also includes the questions of the operation of EU law. The fundamental decision of the European Court of Justice (ECJ) Costa/ENEL in 1964[1] laid the foundation for the constitutional structure of the European Communities, which has been widely accepted by the national constitutional courts, including the

[1] ECLI:EU:C:1964:66

German FCC. The supranational functional system has been consolidated over the years under the influence of European jurisprudence. The national constitutional courts have in the end only insisted that national identity be preserved. However, it should be mentioned that this is largely achieved through functional convergence. This means that it is not primarily important that national competence be maintained, but that the concepts existing in national law be functionally kept, even if they are realized by EU law.

The constitutional structure of the supranational community, as expressed by the ECJ in 1964, is characterized by three elements: (1) the autonomy of Community law, which has come into being as a uniform legal order through the transfer of national sovereign rights, and the Member States have thereby "opened up" their own legal systems, so that supranational law has also become part of the internal legal order, (2) the direct effectiveness of supranational law, and (3) the primacy of supranational law over national law in the event of a conflict (including constitutional law in the opinion of the ECJ).

The opening of the state in favor of supranational law has also opened national constitutions to the influence of this external law. The primacy means that national constitutional law and EU law coexist as part of the national legal order and that, in the event of conflict, EU law must be applied with priority. In addition, national constitutional law must be interpreted in the light of EU law. This was confirmed by the German FCC not long ago.[1]

Beyond this, however, dynamic supranational law also brings about processes that can be described as constitutional change.

The far-reaching and dynamic developments in EC/EU law have had a considerable influence on German constitutional law beyond the wording of the integration norms of Article 24 (1) and, from 1993, Article 23 (1)

[1] See FCC vol. 37,271,279, 296 (underlining that the “identity” of the Constitution is the limit of Community law primacy , an early predecessor of the constitutional identity concept as developed in detail in the Lisbon Treaty decision of the FCC in 2009). See also FCC vol. 22, 271, 279.

of the Basic Law. Since the Constitution only provides a general framework for international and European integration, there has been much scope for constitutional development. The development of the constitution has been essentially oriented towards the requirements of supranational law, as formulated by the Court of Justice of the EC/EU. They themselves have only developed restrictions that are intended to mitigate or exclude too strong an encroachment on national constitutional law.

It is not impossible that the adoption by the FCC of the features of the supranationality concept developed by the ECJ in earlier time could be regarded as a constitutional change. The primacy of Community law over constitutional law was also accepted by the FCC, and was only later restricted by the case law on fundamental rights, the question of ultra vires and constitutional identity.

The jurisprudence on fundamental rights (in the famous Solange I [1]and Solange II[2] cases) prepared the way for the inclusion of the restrictions in the constitutional act in 1993, when the new integration norm of Article 23 (1) of the Basic Law was created.

It is fair to say that the adoption of the ECJ's Primacy jurisprudence by the FCC constituted a constitutional change that can be described as an indirect constitutional change, since this jurisprudence was later incorporated into the new Article 23(1) of the Basic Law.

Other important developments include the interpretation of the German constitution in conformity with EU law (EU-friendly interpretation of national law, including constitutional law) and finally - probably a clear case of constitutional change - the expansion of the concept of "fundamental rights" as a criterion of review by the FCC in the context of constitutional complaints pursuant to Art. 93 para. 1 No. 4a of the Basic Law.[3] Until then, this standard of review was clearly limited to German fundamental rights. Since the relevant decision of 2019, this concept has been "Europeanized" by the Federal Constitutional Court and

[1] FCC vol. 37, 271
[2] FCC vol. 73, 339
[3] FCC vol. 152, 216, 237-243.

the fundamental rights of the EU Charter of Fundamental Rights, i.e. EU primary law, have been included into the category of "fundamental rights" despite the character of the Charter as an autonomous source of law distinct from German law. When German courts apply the EU Charter, it should then be possible to check whether these EU fundamental rights have been applied correctly. This review has now been taken over by the German FCC because, according to the Court, a gap in the protection of fundamental rights would otherwise have arisen.

We can thus see that important stages of deepening EU integration were accompanied by constitutional changes.

BRIEF CONCLUSIONS

(1)Constitutional change means a change of a constitutional normative determination without a formal constitutional amendment procedure.

This change can cover written and unwritten constitutional law.

Constitutional change can occur through interpretation, mostly by the constitutional courts or the supreme courts dealing with constitutional issues, but also by lower courts, whereby such interpretation must be based on established case law. The demarcation from the emergence of constitutional customary law (insofar as this is considered permissible at all in the national legal system) is difficult here.

In narrow exceptional cases, a constitutional change can also be achieved by the ordinary legislator or by state practice. An indication of a change is confirmation by the Constitutional Court or also a permanent unchallenged legislation or state practice of this kind.

(2) Constitutional change can only take place where there is space for it. The anthropocentric basic order of values in its fundamental elements is not subject to the possibility of change, because they are inherently part of an authentic constitution.

(3) Constitutional change is to be distinguished from various other phenomena.

Constitutional change is to be distinguished from the specification of a norm, principle or constitutional concept that already exists

constitutionally (written or unwritten) and determines the specification. Such specification is not something new, i.e. a change, but something that is predetermined. If, however, there is substantial leeway for the specification of a determined principle, a constitutional change can take place at the level of the specification, if only the functional content of this principle is not affected. For example, democracy as part of the determined principle of freedom can be changed from a purely representative system to a representative system with plebiscitary elements and vice versa in accordance with this principle of freedom through constitutional change.

The principle of freedom and thus also of democracy, on the other hand, is not subject to constitutional change. As a necessary component of the above-mentioned anthropocentric value system, it is part of the unchanging essence of the constitution.T his should be specifically emphasized once more.

(4) In the area of open statehood, which is only reflected to a small extent in the written constitutional norms, substantial constitutional changes have taken place, as in the example of Germany, and this largely through the case law of the Federal Constitutional Court. An important recent example is the expansion of the Constitutional Court's standard of review in the context of constitutional complaints by including the fundamental rights of the Charter of Fundamental Rights of the European Union.

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NATIONAL LEGAL BASIS FOR THE ACTIVITIES OF PRIVATE MILITARY AND SECURITY COMPANIES IN SOME AFRICAN STATES

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Abstract:

From the 1960s to the 2000s, the overthrow of legitimate and illegal governments, the struggle for power of various groups, etc. took place in Africa. In almost all known cases, mercenaries from different countries were involved in such incidents. Discussions about the need to take control of such a phenomenon as mercenarism have served as an impetus for the emergence and development of both national and regional legislation, first in the field of banning mercenarism and then in regulating the activities of private military and security companies.

This article examines the legal regulation of the status of private military and security companies in the most relevant cases on the African continent in order to highlight the specific elements and the need to ensure the implementation of the adopted normative provisions.

Keywords *national regulation; private military and security companies; mercenaries; African continent.*

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INTRODUCTION

Mercenary activity was widely used primarily in African countries, where the formation of independent states began after World War II. The withdrawal of European countries from the region, the policy of decolonization, internal conflicts and the low political education of the population led to the worst conflicts, the participants of which attracted soldiers from abroad.

However, in 1977, the African Union Convention on the Elimination of Mercenary in Africa[1] was adopted, as well as the Additional Protocol to the Geneva Conventions prohibiting the participation of mercenaries in hostilities: "A mercenary is not entitled to status of combatant or prisoner of war".[2]

The 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries and the above documents have in fact put an end to the activities of mercenaries in the modern sense of the term: "A mercenary who is directly involved in military or joint violence, as the case may be, commits an offense in respect of this Convention".[3]

In order to analyze the issue of regulating the legal status of private military and security companies (PMSC), it is strictly necessary to analyze the experience of African countries. Many African countries are either quasi-states or failed states, where order cannot be secured on

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[1] OAU Convention for the Elimination of Mercenarism in Africa, 3.07. 1977 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: https://au.int/sites/default/files/treaties/37287-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf>

[2] Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8 June 1977 ,art. 47. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf>

[3] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted and opened for signature and ratification by General Assembly resolution 44/34 of 4 December 1989 art. 3.1 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: https://www.ohchr.org/EN/ProfessionalInterest/Pages/Mercenaries.aspx,

their own,[1] as most states on the African continent have been colonies for a long time, and then they have followed the path of national liberation movements, civil wars, coups d'état and regime change.

Such a course in the history of the African continent development could only negatively affect the sphere of security. Historically, the use of the services of private structures has been a key element in the policy of expanding the borders of empires. In the modern sense of the word, these forces can be called neither national nor social.

These structures were created by a wide variety of local militias or local mercenaries, who were a key element in maintaining order and power. In the colonies, private power sometimes reached the same size as in the metropolis.[2]

Problems at the government level exacerbate deficiencies in providing state security. The inadequate regulatory framework, the lack of resources for national legislation, the shortcomings of regulatory systems and the lack of independence of the judiciary do not ensure the necessary control, transparency or accountability for the protection of human rights in the African continental states.[3]

For a long time, the PMSC longed to settle in Africa. The continent offers them many opportunities: the protection of sensitive people and infrastructure in unstable areas, the fight against piracy on merchant ships in the Indian Ocean, and even informal participation in armed conflict and tense situations.

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[1] Ильин М.В. Альтернативные формы уверенной государственности. В:Материалы конференции кафедры сравнительной политологии "Государства и их соперники в мировой политике". 19.11.2008. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:http://www.mgimo.ru/study/faculty/politcs/ksp/docs/34538/document34545.phtml>

[2] Abrahamsen R. and M. C. Williams Security Beyond the State: Private Security in International Politics (Cambridge, 2011), 10.

[3] Bryden, A. and F. Chappuis, *Gouvernance du secteur de la Sécurité : Leçons des expériences ouest-africaines* (Ubiquity Press, 2015), 5-6.. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:https://www.dcaf.ch/sites/default/files/publications/documents/learning_west_africa_FR_0.pdf>

Unlike mercenaries, which have been widely opposed by the Organization of African Unity (OAU), the presence of PMSCs on the continent does not seem to be of much concern to the African Union (AU), its successor in law, and the Economic Community of West African States (ECOWAS). This may seem paradoxical given that human security[1] remains a major concern for both organizations and that PMSC, especially large multinationals providing various security-related services, are growing in Africa.

This rapid growth of the sector poses many problems, especially related to public safety and respect for human rights. The lack of strict control over PMSCs by the competent authorities, the greed and vulnerability of the security guards mean that the sector does not always act in accordance with the legislation in force. In addition, in many states, the number of private security guards is higher than that of the police, and the PMSC often has more efficient equipment than the police. Thus, if we analyze Ivory Coast, the ratio is 3 private security agents for a police officer.[2]

Since the 1990s, the United Nations has used such private companies, mainly unarmed local contractors, to ensure the security of its premises and to protect its personnel and property. In recent years, the Organization has also engaged private military and security companies in complex emergencies and in situations of conflict or post-conflict in which the host government has not been able to ensure the security of United Nations personnel and property.[3]

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[1] ussein K., Gnisci D. and J. Wanjiru, *Sécurité et sécurité humaine: Présentation des concepts et des initiatives – Quelles conséquences pour l'Afrique de l'Ouest, Document de discussion*, OCDE, décembre 2004. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:https://www.oecd.org/fr/csao/publications/38826711.pdf>

[2] Conesa P., *Modernes mercenaires de la sécurité*, dans 'Le Monde diplomatique', avril 2003, 63 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:https://www.monde-diplomatique.fr/2003/04/CONESA/10080.>

[3] ONU, Doc. A/69/338, Rapport du Groupe de travail sur l'utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice du droit des peuples à disposer d'eux-mêmes, 21 août 2014, , p. 3. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:https://undocs.org/fr/A/69/338>

The study "UN Use of Private Military and Security Companies: Practices and Policies"[1] examines various aspects of UN use of PMSC. The United Nations justifies the frequent use of PMSC services by the existence of a new context characterized by increasing conflicts, increased vulnerability of local populations to human rights violations and the effects of subsequent humanitarian crises, but also reducing the means available to Member States to ensure the security of personnel and the organization's assets.

The high-level conference called on the African Union Commission to work towards the adoption of a code of conduct containing standards and good practices for the PMSC by the end of December 2015.[2] In another document on security sector reform, "the African Union regrets the use of private military companies in activities related to security sector reform in Africa, either by the Regional Economic Communities, Member States or their international partners".[3]

It also states that: "In cases where they employ the services of private security companies, they will have to comply with the relevant international, regional and national rules governing the activities of private military companies".[4]

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[1] Østensen Å. G., *UN Use of Private Military and Security Companies : Practices and Policies* (DCAF, Genève, 2011) [on-line]. [accessed 17.10.2021]. Available on Internet: <URL: http://www. dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies.>

[2] Le Document de Montreux sur les entreprises militaires et de sécurité privées ; Rapport de la Conférence régionale en Afrique francophone et lusophone sur le Document de Montreux, DCAF, Genève, 2015, 31, on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.montreuxdocument.org/pdf/regional/2014-06-04-Rapport-de-la-Conference-regionale-en-Afrique-francophone-et-lusophone.pdf>

[3] UA, Cadre d'orientation sur la réforme du secteur de la sécurité (RSS), Commission de l'Union africaine, Addis-Abeba (janvier 2013), § 20, 13, [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:http://issat.dcaf.ch/fre/content/download/60132/996775/file/SSR_policy_framework_fr.pdf.>

[4] Le Document de Montreux sur les entreprises militaires et de sécurité privées ; Rapport de la Conférence régionale en Afrique francophone et lusophone sur le Document de Montreux, p. 31.

ECOWAS's regional framework draft for governance and security sector reform, which is being developed, recognizes that democratic governance and human security are at the heart of the strategy, which aims at making security a regional public good, an essential service for citizens and an essential condition for achieving sustainable development.[1] In the Framework Document on Conflict Prevention, ECOWAS cites PMSCs as part of the target group for the "security management" component.[2]

The African continent is experiencing a growing development in the use of PMSC, and the trend towards privatization of security seems irreversible.[3] However, statistical information is scarce or non-existent, and research in the private security sector is very poorly developed.

Of all the states on the African continent, the **Republic of South Africa**, which is the largest private power market in Africa, is also the most advanced in terms of PMSC regulation. Currently, about 5,000 companies are registered here, employing over 300,000 officially registered employees.[4] Given that the number of South African police

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[1] Uzoechina O., « Gouvernance et réforme du secteur de la sécurité en Afrique de l'Ouest : du concept à la réalité », Centre pour le contrôle démocratique des forces armées Genève (DCAF), *Document d'orientation politique* - № 35 (Genève, février 2014) : 23[on-line]. [accessed 25.09.2021]. Available on Internet: <URL:https://reliefweb.int/sites/reliefweb.int/files/resources/FINAL%20Policy%20Paper%2035%20French_0.pdf>

[2] Document cadre de prévention des conflits de la CEDEAO Commission de la CEDEAO, Abuja, janvier 2008, p. 36, [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.ceja.ch/images/CEJA/DOCS/Bibliotheque/Legislation/Africaine/Textes%20Regionaux/DD/DD4.pdf.>

[3] Holmqvist C., "Private Security Companies; The Case for Regulation"; SIPRI *Policy Paper* No. 9, Stockholm International Peace Research Institute (Janvier 2005): 3, [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.sipri.org/sites/default/files/files/PP/SIPRIPP09.pdf.>

[4] "Gumedze S. Regulation of the Private Security Sector in Africa". In: *Policy Paper*. Institute for Security Studies (ISS), (2008): 22 [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:http://www.issafrica.org/uploads/PVTSECPOLPAPFEB09.PDF>

officers is just over 150,000,[1] it is clear that there are twice as many private military guards in the country than representatives of the national police.

Another necessary conclusion is worth mentioning that there are twice as many weapons in the hands of the PMSC as in the hands of the representatives of the state structures. The emergence of a market for private security forces in South Africa, in fact, does not differ from the general trends in the formation of a similar market in other African countries.

Some African PMSCs, especially those in South Africa, are also very active on the continent. These are companies that differ from the rest of the continent in number, size, but especially in their experience in war zones in the sub-region, especially in Sierra Leone. South Africans are the pioneers of war privatization and the founders of the system of private military companies such as Executive Outcomes, which was founded in 1989 by former South African soldiers and was disbanded in 1998 following numerous violations.[2]

However, in the case of South Africa, we should not talk about the emergence of a new market for PMSC, but about its transformation, because before this period, there were mercenary detachments in the country that, according to known precedents in some countries of the continent, were prohibited by law. The development of legislation on the regulation of private military structures in the Republic of South Africa is largely associated with the participation of South African contractors in the Executive Outcomes PMSC in political-military events from the mid-1990s to the early 2000s in states such as Angola, Zimbabwe, Sierra Leone, Ivory Coast, Mozambique, Papua New Guinea, Equatorial Guinea, etc.

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[1] Gumedze S. "The Private Security Sector in Africa" // *ISS Monograph Series* (2008, July): 106 [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:https://issafrica.s3.amazonaws.com/site/uploads/MONO146FULL.PDF>

[2] « Global Analysis, La privatisation de la guerre », dans *France* (1 février 2009) [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:http://globalanalysisfrance.blogspot. com/2009/02/la-privatisation-de-la-guerre.html.>

The reaction of the South African government to the participation of its citizens as part of the armed groups in military-political operations on the territory of foreign states led in the first stage to the creation in 1998 of the Law on the Regulation of Foreign Military Assistance. However, this normative act did not define the legal activities of private security and also interpreted the concept of "foreign military assistance" very broadly. This prevented the legal integration of former military personnel as well as former mercenaries.

At the same time, the number of military personnel employed in the PMSC continued to grow steadily. In the next stage, the Law on the Regulation of the Private Security Industry of 2001 was adopted in South Africa, which contains a broad definition of what is meant by security services.

According to the Law, the concept of "security services" includes any protection or protection of a person or property; counseling on the protection or protection of a physical person or property, as well as on any other types of security services provided by law, or in matters related to the use of security equipment; providing response services related to any kind of protection or protection of a person or property; ensuring order and security in the spaces used as sports, recreational, entertainment or similar facilities; the manufacture, import, distribution or advertising of controls acting as a private detective; training or instruction of employees of a private security company in security matters; installation, maintenance or repair of security equipment; tracking signals or transmissions from electronic security equipment, etc.[1]

In 2002, the government adopted the Private Security Taxation Act. In 2006, the South Africa adopted the Law on the Prohibition of Mercenary and Other Mercenary Activities in Armed Conflict Areas, which provides for the registration and licensing of PMSC. The licensing

[1] Private Security Industry Regulation Act № 56 of 2001, [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/SouthAfrica5.pdf>

authority according to the law is the National Committee for the Control of Conventional Weapons, established in 2002. The new law prohibits military and security activities in the territory of those states where there is a threat of an armed conflict.

The list of these states is established by the National Committee.[1] However, in 2006, the South Africa's private military company Meteoric Tactical Solutions was awarded a contract worth nearly $ 500,000 to provide security services while escorting British officials to Iraq.

Later, it turned out that the company did not receive permission from the National Committee and provided services illegally. A similar incident occurred with this company when its employees protected Swiss officials.[2] Two former mercenaries who ran the company were later arrested in Zimbabwe.

The need to regulate the private security industry in the South Africa, as well as to regulate the cooperation between the private and the state security affairs in order to balance the relationship and prevent the complete privatization of the security sector by private structures, was generated by a series for reasons.

Firstly, it was facilitated by a failed attempt to implement the demobilization and reintegration program. The transition period that began in the South Africa after the fall of the apartheid regime was marked by a comprehensive program aimed at integrating the former internal security forces with the National Defense Forces of South Africa.

At the same time, there have been cuts in the South African National Defense Forces, the authorities have tried to limit the number of employees in law enforcement to the needs of the state. As a result, many former members of the South African National Defense Forces have started private military and security affairs.

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[1] Republic of South Africa, Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill. [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:https://www.gov.za/sites/default/files/gcis_document/201409/b42-050.pdf>

[2] Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill.

Secondly, the increase in crimes following the period of political transformation in South Africa and the inability of state security agencies to maintain order have led to an increase in demand for PMSC services.

Thirdly, the appearance of new players in the South African market in the mid-1990s (TNCs, NGOs, international organizations, etc.), which make extensive use of PMSC services, has also contributed to strengthening privatization in the security sector.

In 2008, PMSC's annual turnover in South Africa exceeded $ 6 billion.[1] The demand for services, due to the fact that the state sphere does not meet its functions, leads to the privatization of this sphere by private forces and to a further decrease in the effectiveness of state mechanisms.

And in the **Ivory Coast**, the sector is thriving rapidly, especially with the political crisis that the state has faced in recent years and with the significant growth of the economy. The number of private security companies exploded during and after the conflicts in this state, many of them acting illegally. This proliferation of PMSC is partly due to the lack of public confidence in the public security forces, as well as their lack of effectiveness.[2]

With the adoption of the 2005 Decree, the Ivory Coast has strengthened the legislative arsenal of private security companies, which until then consisted only of general laws such as the Criminal Code[3] and the law sanctioning violations of the regime of using weapons,

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[1] Hendricks Ch. And T. Musavengana. "The Security sector in Southern Africa". Institute for Security Studies. *Monograph* № 174 (October 2010): 136 [on-line]. [accessed 28.10.2021]. Available on Internet: <URL:https://www.issafrica.org/uploads/Mono174.pdf>

[2] De Tessière S., "Reforming the Ranks, Public Security in a Divided Côte d'Ivoire", dans *Small Arms Survey 2011: States of security* (Cambridge University Press, 2011): 193-194.

[3] Loi n°1981-640 du 31 Juillet 1981, instituant le Code pénal. [on-line]. [accessed 28.10.2021]. Available on Internet: <URL:https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/49255/128598/F-1693355407/CIV-49255.pdf>

ammunition and explosives.[1] This decree also regulates the establishment of PMSCs, the conditions imposed on managers and agents to exercise their profession and regulates the use of possession and use of weapons.

According to the law, three types of approvals are required. PMSC itself not only has to be licensed, but its managers and staff are also subject to the licensing procedure. Indeed, under the terms of the 2005 decree, no one can be hired as a manager or hired to participate in an activity of the private security or cash transport company unless one holds an authorization issued by the Directorate of Territorial Surveillance.

The 2007 decree sets out a number of preconditions for both managers and PMSC agents. Thus, supervisory staff must justify the necessary studies, while operational personnel must have at least a certificate of primary education, and companies are required to provide training of their personnel in authorized training centers every two years.

The major challenges of PMSC management in Ivory Coast are centered here around the implementation of ambitious and structural reforms that will make it possible to clean up this sector in the long run. Also, in the absence of appropriate reforms and awareness of the players working in the sector, the rampant privatization of security and in particular the decommitment of the state in a number of areas could lead to a new crisis.[2]

In Liberia, PMSCs began to appear in the late 1970s and early 1980s. Company services at the time were in demand in the extractive industry, however, as a result of internal political tensions that lasted here from 1989 to 2003, and of the economic downturn, part of the PMSC was shut down due to difficult economic conditions and then new players

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[1] Loi n°98-749 du 23 décembre 1998, portant répression des infractions à la réglementation sur les armes, munitions et substances explosives. [on-line]. [accessed 28.10.2021]. Available on Internet: <URL:https://www.unrec.org/docs/harm/COTE%20D%27IVOIRE/loi/R%82pression%20des%20infractions%20%85%20la%20r%82glementation%20sur%20les%20armes,%20munitions%20et%20substances%20explosives.pdf>

[2] Comlan E. K., « La Côte d'Ivoire ». En: *La Privatisation de la Sécurité en Afrique Défis et Enseignements de la Côte d'Ivoire, du Mali et du Sénégal DCAF* (2016) : 71

emerged in the Liberian private military security business market. PMSC's main clients are international organizations, diplomatic structures, extractive industry representatives, small and medium-sized enterprises, and the rich population of Liberia.

However, the biggest clients are international missions, USAID, etc.[1] Since 2003, the UN Mission has been operating in the country, with the aim of restoring the foundations of statehood and the functioning of the political system.[2] Later, in 2005, the United States, represented by two PMSCs: DynCorp and Pacific Architects and Engineers, created the Liberian Armed Forces.[3] Today, Liberia has about 2,000 US-trained PMSCs, and more than 4,000 Liberian police officers have received special training and education under the auspices of the UN mission by 2011.

It should be noted that in Liberia, as in Uganda, PMSC employees are prohibited from carrying weapons. That is, we can talk about the "division of labor" between the police and the PMSC, as a typical example of cooperation between state and private power structures. Liberia's largest PMSC is Inter-Con Liberia, owned by the US-based Inter-Con security group, founded in 1990. This PMSC provides support to different UN missions and is employed in protecting USA Embassy and in important facilities kept by USA government.

To obtain a license, a PMSC must register with the public security department of a Liberian government agency, renew its license annually, and submit monthly incident reports. In Liberia, PMSCs are regularly attacked, and PMSCs themselves often detain criminals or prevent crime. All these incidents must be reported.

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[1] Kirunda S.W. "Private and Public Security in Uganda. The Private Security Sector in Africa". In: *Country series. ISS Monograph series* № 146 (2008. July): 34 .

[2] United Nations Mission in Liberia. [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://peacekeeping.un.org/en/mission/unmil.>

[3] Gumedze S. "From Market for Force to Market for Peace. Private Military and Security Companies in Peacekeeping Operations. Pretoria", Institute for Security Studies, *Monograph Series* No 183 (2011): 26. . [on-line]. [accessed 28.10.2021]. Available on Internet: <URL:https://www.issafrica.org/uploads/Mono183.pdf

In practice, however, the requirements for company registration are very vague, lacking a clear explanation and therefore difficult to meet. Moreover, there is nowhere an express obligation to register only local companies, i.e. those run by Liberian citizens.

At the regulatory level in the private security industry itself, attempts were made to unionize PMSCs in 2009, when 40 companies merged into the Liberian Association of Private Military and Security Service Providers. The creation of the union was dictated by the desire of both large qualified companies and low-skilled companies to develop some general standards of behavior in the industry in the absence of adequate control by the state. In addition to state and industry initiatives, efforts are being made to regulate the activities of PMSCs according to the needs and expectations of the beneficiaries. The UN mission in Liberia is checking potential contractors.

In addition, the UN mission, together with the UN Development Program, has set up a joint working group for the PMSC, which inspects UN-contracted companies. The verification covers the availability of licenses and insurance, training standards, personal data of employees, working conditions and selection procedures. Thus, the UN controls a very small number of companies, which in fact must be carried out by the state in relation to the private security industry in general.

As in other African countries, Liberia has a program to demobilize and reintegrate former participants in the civil war, as a result of which more than 100,000 militants yesterday were to be integrated into society in 2003-2004.

In addition, the demobilization and integration program extends not only to former men but also to women who took up arms during the Liberian civil war. During the war, the number of women with guns in their hands reached 25,000, or about 30-40% of the total number of armed participants in hostilities.[1]

[1] Maharg S., Arnusch A. Security Sector Reform: A Case Study Approach to Transition and Capacity building (2013), 122.

The private military and security companies are also developing in **Mali**,[1] where the market is very attractive due to the crisis that this state has just overcome. Thus, the country would have 263 PMSCs approved in December 2015 according to the study on the state of the sector.[2]

The first PMSC, the Malian Security and Surveillance Society (SOMAGES), was established in May 1986. The personnel of these PMSCs was recruited mostly from young people in the rural exodus, with a very low level of qualification and education. The emergence of democracy and multipartyism in 1991 led to the birth of many national PMSCs and also allowed foreign PMSCs to enter the local market.

The emergence of new types of threats, such as the terrorist attack that targeted the capital in November 2015, as well as the lack of public confidence in the public forces, have favored an extremely rapid evolution of the private security sector in Mali. Thus, the number of PMSCs in Mali has increased considerably since the onset of the crisis in 2012, providing services tailored to the circumstances.[3]

The development of the sector and its professionalization have also made it possible to attract university graduates, as well as many young women, who find in PMSC an alternative to unemployment.[4]

Mali does not have a central operational coordination body yet, so the various initiatives aimed at security sector reform are not coordinated with each other. Mali is in dire need of peace and security. For this to

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[1] Soudan F., « Le Mali ; futur marché des armées privées ? », En: *Jeune Afrique* (26 novembre 2012) [on-line]. [accessed 28.10.2021]. Available on Internet: <URL:http://www.jeuneafrique. com/139255/politique/le-mali-futur-march-des-arm-es-priv-es/>

[2] Soudan F., Le Mali ; futur marché des armées privées ?

[3] « Sécurité privée, un secteur en plein boom ». Dans: *Journal du Mali* (28 Janvier 2016) [on-line]. [accessed 25.09.2021]. Available on Internet: <URL:http://www.journaldumali.com/2016/01/28/securite-privee-un-secteur-en-plein-boom/>

[4] Almouloud L., « Sociétés de surveillance et de gardiennage: l'expansion du marché de la sécurité privée ». Dans *Mali Actu'* (21 Mars 2013) [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: http://maliactu.net/societes-de-surveillance-et-de-gardiennage-lexpansion-du-marche-de-la-securite-privee/>

happen, PMSCs have a crucial role to play, given the diversity of security issues and the intensity of terrorist attacks on private institutions under their control.[1]

The activity of private security companies in Mali is regulated by Law no. 96-020/AN[2] and its implementing decree.

Personnel training is the responsibility of the company that hires them. The training generally includes theoretical and practical lessons through martial arts. In this sense, Article 27 of Law no. 96-020 expressly provides that: "the training of surveillance and guard personnel, the transport of cash and personal protection belongs to the companies that hire them. The security services have access at all times to these companies and training centers to ensure security and training conditions".[3] However, there is no legal framework to formalize recruitment procedures and each company organizes its activities, establishing its own internal regulations.

The Department of Homeland Security, through its employees, is responsible for ensuring compliance with these provisions by the PMSC. The legal provisions are in some cases simply ignored. For example, the prohibition for any non-Malian person to be "director, associate, legal or de facto director of a company engaged in surveillance and security activities, transportation of funds or protection of persons"[4] does not apply.

The effective control is very rare, if not non-existent. This lack of control can be a source of abuse and/or non-compliance with adopted standards. The control process is thus inadequate and effective controls

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[1] Coulibaly K. S., « Le Mali ». En: *La Privatisation de la Sécurité en Afrique Défis et Enseignements de la Côte d'Ivoire, du Mali et du Sénégal DCAF* (2016) : 92.

[2] Loi n°96-020, 18.01.1986 relative aux entreprises privées de surveillance et de gardiennage, de transport de fonds et de protection de personnes. [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Mali%20-%20Mali_Loi%2096%20020%20entreprises%20privees%20surveillance_2.pdf>

[3] Loi n°96-020, Art. 27

[4] Loi n°96-020, Art. 6.

are almost never carried out: the only moment of effective control is carried out during the examination of an application for approval.

In Senegal, the situation is the same and the private military and security companies sector is not being analyzed.

In 1978, law no. 78-40, prohibits the exercise of private police activities and submits to the authorization the opening and operation of any company of surveillance, guarding or escort of private property. According to this law, PMSCs are placed in the category of temporary work and classified in the collective bargaining agreement.[1] Consequently, PMSCs do not have any specific status under this law, but are treated in the same way as any other business, regardless of the specific activity.

The 1978 law and the 2003 decree were adopted in response to the rapid expansion of the private security sector in Senegal. The expansion of the sector can be explained, among other things, by the lack of human and material resources of national public security institutions and their inability to solve the equation of amplifying urban and juvenile delinquency.[2]

With this in mind, the Senegalese government sets up the Proximity Security Assistance Agency (PSA) in 2013. This new hybrid security structure, motivated by the need to establish "security governance"[3] at the national level, aims at developing partnerships between the police and local actors to prevent and fight crime.

As mentioned above, Decree 2003-447 was adopted in 2003, which is a direct response to the proliferation of requests for approvals as

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[1] Loi n°78- 40 du 6 juillet 1978. [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://senegal7.com/tension-pre-electorale-jamra-appelle-au-desarmement-de-toutes-les-milices-privees/>

[2] Conseil des Ministres du 12 mars 2015, Communiqué [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.sec.gouv.sn/actualit%C3%A9/conseil-des-ministres-du-jeudi-12-mars-2015>

[3] L'innovation sénégalaise de la « gouvernance sécuritaire de proximité » : Une nouvelle vision du Chef de l'Etat, site officiel de l'ASP, [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: http://www.asp.gouv.sn/?p=411>

well as to the numerous observed incidents. It is therefore established the subsequent control of the approved activities as well as the obligation of a thorough investigation on the moral and material guarantees for the exercise of their activities.[1] In order to obtain an operating license, the company must review the standards for its directors and personnel.[2] However, the text does not mention the respect for human rights or international humanitarian law as a condition for obtaining a license and does not require mandatory and regular training of PMSC personnel.[3]

Unfortunately, there are few official figures in the sector and there is no dedicated PMSC register, and the Senegalese legal framework does not require the maintenance of a national register of them.[4]

It should be noted that the employment conditions and areas of intervention of these companies are not very transparent and suffer from the lack of effective control from the part of the authorities and the lack of precision of regulatory provisions.

The combination of the PMSC proliferation in Senegal and the limitations and shortcomings of the national regulations studied above, in particular the lack of an adequate selection and training process, have led to the qualification of PMSC employees as a threat to public safety.[5]

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[1] Décret n° 2003-447 du 18 juin 2003 abrogeant et remplaçant le décret n° 79-113 du 1er février 1979, fixant les conditions d'exercice des activités de surveillance, gardiennage et escorte de biens privés. [on-line]. [accessed 25.09.2021]. Available on Internet: <URL: http://www.jo.gouv.sn/spip.php?article277>

[2] Décret n° 2003-447 du 18 juin 2003, art. 3.

[3] UN Human Rights Council, A/HRC/27/50, Annual report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 30 June 2014, Para. 59. [on-line]. [accessed 29.11.2021]. Available on Internet: <URL:http://www.refworld.org/docid/53eb37194.html.>

[4] UN Human Rights Council, Annual report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 30 June 2014, para. 27.

[5] Sagne A., « Le Sénégal ». En: *La Privatisation de la Sécurité en Afrique Défis et Enseignements de la Côte d'Ivoire, du Mali et du Sénégal DCAF* (2016) : 126.

The activities of PMSCs **in Uganda** are governed by the 1994 Police Act, in particular the PMSC Police Control Regulations of 2004,[1] which replaced the 1997 PMSC Control Regulations.[2]

The new rules cover the procedure for setting up a company and regulating its activities, but only apply to PMSCs registered in Uganda. The Uganda Registration and Licensing Committee is responsible for the registration, licensing, supervision and control procedures.[3]

According to the Association of Private Security Organizations of Uganda, there are 60 registered PMSCs in the country. The total number of staff is about 20 thousand people.[4]

A training manual for PMSC personnel was to be adopted in Uganda, but has not been developed, and companies need to build on the standards adopted in the South Africa and adapt them to working conditions in Uganda.

Another reason for the involvement of the PMSCs was that the ratio of police forces to the country's population remains below international standards. Due to the lack of police forces and their low efficiency, it was decided to transfer some of the police functions to these companies. For companies operating in Uganda, hiring private security agents has become part of their business behavior.

It is interesting to note that the PMSC Control Regulations only regulate the activities of Ugandan companies, effectively banning foreign PMSCs. This has led to a ban on the import of such services. However,

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[1] Uganda, The Police Act, 1994. on-line]. [accessed 29.11.2021]. Available on Internet: <URL: https://www.upf.go.ug/download/legal_mandate/The-Police-Act.pdf>

[2] Kirunda S.W. Private and Public Security in Uganda. The Private Security Sector in Africa. Country series. ISS Monograph series № 146. (2008. July):17

[3] Status Report on Anglophone Africa, Comprehensive Study and Analysis of National Legislation (Ghana, Mauritius, Sierra Leone, and The Gambia, Nigeria, Uganda, Kenya). [on-line]. [accessed 29.11.2021]. Available on Internet: <URL: https://r.search.yahoo.com/_ylt=AwrJ6ysTZqhhcy8A75dXNyoA;_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZAMEc2VjA3Ny/RV=2/RE=1638454931/RO=10/RU=https%3a%2f%2fwww.ohchr.org%2fDocuments%2fIssues%2fMercenaries%2fWG%2fLegislation%2fAnglophoneAfricaStudy.doc/RK=2/RS=2.m..47wFnvhOx1nhkx57y_9KGo->

[4] Commonwealth Network. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: http://www.commonwealthofnations.org/sectors-uganda/business/security/>

the export of services is quite common. In particular, during the Iraq campaign of 2003, several thousand Ugandan soldiers were deployed to guard US military bases. The export of Ugandan soldiers was made possible by an agreement between the Ugandan government and some Western PMSCs: SOC-SMG, Triple Canopy and EOD Technology.[1]

The emergence of the PMSC market in Uganda, as in many other African countries, follows almost the same scenario. The failure of the police to ensure security in these states has led to an increase in demand for the services of private military companies and to the development of this market in general. At the same time, the regulation of PMSC activities, as well as the relationship between local police forces and these companies, is very poorly developed.

CONCLUSIONS

The African continent was by far the most affected area in the world by the negative effects of the mercenary phenomenon, especially in the 20th century. Following the analysis, we can see that both the states on the continent and the regional organizations created by them have proposed and adopted a set of international normative acts of a regional nature that have as object the regulation of the fight against mercenarism.

Over time, mercenarism have undergone a metamorphosis and become private military and security companies whose employees are directly involved in both armed conflict and illegal actions to overthrow legal governments. These circumstances have generated the imperative to expressly regulate both the legal status of these companies and their employees at national and regional level.

In some African states, the number of employees of private military and security companies exceeds the number of persons employed in the service of the state responsible for ensuring public order and rule of law. Also, the material equipment, logistics and training of the employees of these companies is clearly superior to the equipment of

[1] Коновалов И.П., Валецкий О.В. Эволюция частных военных компаний. (Пушкино.: Центр стратегической конъюнктуры, 2013), 138.

the state structures, which generates a dependence of the state structures on the military and private security companies.

Despite fairly well-developed national legislation in the African continent, their inability to ensure the effective implementation of these regulations can be seen, which makes this area most often affected by both armed conflict and the presence of private military and security companies that violates these provisions.

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SOME ASPECTS CONCERNING THE PURPOSE OF THE JURIDICAL RESPONSIBILITY OF THE STATE

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Abstract:

The juridical responsibility of the state is a complete phenomenon involving both beginnings of private origine and pubic one. The juridical responsibility in a right state represents the achievement of state obligation for repairing the damages (abolition of consequences) the re-establishment of the rights and legitimated interests of the victims as a result of illicit deeds of the state bodies and public civil servants, an obligation which is settled especially by the juridical norms of internal right of the state.

Key words: *Juridical responsibility; state; norms of right; phenomenon.*

INTRODUCTION

The investigation of the phenomenon of juridical responsibility of state should start with the determination of the proper notion, but we wile mention that this determination presents certain difficulties. It is absolutely obvious that the juridical responsibility of the state is a complex phenomenon composed of two categories: juridical responsibility and the state. For these reasons the determination of essence of phenomenon of juridical responsibility of the state is exclusively possible in the conditions in which we will investigate its

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both components, each of them being treated non univocal in the speciality doctrine.

The notion of "responsibility" is principal not only in the legal field. The social sciences (sociology, psychology, philosophy etc.) utilize this category to characterize various parts of individual behavior and different phenomena. In addition at the lever of general conscience the responsibility has a specific meaning a little distinctions of our context.

The antic thinkers starting with the sophists (Democrit and Socrate for ex.) considered the responsibility as being an inferior quality of a person. The specific conditions from antiquity led to the determination of the responsibility sense as being a superposition of the society will on the individual one as revenge with reference to inadequate behavior of this one.[1]

The Middle Ages is characterized by the tendency of accenting the responsibility identification with punishment. In this way T.H. Hobbes had in his view by the notion of responsibility which he used for the first time in the low science an abstract responsibility of co citizens connected by "social contract" for the actions of the state. Kant makes a parallel between responsibility and duty, but Hegel does it bet week responsibility and necessity of following an adequate behavior conscious by every person.

By the half of XX century is being attested an approach much more wide of the responsibility than a simple reaction to the negative behavior. Among the supporters of this approach we can name the philosophs F. Pollak, J.P. Sartr, N.Heint etc. These ones were supported in 60-th years by a such authors like R. Kosolapov, V. Markov, V. Tugarinov, A. Cherepnina etc. [2] Thus, A. Cherepnina considers that the responsibility for the future actions (especially both for the further perspectives and for the nearest future) represents the soul and crystallized essence of any

[1] D. Baltag and E.Moraru, *Statul subiect al răspunderii juridice* (Chișinău, 2015), 30.
[2] D. Baltag, *Teoria răspunderii şi responsabilităţii juridice* (Chişinău: Tipografia Centrală, 2007), 31-34.

responsibility of any genre whenever and wherever.[1] As a result the science rooted the tradition of responsibility as a phenomenon reflecting the dualist relation between an individual and a social group who belongs this vis-à-vis of certain pre-established rules.

The classification of various forms of social responsibility is being made depending of the social sphere in which works the given person. In this connection in the doctrine is being known political, moral, social, organizing, of party, juridical etc.[2] All these forms are connected among them by the capacity of the person for understanding the necessity of respecting certain rules and to correlate his behavior in concordance with there ones.

In accordance with the opinion of prof. D. Baltag the juridical responsibility as a form of social responsibility has the mission to protect the public order, the rights and liberties of collectivity members, the life, health and person integrity, to guarantee the normal unfolding of living together in society[3]. We mention that the juridical responsibility represents only one between the forms of social responsibility.

The juridical responsibility and social one have a relation pre-established like among a part and entire, and all that we have mentioned earlier concerning the social responsibility has a direct relationship with juridical responsibility. The concepts of juridical responsibility its definition, the normative construction of this one determines the juridical and organizational content of the mechanism of juridical responsibility, the place and role of the phenomenon of juridical responsibility in the entire law system.[4]

In this way we consider that the problem of the phenomenon of juridical responsibility remains to be discussed and with a lot of ambiguities for example, the prof. Gh. Avornic presents diverse approaches for the concept of juridical responsibility, especially that

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[1] Baltag, *Teoria răspunderii şi responsabilităţii juridice*, 31-34.
[2] Baltag and Moraru. *Statul subiect al răspunderii juridice*, 45.
[3] Baltag, *Teoria răspunderii şi responsabilităţii juridice*, 31-34 .
[4] E. Moraru, "Social responsability – a special relatiouship", in: *The international conference „European unions history culture and citizenship: Current problems of Europea Integration, 2-nd Edition* (Piteşti, 2009).

"juridical responsibility is a measure of compulsion applied by the state for having committed an illicit deed, expressed by applying certain penalties with a material and organizational character or of patrimonial order."[1]

The long contest on the problem of juridical responsibility did not end with the elaboration of a unique conception in this regard. At the same time we need to understand that the responsibility represents one of the basic pillars of the law system one of the factors with determining impact on a good functioning of this system. For these reasons the study of the juridical responsibility represents one of the priorities both of general theory of right and of sciences of the same branch. As a result of long debates on the subject of juridical responsibility occurs enough various treatment of the problems of juridical responsibility of the state. It is evidently that diverse existent visions concerning the juridical responsibility let their stamp on the treatment of state responsibility of state bodies and civil servants.

The state always presented an intricate social structure with own specific elements: public power, territory, boundaries, population, law system, state bodies etc. In addition this structure, this system is not a static system it is contrary a dynamic one. The state being developed and suffers modifications resulting from the logic-didactic process of objective historical evolution of the society. However, this process is not characterized by uniformity but on the contrary it is often specific to its diversity and contradiction.

In determining of state activity an important role belongs to the essence and its social mission. Without doubt the stat represents a multifunction and complicated social phenomenon. The trials to define the state are attested still from antiquity but till present-day does not exist unanimity in this sense.

The state was seen as a socio-political community by the thinkers like Aristotel, Toma d Aquino, J. Lock, Grotius, Kant. Thus, the founder

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[1] Gh. Avornic şi coaut. *Teoria generală a dreptului* (Chişinău: Cartier juridic, 2004), 490.

of political theory Aristotel treated the state as a totality of citizens, specific collectivity generated by the life, necessities, but was born in the result of expressing their members will or reaching the common good.[1]

Basically at present stage we meet adepts of this theory. For example L.S. Mamut considers that people constitute the state support and in this way the state is only "the form of political organization of people that reach the level of civilization in the process of economic and social development".[2]

The majority of theorists support that in various historical periods the state is characterized by certain specific characters. As for example the author L.A. Morozova attributes to the category of these elements the following:

-the existence of political public power that dispose of an apparatus of management and compulsion;

-the territorial organization of the population, the state sovereignty;

-the compulsory character of normative act of the state;

- the existence of state property, resulting from taxation and in general from the functioning of the fiscal system.[3] It is recognized that these characters to be the most important because they determine politico-juridical character of the state.

Taking into account the characteristics named before, L.A. Morozova defines the state as being "the society organizing from the political point of view and public politics too, endowed with state sovereignty, with special system of management and compulsion which establishes the right order on the concrete territory." [4]

We estimate this definition as being relevant and successful and also corresponding to our idea to analyze the state as a subject of juridical responsibility. The general theory of the law claims the presence of some

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[1] Baltag, *Teoria răspunderii şi responsabilităţii juridice*, 31-34.

[2] Мамут Л.С. *Народ в правовом государстве*. - М., 1999. С. 18.

[3] Морозова Л.А. *Понятие, сущность и типология государства*. В кн. Теория государства и права /Под ред. проф. В К Бабаева. - М., 1999. С. 53.

[4] Морозова, *Понятие, сущность и типология государства*, С. 53.

theories de facto and de jure for occurring of juridical responsibility or for entering in function of the institution of juridical responsibility.

The foundation of jure of juridical responsibility of the state is presented by the juridical form stipulating the possibility of applying of responsibility measures in the result of some illicit facts and also the juridical act of application which materializes the juridical norm, the concrete form and drawing the juridical responsibility (the judicial decision etc.)

The foundation de facto of the state juridical responsibility is represented by the composition of the illicit deed promoting the appearance of juridical relations of responsibility. The specific of these juridical relations is firstly determined by the state character in its role of subject of juridical accounts. In this order of ideas, in order to analyze the legal responsibility of the state, it is necessary to highlight the legal relations within which the state has the role of subject that violated the law.

All these relationships can be divided in two large categories legal relations of international law and juridical ones of human rights. Consequently as part of these juridical relations the state should play a role of passive subject so it is necessary firstly to dispose of quality of right subject. For example the subject quality of civil relations derives from the civil legal capacity of the state and also from its tort capacity. The civil juridical capacity of the state like in the case of other right subjects supposes the capacity of his one to have rights and civil compulsion juridical tort capacity of the state represents the capacity of this one to answer for committing illicit civil actions. The mere holding of sovereignty is a reason for considering the juridical civil capacity of the state.

Thus as it is unanimously accepted, the final the ultimate goal of responsibility is to exclude illicit actions from daily life. But it is an ideal purpose, but in fact it is being tended to minimize the number of illicit deed and of negative consequences which are attracted for the society.

Taking into account the just said above we may point out the following objectives of juridical responsibility of the state:

-firstly the state responsibility has objective the protection of right order, of the rights and interest of illicit deed of victims;

-secondly the state responsibility is oriented to the maximum possibly compensation of the damages caused by acts and illicit deed of the state bodies and of civil servants;

-thirdly the institution of the state responsibility contributes to the reduction of the number of illicit deeds by warning of likely authors of illicit actions about inevitability of their punishment as a result of not respecting the law;

-fourthly it contributes to the juridical education of citizens and civil servants too.[1]

CONCLUSIONS

In conclusion we may mention that the objectives of juridical responsibility find their reflection in the functions of the state responsibility. The functions of juridical responsibility are defined by the right theory as being the principal directions through which are reached the responsibilities objectives and in which is being reflected the mission of this one. In other words said, the objectives of the juridical responsibility determine the functions of this one.

The functions of juridical responsibility of the state are as follow: sanctioning (of punishment); reparable (of re-establishing of right order); instructive; preventive.

Taking into account of the corresponding functions of juridical responsibility of the state with these objectives, we will allow ourselves to let them without commentaries. We will only mention that the essence of sanctioning function is visible only in punishment of the culprits in committing of illicit deeds of the civil servants and state bodies exercising the public power on behalf and or by virtue of the mandate on the state behalf.

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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.

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RATIO DECIDENDI END THE SCIENCE OF LAW

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Abstract:

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

Key words: *The jurist; jurisprudence; source of law; legal practice; science of the law.*

INTRODUCTION

From the perspective of the way in which the law is born, one can differentiate between the *ius scriptum* and the *ius non scriptum*[3].

Ius scriptum is stated by the public organisms, invested with the power to establish compulsory legal norms for the citizens, who have entrusted them with this power. It can be the creation of the legislator,

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[3] *Dig.*, 1.1.6 § 1

which is rarely happening, or, may establish norms previously established as customs.

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

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

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

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

The case law is one of the concepts of the science of law to which the most contradictory opinions are related. Two of the largest systems of law, the Roman-Germanic and the Anglo-Saxon ones, traditionally have

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[1] *Dig*., 1.3.39

[2] Andreea Rîpeanu, *Drept roman* (Bucharest: Pro Universitaria, 2008), 17-18

[3] Irina Grigore-Rădulescu, *Teoria generală a dreptului* (Bucharest: Universul Juridic, 2010), 117-118

[4] Maria Fodor, *Drept procesual civil* (Bucharest: Universul Juridic, 2014), 38

[5] Fodor, *Drept procesual civil*, 39

separate opinions on the recognition of the jurisprudence as source of law.

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

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

The Roman-Germanic legal system[2], by declaring the continuity of the Roman law, has waived the active casuistic, in favour of the written law. It has recognized the concept of *res judicata*, according to which the legal decision is mandatory only for the parties who have participated in the examination of the case. Thus, the legal decision has been recognized as legal fact. The echoes were different in the continental European states. The case law in the legal system of the northern European states traditionally has a value that high that certain jurists came up with the proposal to include those legal systems in the family of the common law. Among the states of Western Europe, France had the strongest attitude, the *Code of Napoleon* consecrated the fact that the judge cannot refuse to examine the case under the pretext of the inexistence, uncertainty or insufficiency of the legal norm (Art 90 of the French Civil Code), but

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

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

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

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

In the literature of the common law states traditionally it is considered that the case law is created by a few judicial decisions. In the process of counterbalancing different judicial decisions by comparing them was shaped a common norm which needed to be developed[3].

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

[2] Milson, *Studies of the History of Common Law*

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

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

To a certain extent, the judicial law is contrary to the case laws. Thus, the judicial case law is the traditional source of law in the common law states. Having this quality, it faced a difficult evolution, its creation lasting for centuries, being finalized by the recognition of the case law (*stare decisis*) in the 19th century, by differentiating the law of the precedent from the judicial law. The principle of the case law has stated that the judges are compelled to follow the decisions of the courts which, according to the law, are placed on a hierarchic superior scale (*the vertical action of the principle of the case law*). The superior courts are compelled to follow their own previous decisions (*the horizontal action of the principle of the case law*). The principle of the case law has proven the general mandatory feature of the legal decision, not only for the parties involved in the case examination, thus permanently shaping the denial in the application of the principle of *res judicata*. The fact that the judges are compelled to consult the case laws and to find the logical connection between cases; the doctrine has examined it as the domination of the law, the limitation of the legislation by the courts, the inner will of the judges. The principle of the case law has permanently recognized the creation of the legal norms by the courts, though subsequently it has been subjected to several modifications[1].

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

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

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

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

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

For the purpose of exercising the control over the existing situation in the common law states, there were created special councils[2].

Substantial changes in the systematization of the judicial case law have been introduced through informatics. The constant evolution of the case law with the intent of preserving the traditional structure of the

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

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

system of law has generated a series of consequences in the states of the common law[1].

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

JUDICIAL PRECEDENT AND THE COMMON LAW

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

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

removal of the contradictions between different judicial cultures (states with joint jurisdiction).

Thus, in Great Britain the single common law was formed through legal decisions. This fact has a historical explanation, but not logical[1]. For the English law it is applicable the use of the terms common and case law (precedent)[2]. The establishment of the single law (common) has begun after the Normand conquest. According to English scientist P. Stein, the English law represents a species of the German law, in which the two currents were formed (Anglo-Saxon and Normand). The Normand kings had more success in establishing a centralized governing, managing to maintain the noblemen in a state of dependence, offering the English law a series of specific features[3]. In the creation of the law, a special role was played by the royal courthouses. In case of litigation, the person was entitled to address the local courthouse (the customary law); the church judges (the canonical law); the city court (the commercial law); the baron's court or the royal court (active throughout the country). Initially, the royal courthouses followed the king, settling the litigations. Later, the judges settled in a London's neighbourhood from where they moved for examining the cases. Because in every locality there were a series of customs, the judges tried to take them into account. This situation has been determined by the fact that in the royal courts was used the institution of the jurors, who were locals and in their personal assessment of the litigation were using the local customs known to them. Also the parties had the right to bring witnesses to confirm the existence of a certain custom. Thus, the judges moving around the state became aware of different customs. Returning to London, knowing each other and having the opportunity to communicate intensely (by living in the same neighbourhood), they debated the cases handled and compared the

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

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

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

judgments handed down in similar cases. The common debate of the practice has eased the establishment of a common position of the judges for similar cases. E. Jenks stated that: "*it is not possible the precise determination of the means for establishing the common law. By means which cannot be established, the royal judges, meeting in London after returning from the territory, for the purpose of examining the cases in centralized courts... and Westminster, have agreed upon the need to merge different local customs in a common or single law, which shall be applied throughout the state*".

Even if the judicial precedent suggests the existence of a certain judicial hierarchy, differentiated by a superior and inferior statute, the British legal system has been fundamentally reshaped and reformed in the past two centuries. The reform did not stop the development of the law of precedents, but has had a significant influence. The unification of the courts of common law with those of the chancellor during the reform of 1873-1875 has conditioned the unification of the precedent law with the law of equity. Because the law of precedents is understood as the law of the jurists, a determinant factor was the qualification made by the jurists. It was supported by the professional corporations existent in the 16th century, establishing certain requirements for the persons applying for membership. They have contributed not only to the maintenance of a high professional level and the prestige of the judicial profession, by guaranteeing continuity in the approach of the law, thus contributing to the development of the single national law. In order to be a good jurist, to build a career in the legal area, was necessary the detailed study of the principle of the precedent. This is the reason why, in many common law states, there has been a stage in which the teaching in legal education institutions was insured exclusively by jurists. They combined the theoretical knowledge with practice. The fact that the teaching was pointed in the direction of the practice and especially towards the law of precedents generated a series of consequences. This gave rise to the method of legal thinking and culture, especially directed towards the precedent. In England, for centuries, schools near professional unions have thrived (*Inns of Court*), where the teaching was insured by lawyers and judges. In the same time, universities like Oxford or Cambridge,

until mid 19th century, were specialized in the teaching of the Roman and canonical law.

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

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

THE LAW OF PRECEDENTS AND THE COMMON LAW

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

In this context, the Australian scholar A. Castles stated that "*for centuries the method, practice and style of the judicial thinking, which were developed using and around the unwritten British law, have created a specific judicial culture. This was the culture in which the judges, same as the legislator, were recognized as spokesmen of the law...*"[2].

Nowadays, the common law is one of the largest families of law, of which there are states whose population represents 1/3 of the world population, but which are economically, culturally and traditionally different (Great Britain, Ireland, USA, Canada, Australia, Oceania, New

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

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

Zeeland, Nigeria, Ghana, Kenya, Uganda, Tanzania and Zambia). The common element of these states is that in the past they all were under British ruling, which also determined the direct action of the British law, including the jurisprudential one, thus the reception of the principle of precedent

In the national systems of law two stages are to be emphasized: the stage of the active reception of the British jurisprudential law and the acceptance of the principle of precedent and the stage or the establishment of the national jurisprudential law. In addition, simultaneously with the legal norms were created the judicial thinking, technique and the educational system. In other words, *the entire factory of the common law has been transported by colonists in the new territories*[1].

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

As a result, the common law (jurisprudential) was seen as a natural law, which eased its spreading. In this context, the French scholar R. David stated that "*the thought that the law represents the reasoning, causes for British, according to tradition, a feeling of supranational. The term of common law is usually used without a national label. The*

[1] Castles, *Australian Legal History*, 553

common law is not intended as a supranational law; it is the legacy of all nations of English language"[1].

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

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

The purpose of the Judicial Commission was to bring the law of the community states in accordance with the British law, so that *the law from the north to the south of the borders to develop as uniform as possible*[3]. Nevertheless, while the national systems were established, the role of the Judicial Commission diminished and even it began to attach more importance to national specificity in the decision-making process. The Judicial Commission has recognized the fact that the force of the common law does not lie in uniformity, but in its capacity of adjusting to the particularities of the national law.

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

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

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

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

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

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

The proof of the fact that the judicial precedent allows the unification of different judicial cultures is represented by the joint jurisdictions. Their specificity results from the fact that the jurisprudential law coexists either with the Roman-Germanic law (French, Roman-Dutch) or with the religious law (Muslim, Hindu). From the category of the states with joint laws are part Scotland, Quebec, Louisiana, India, Pakistan, Israel, Philippines, Trinidad and Tobago and the South-African Republic. For certain law systems, the judicial precedent is placed in second plan, in other, on the contrary it has a new development, because its flexible feature allows it to adjust to different conditions and therefore in a legal system certain branches are formed

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

based on the common law, while in others on the fundament of the Roman-Germanic law (see Louisiana, Quebec).

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

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

THE EVOLUTION OF THE JURISPRUDENCE IN CONTINENTAL EUROPE

In the Roman-Germanic law system it is accepted the reference to the solutions given in similar cases[1], for the solving and reasoning of certain jurisprudential solutions, even if this legal system does not consider as source of law the precedent. The same phenomenon happened with the Praetorian law over the Roman law[2]. The Praetorian law was formed by the creative solutions of magistrates for the purpose

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

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

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

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

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

In its turn, the judicial precedent did not receive the recognition as source of law for the bourgeois continental law. The French civil code of 1804 has prohibited for the courts to rule based on general provisions. This normative act, with considerable influence, has dictated directly the non-application and non-recognition of the jurisprudence as source of law in the legal system of the continental Europe. It is the case of the Austrian Civil Code of 1811 (Art 12) and of the German Code of 1794 which stated that for the decisions to be rendered under no circumstance shall be taken into consideration neither the scientists' opinions nor the

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

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

precedent decisions ruled by other courts. As result, with the emergence of codifications, the main source of law has become the law itself, drafted and adopted by the legislative organs. The precedent, though a subsidiary source of law, continued to hold an important role in that particular legal system.

CONCLUSIONS

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

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

The legal practice, also known as the jurisprudence (Lat. jurisprudentia) represents all decisions ruled by all the courts. It is the science of the law[2] or, in other words, the knowledge of the divine and human things, the science of what is fair and unfair (Ulpian). The jurisprudential law or the common law system (from the English common law, case-law, judge-made law) represents the legal system developed based on the jurisprudence of the courts, auctoritas rerum perpetuo similiter indicatum. In the common law systems, the law is drafted and/or modified by judges, who have the authority and responsibility to create law using the case law[3].

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

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

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

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THE TOPICAL NATURE OF THE WHISTLEBLOWING DIRECTIVE TRANSPOSITION IN OUR COUNTRY

Elena Emilia ȘTEFAN[1]

Abstract:

Although it seems an easy thing for a person to do, the activity of disclosing information on actions or facts that can endanger public interest, is in fact difficult to achieve, due to the fact it entails certain legal consequences. Therefore, the states were concerned to adopt normative acts for the protection of such persons who make public disclosures, as well as for the sanctioning of potential abuses in the exercise of this right of disclosure. The protection of the public interest is, in this context, an imperative goal.

A recent normative act, entitled in common language the "Whistleblowing Directive", provides the obligation of the European Union Member States to transpose it into the national legislation, within a certain period.

Therefore, this study analyzes the most important provisions of the "Whistleblowing Directive" but also the status of the current legislation in our country because it is important to know that, at the time of the draw up of this study, this European normative act has not been transposed into the national legislation, by exceeding the two-year deadline.

Keywords: *public authority; public interest; Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of the persons who report breaches of Union law; law; Parliament.*

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INTRODUCTION

Known as the "*Whistleblowing*" Directive, the starting point of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of the persons who report breaches of Union law[1] is the finding that, "*At Union level, reports and public disclosures by whistleblowers are one upstream component of enforcement of Union law and policies. They feed national and Union enforcement systems with information, leading to effective detection, investigation and prosecution of breaches of Union law, thus enhancing transparency and accountability*[2]".

In what concerns transposition deadline, art. 26 with marginal name – *Transposition and transitional period* provides the following in paragraphs (1) and (2):

"Para. (1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

Para. (2) By way of derogation from paragraph 1, as regards legal entities in the private sector with 50 to 459 workers, Member States shall by 17 December 2023 bring into force the laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels under Article 8(3)".

Therefore, according to this article, our country has the obligation to transpose this Directive until 17 December 2021, which has not happened so far, by exceeding the two-year deadline set by the Directive[3]. Furthermore,

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[1] Public information, available online at: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32019L1937&qid=1642005043403, visited on 12.01.2022.

[2] Paragraph 2 Preamble.

[3] Issues regarding the transposition of directives in Romania have often been analyzed in the doctrine; see as example, a recent study on the implementation of the deposit guarantee system, Marta-Claudia Cliza and Laura-Cristiana Spătaru-Negură, "Towards a Cleaner Planet – The Implementation of the Deposit Guarantee System in Romania", in *Perspectives of Law and Public Administration*, vol. 10, no. 1

according to the *Annual plan for transposing the European Union Directives for 2021*, adopted by Memorandum, we note that, in Appendix no. 1, position no. 43 is filled by Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of the persons who report breaches of Union law[1]. The annual transposition plan (...), states that the public authority in charge which undertook the transposition is the Ministry of Justice, with transposition deadline: November 2021. As the doctrine shows, "every state is bound to ensure the provision of public goods or services in order to fulfill its obligations[2]".

From this point of view, the subject in question has a topical and important nature, the object of which being the mandatory applicability of a European normative act, however, we do not intend to analyze herein the case law of the European Court of Justice[3] on whistleblowers.

Therefore, this study aims to summarize the most important provisions of the "*Whistleblowing Directive*", by using law-specific scientific research methods.

THE CURRENT STATUS OF THE LEGISLATION ON THE PROTECTION OF WHISTLEBLOWERS

According to 2021 Rule of Law Report[4] of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "The legal framework on integrity remains fragmented. The 2020 Rule of Law

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(2021): 54-64, available online at: http://www.adjuris.ro/revista/articole/an10nr1/5.%20Cliza,%20Spataru.pdf.

[1] Public information available online at: https://www.mae.ro/sites/default/files/file/anul_2021/2021_pdf/anexa_1_plan_2021r.pdf, visited on 12.01.2022.

[2] Ioan Lazăr, *Măsurile financiar-fiscale și politica Uniunii Europene în domeniul ajutoarelor de stat* (Bucharest: Hamangiu, 2018), 36.

[3] "A key element in understanding the policies of the European Union is the role of the case law of the European Court of Justice, as a source of law" according to paperwork: Alina Conea, *Politicile Uniunii Europene* (Bucharest: Universul Juridic, 2020), 9

[4] Public information available online at: https://www.integritate.eu/Files/Files/Untitled.FR12.pdf, pag.3, visited on 12.01.2022.

report highlighted continued challenges to the legal framework for integrity and the need for stability, clarity and a robust framework (...)".

The status of the national legislation on whistleblowers, until the date of the transposition of the European Union adopted in 2019, consists of Law no. 571/2004 on the protection of personnel within public authorities and institutions and other establishments reporting breaches of the law[1]. The new draft of law on the protection of whistleblowers is currently in the Romanian Parliament and in the parliamentary circuit for adoption. Specifically, we refer to Draft of law no. 573/2021[2] registered with the Chamber of Deputies on 23 November 2021[3]. In terms of the chronology of this draft of normative act adoption, from the query of the website of the Ministry of Justice, it appears that in April 2021, the Draft of law on the protection of whistleblowers was submitted to public debate[4] and, subsequently, in the same period of the year, the Minute of the public debate which resulted from the public consultation process was published.

Therefore, we currently have two national normative acts on this matter, namely a normative act adopted before our country signed the Accession Treaty[5] (namely 2005), which is applicable and a draft of a normative act in order to be in compliance with the acquis communautaire.

At this point in time, we do not aim to detail the provisions of these two normative acts, the research on this subject remaining open, depending on the progress of the aforementioned legislative procedure. We would like

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[1] Law no. 571/2004 on the protection of personnel within public authorities and institutions and other establishments reporting breaches of the law, published in Official Journal no.1.214 of 17 December 2004

[2] Public information available online at: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19690, visited on 12.01.2022

[3] Public information available online at: http://www.cdep.ro/proiecte/2021/500/70/3/pl704.pdf, visited on 12.01.2022

[4] Public information available online at: https://www.just.ro/proiect-de-lege-privind-protectia-avertizorilor-in-interes-public, visited on 12.01.2022

[5] Public information available online at: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=uriserv%3AOJ.L_.2005.157.01.0203.01.RON&toc=OJ%3AL%3A2005%3A157%3ATOC and https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=OJ:L:2005:157:TOC, visited on 12.01.2022

to make mention of two more things: firstly, the Legislative Council approved in favor of[1] Draft of law no. 573/2021, with a series of observations of legislative technique and, secondly, in terms of a time frame dedicated to the debate of this normative act, public information shows that the deadline for the submission of the report drawn up by the specialized commissions is set on 8 February 2022. Therefore, given the status of this new normative act, it seems that it will take more time for its adoption by the Parliament and, at this point in time, we cannot estimate an approximate date of its publication in the Official Journal.

WHAT DOES THE WHISTLEBLOWING DIRECTIVE PROVIDE?

What does a whistleblower mean?

According to the directive, there is a broader framework for defining the persons who can be whistleblowers[2]. Specifically, art. 4 sets out four categories of persons reporting in the public interest and whom the directive applies to:

- "*reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, at least, the following: persons having the status of worker, within the meaning of Article 45(1) TFEU, including civil servants; persons having self-employed status, within the meaning of Article 49 TFEU; shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees; any persons working under the supervision and direction of contractors, subcontractors and suppliers;*
- *reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended;*

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[1] Public information available online at: http://www.cdep.ro/proiecte/2021/500/70/3/cl573_2021.pdf, visited on 12.01.2022

[2] We hope that these provisions will not lead to discrimination. See in this respect, Marta-Claudia Cliza, *What Means Discrimination in a Normal Society with Clear Rules?*, in Lex ET Scientia International Journal no. 1/2018, vol. XXIV, pp. 89-99, available online at: http://lexetscientia.univnt.ro/download/622_LESIJ_XXV_1_2018_art.009.pdf.

- reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations;
- the measures for the protection of reporting persons set out in Chapter VI shall also apply, where relevant, to: facilitators third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context".

Therefore, reporting person means: "a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities*".* Reporting persons shall qualify for protection under this Directive provided that:

- *"They had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and*
- *They reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15".*

According to Law no. 571/2004(...) whistleblower is: "*the person making a report according to letter a)*[1]*and who is employed by one of the public authorities or institutions or by the other establishments referred to in art.2".* Furthermore, the supreme court, in its case law, ruled on the meaning of public authority, by establishing that: "the term of "public authority[2], as defined by art. 2 para. (1) letter b.) of Law no. 554/2004 on the contentious administrative (...), is not similar to that of "public institution" as provided for by art. 2 para. (1) item 39 of Law no. 273/2006 on local finances[3] (...)"[1].

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[1] Letter a.)- whistleblowing: "*notification made in good faith of any deed entailing any infringement of the law, of the professional ethics or of the principles of good administration, efficiency, effectiveness, economy and transparency*".

[2] See Marta-Claudia Cliza and Constantin-Claudiu Ulariu, *Drept administrativ. Ediție revizuită conform modificărilor Codului administrativ* (Bucharest: Pro Universitaria, Bucharest, 2020), 9.

[3] For another analysis, from another point of view, see Ramona Ciobanu and Zoltan Varga, *Romanian and hungarian fiscal systems. Regulations and fiscal apparatus*,

The material scope of the Directive. Terms

The Directive lays down common minimum standards for the protection of persons reporting the following three categories of breaches: "*breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: public procurement, financial services, products and markets, and prevention of money laundering and terrorist financing; public health (...); breaches affecting the financial interests of the Union (...); breaches relating to the internal market"*.

For the purpose of the Directive, competent authority means "any national authority designated to receive reports in accordance with Chapter III and give feedback to the reporting person, and/or designated to carry out the duties provided for in this Directive, in particular as regards follow-up*"*.

Furthermore, two closely related terms are also defined: breaches and information on breaches. Therefore, the term of *breaches* entails a complex content: "*acts or omissions that: (I) are unlawful and relate to the Union acts and areas falling within the material scope referred to in Article 2; or (II) defeat the object or the purpose of the rules in the Union acts and areas falling within the material scope referred to in Article 2".* The term of *information on breaches* means: "*information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organization in which the reporting person works or has worked or in another organization with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches"*, and the term of *report* means "*the oral or written communication of information on breaches"*.

Reporting channels and other provisions

The Directive sets out three ways of reporting: "internal reporting channels; reporting through external reporting channels; public disclosures".

Transilvania University of Brasov. Bulletin.Series VII:Social Sciences, Law (2020): 307-317.

[1] The High Court of Cassation and Justice, Contentious Administrative and Fiscal Division – The panel for legal issues settlement, Decision no. 28/2017, published in Official Journal no. 378 of 22 May 2017

"Persons who are considering reporting breaches of Union law should be able to make an informed decision on whether, how and when to report[1]*"*.

Furthermore, the directive sets out: "the obligation of confidentiality (by virtue of which, "the identity of the reporting person shall not be disclosed to anyone unless the person in question gives the consent in this respect"); personal data protection; the records of reports or measures for the protection of data subjects (the right to an effective remedy by a fair trial, the presumption of innocence, the right to a fair trial, the right to be heard and the right to access to its own file)".

Chapter VI – *Protection measures* is very interesting, due to the fact it expressly provides the – *the prohibition of retaliation*. Furthermore, measures are established in order to support or protect against retaliation. According to the Directive *retaliation* means: "*any direct or indirect act or omission which occurs in a work-related context, is prompted by internal or external reporting or by public disclosure, and which causes or may cause unjustified detriment to the reporting person"*.

Specifically, the Directive sets out the conditions under which the reporting person is protected: "*Without prejudice to Article 3(2) and (3), where persons report information on breaches or make a public disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive"*.

The obligation to establish internal and external reporting channels

According to the Directive, it is very important that: *„legal entities in the private and public sector should establish appropriate internal procedures for receiving and following up on reports* (...)", under art.8 para. (1). "This obligation shall apply to all legal entities in the public sector, including any entity owned or controlled by such entities. Member States

[1] Para. 59 Preamble

may exempt from this obligation municipalities with fewer than 10,000 inhabitants (...)". Furthermore, "*Member States may provide that internal reporting channels can be shared between municipalities or operated by joint municipal authorities in accordance with national law, provided that the shared internal reporting channels are distinct from and autonomous in relation to the relevant external reporting channels"*. With regard to the external channels, the Directive establishes that the Member States shall make sure that*: "the competent authorities publish on the website, in a separate section, information on the protection of whistleblowing"*.

CONCLUSIONS

We consider that the scope of this study was achieved, namely to present the most important provisions of the *Whistleblowing Directive*, a European normative act with impact on the national legislation. We did not aim to detail other provisions of the Directive, but to draw future lines of research in this regard.

However, it is unlikely to pass ignored the fact that, in legal terms, our country failed to fulfilled the deadline set up for the transposition of the Directive, as established, namely 17 December 2021, by exceeding this stage by more than 2 years, but the prospects seem to be optimistic, in the sense that there is a draft of law in the Parliament on the protection of whistleblowers. In conclusion, not only the obligation of the Member States to transpose European acts into national legislation is highlighted, but also the digitization process, in the context of the exceptional situation created by Covid 19 virus, which is, in our opinion, one of the biggest challenges for the global public administration.

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INITIAL TREATIES - PRIMARY SOURCES OF EUROPEAN UNION LAW

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Abstract

The issue of European construction - as its first stage, the partnership - Germany - was reiterated from historically by Robert Schuman, in the statement of 9. 1950 in Paris, by formulating a fundamental principle, whose central point and It was to build a high authority - today's committee - to manage basic production - coal and steel - of France and Germany initially, and subsequently the countries that will adhere. The Paris Declaration led to the creation of the economic community of coal and steel (ECSC, 1951), followed by the European Economic Community and the Economic Community of Atomic Energy (1957). The transformations faced by the European communities since its inception, have imposed permanent reconsideration of their objectives, which has led to the establishment of the European Union by formalizing it by the Treaty of Lisbon and the European Union's Treaty.

Key words: *High Authority; Commission; CEEC; CEEE; EAEC; European Union.*

1. ECSC TREATY, THE FIRST STEP TOWARDS INTEGRATION

"Europe is not suddenly done, by an overall construction, it is done through concrete achievements, creating a solidarity in fact, this is what the project involves in the statement on 9 May 1950, from Paris,

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presented by Robert Schuman[1]. The project successfully counteracts the disastrous effects with which Europe faces after the Second World War, and a reconciliation between France and Germany becomes an essential priority. In this historical context, it was signed in Paris, the EC Treaty establishes the economic community of coal and steel (TCECO), in 1951 (April 18th), and entered into force in 1952 (23 July). In 1953 (10 fever) opens the Common Coal Market (February 10) and for steel products (May 10th). Here is another step towards integration, by setting up the common market for coal and steel, with the aim of developing and expanding the labor force and lifting the living standards within the ECSC[2] community.

The project also presented by Robert Schuman states that the functioning of European construction, at the same time, removes global integration into the profit of sectoral integration and political integration in the profit of economic[3]integration. The idea of "the operation of European construction, as it was conceived in the declaration presented, it was abandoned during it, which was proven by the Treaties after the ECSC Treaty.

The ECSC Treaty took over by the establishment of a high authority, the fundamental principle of Jean Monet and Robert Schuman, according to which basic production be administered by a high authority.

The 4 institutions established by TCECO are[4]:

- The High CECIO authority is the executive power, a strong supranational institution (is the committee today), has jurisdiction to manage the coal and steel market within the territorial limits of signatory states, the Treaty, respectively France, Germany, Italy, Belgium, Netherlands and Luxembourg;

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[1]The project is named, see, Guy Isaac and Mark Blanquet, *Droit Commnunautaire General*, 8 Edition (Paris: Dalloz, 2001), 1.

[2] Ioana-Nely Militaru, *European Union law. Timeline. Springs. Principles. Institutions. The internal market of the European Union. Fundamental freedoms*., 3rd edition (Bucharest, 2017), 359.

[3] Militaru, *European Union law. Timeline. Springs. Principles. Institutions. The internal market of the European Union. Fundamental freedoms*.,359

[4] Isaac and Blanquet, *Droit Commnunautaire General*, 2.

- the parliamentary assembly, the institution that is entrusted with the political control of the high ECSC Authority;
- The Special Council of Ministers, today, the Council guarantees that the High Authority acts in close connection with the national governments,
- the CEO Court of Justice, is the authority of the right within the territorial limits of signing States. The ECSC Treaty has been signed to be in force for a period of 50 years, therefore produced its effects by 2002 (July 23, the date from which it came out of force). According to Protocol no. 37 Annexed to the Treaties, ie the Treaty on European Union and the Treaty on the Functioning of the European Union, the net value of ECSC assets at the time of its deployment was allocated to the research in the sectors related to the Industry of Coal and Steel, through a Fund and a Research Program for Coal and steel[1].

The Paris Treaty is the first step on European integration, started by jointly administering coal and steel industries by the six European countries, and the Treaties in Rome, which we will continue to present, have strengthened the foundations of this integration and focused on the idea that the six European states have a common future as an open gate and other (European) states.

The ECSC institutions are considered preparatory for the institutions of the two subsequent communities, the European Economic Community
- EEC and the Economic Community of Atomic Energy
- EAratom[2].

Moreover, in 1955 (June 1-3) in Messina, Benelux proposes in a memorandum to create a common market with a wider economic activity than the production of coal and steel[3], covering nuclear energy, transport, finance and so on.

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[1] Ina Sokolska, https://www.europarl.europa.eu/factsheets/en/sheet/1/tratiates-itial, 04, 2021.

[2] R. Munteanu, *European Law* (Bucharest: Oscar Print, 1996), 29.

[3] Brânduşa Ştefănescu, *Court of Justice of the European Communities* (Bucharest:Scientific and Encyclopedic, 1979), 23.

2. THE SECOND STEP TOWARDS INTEGRATION - THROUGH THE EC TREATY ESTABLISHES THE EUROPEAN ECONOMIC COMMUNITY AND THE EC TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY

Thus, uninterrupted efforts to relaunch the European construction have materialized under the signing of two treaties the EC Treaty (TECE) and the EC Treaty establishing the European Atomic Energy Community (TCEA) in Rome on March 25, 1957. They have entered into force a year later in 1958. The TCEA provisions include the following objectives[1]:

- the elimination of customs duties between Member States;
- Establishment of a common customs tariff for imports;
- introducing a common policy in the field of agriculture and transport;
- creating a European Social Fund;
- setting up a European investment bank;
- Develop closer relations between Member States. TCEA has also established guidance principles for achieving these objectives by defining the legislative framework of the Community institutions. Achieving those objectives have been foreseen through common policies covered by the Treaty, namely: Common Agricultural Policy (Articles 38-43), Transport Policy (Articles 74-75) and Common Commercial Policy (Articles 110 to 113). The common market for TCEE has been designed to guarantee:

1. Free movement of goods;
2. Mobility of production factors, respectively, free movement of persons, freedom to provide services and free movement of capital).

The common market was envisaged to set up within 12 years (according to Article 8 TCE) considered a transitional period.

The common market is based on:

- the free movement of goods, persons, services and capital;
- Customs union, which according to art. 9 TCEE comprises all exchanges of goods and involving the prohibition in relations between Member States of customs duties on import and export and any fees

[1] Ina Sokolska, https://www.europarl.europa.eu/factsheets/en/sheet/1/tratiates-itial, 04. 2021.

having equivalent effect, as well as the adoption of a common customs tariff in relations with third countries. It is noteworthy that the goal of the customs union was reached 18 months before the end of the TCEE transition period.

3. Free competition. The common market is based on the principle of free competition, TCEI provides that they are incompatible with the common market and prohibited any agreements between undertakings, any decisions of business associations and any concerted practices that may affect trade between states and which have as their object or effect. restriction or distortion of competition within the internal market (Article 85 TCEE).

The Treaty establishing an Economic Community of Atomic Energy (Turatom or TCEEA) has the mission to contribute, by establishing the necessary conditions for the training and rapid development of nuclear industries[1], to raise the standard of living in the Member States and to the development of trade with other countries (Article 1 Teuratom).

It is worth mentioning that Turatom initially set very ambitious objectives, especially "the rapid establishment and development of nuclear industries." However, due to the complex and delicate nature of the nuclear sector, in close connection with the vital interests of the Member States (national defense and independence), the Euratom Treaty had to reduce their ambitions[2].

At the same time as the signature of the Treaties in Rome on 25 March 1957, a Convention on some joint institutions of the European Communities was adopted. This is common, for the three communities, the Parliamentary Assembly and the Court of Justice[3]. The Convention expired on 1 May 1999. They remained for each Community as a council (the special Council of Ministers for CECO) and an Executive Commission (High Authority for CECO).

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[1]Ina Sokolska, https://www.europarl.europa.eu/factsheets/en/sheet/1/tratiates-

[2] Sokolska, https://www.europarl.europa.eu/factsheets/en/sheet/1/tratiates-

[3] Militaru, *Union law. Timeline. Springs. Principles. Institutions. The internal market of the European Union. Fundamental freedoms*, 17

The unification of the executives was made by the Treaty of Brussels of 8 April 1965, also called a single council and a unique commission of the European Communities, known as the "Fusion Treaty of Executives, which Completed unification institutions in 1957 in Rome.

It is considered that from this date, the Victoria of the EEC General System on the coexistence of some organizations with sectoral competences[1], it is obvious.

3. MAASTRICHT TREATMENT, FIRST STEP, OFFICIAL, TO THE EUROPEAN UNION

The Maastricht Treaty signed on 7 February 1992, entered into force on 1 November 1993, is also referred to as the Treaty on European Union. The Treaty establishes a European Union, marking a new stage in the process of creating, an increasing union between the peoples of Europe. The European Union, according to the Maastricht Treaty, is based on three pillars[2]: the European Community, Common Foreign and Security Policy (CFSP), cooperation in the field of justice and foreign affairs (JHA), as follows:

- The first pillar provided, a framework which allowed the exercise by the Community institutions for competences for which Member States had transferred their sovereignty in the areas covered by the Treaty,,
- the second pillar considered the Common Foreign and Security Policy provided for in Chapter V of the Treaty;
- The third pillar concerned cooperation in the field of justice and home affairs provided for in Chapter VI of the Treaty.

By the Maastricht Treaty, the role of the European Parliament obviously increases, consulted before the convening of an intergovernmental conference, more was associated with intergovernmental conferences according to ad-hoc formulas. He was

[1] Sokolska, https://www.europarl.europa.eu/factsheets/en/sheet/1/tratiates-

[2]Sokolska, https://www.europarl.europa.eu/factsheets/ro/sheet/3/tratatele-de-maastricht-i-de-la-amsterdam 03. 2021

represented, during the last three of these by the President or by two Members of the European Parliament.

4. TREATY OF LISBON - TREATY OF EUROPEAN UNION REFORM TREATY

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community[1] signed on 13 December 2007 entered into force on 1 December 2009. The preparatory acts led to the signing of the Treaty of Lisbon were: a constitutional project at the end of 2001 (European Council Declaration on the Future of the European Union or the Laeken Declaration), followed in 2002 and 2003 by the European Convention which has developed the Treaty establishing a Constitution for Europe (Constitutional Treaty).

The Constitutional Treaty did not come into force as a result of two negative referendums since 2005, which is why the European Council decided to take a "period of reflection, two years, so that in 2007 it adopts a mandate for an intergovernmental conference (CIG) under Portuguese presidency. The conference ended its work in October 2007. After two months, the Treaty of Lisbon was signed in December 2007 being ratified by all Member States.

According to the Treaty of Lisbon, the Treaty establishing the European Community is renamed, becoming the "TREATE on the Functioning of the European Union" (TFEU), and the term "Community" is replaced by "Union".

The Union is the successor of the community. Although the Constitutional Treaty did not enter into force, the TFEU maintains many provisions thereof. TFEU creates for the citizens of the European Union a new institutional order, as it encourages their participation in the decision-making process - by setting up the European Citizens' Initiative[2] - protects them and grants their rights within the Union[1].

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[1]JO C 306, 17.12.2007

[2] The basis of the European Citizens' Initiative is represented by: Article 11 (4) of the Treaty on European Union (TEU); Article 24 (1) of the Treaty on the Functioning of the

Regarding the principle of the rule of Union law, although not included in the text of the Treaty, is provided in a statement, no 17, which is attached to the Treaty, which refers to an opinion of the legal service of the Council which refers to the case-law The Court of Justice of the European Union in the matter.

The competences of the Union, according to the Treaty of Lisbon, are clearer in the regulation, which divided into three categories: the exclusive competence of the Union (Article 2 par. 1tfue), shared competence with Member States and competence of support, coordination or Completion of the action of the Member States (Article 2 paragraph 2 TFEU), without replacing the competences of the States in the respective areas (Article 6 TFEU)[2].

According to the Treaty of Lisbon, the European Union acquires legal personality, acquiring by shielding, the quality of law on the international scene. So, "the Union has the right to sign international treaties in its areas of competence and may become a member of international organizations. Member States may only sign international agreements compatible with EU law[3].

The Treaty of Lisbon provides for the amendment to the Treaties on Parliament's proposal, as opposed to the earlier regulatory that that amendment was proposed by the Council, the governments of the Member States or by the Commission.

European Union (TFEU); Regulations (EU) No. 211/2011 and SA (EU) 2019/788; Articles 222 and 230 of the Rules of Procedure of the European Parliament. See, Alessandro Davoli, https://www.europarl.europa.eu/factsheets/ro/sheet/149/linitiative-citoyenne-europeenne, 04-2021

[1] Articles 2, 3, 7 and 9-12 of the TEU, Articles 18-25 of the TFEU and Articles 39 to 46 of the Charter of Fundamental Rights of the European Union, and UDO BUXhttps://www.europarl.europa.eu/factsheets/ro/sheet/145/cetatenii-uniunii-si-drepturile-lor, 05-2021

[2] Militaru, *Union law. Timeline. Springs. Principles. Institutions. The internal market of the European Union. Fundamental freedoms*, 39-40.

[3] EevaPavy, 04. 2021, https://www.europarl.europa.eu/factsheets/ro/sheet/5/treatat-de-lisabona#_ftnref8a; Valcu Elise, *Institutional Community Law*, University Course. Third Edition, Revised and Addition (Craiova: Sitech, 2012).

It is worth mentioning that the Treaty regulates in Art. 50 TFEU, an official withdrawal procedure of a Member State in the Union, the procedure unknown by the EC Treaty establishing the European Community. The withdrawal procedure was used by the United Kingdom, which on 24 June 2016 organized a referendum known as "Brexit". Britain has come out of the Union, effectively on 1 February 2020.

5. THE TREATY OF LISBON AND THE NEW INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION

● The European Parliament and the Council are in the same position, equality, in respect of legislative computers[1], respectively in the ordinary legislative procedure, which replaces the decision procedure. This equality is also maintained in the budgetary procedure in the ECEA as regards the approval of the annual budget. The European Parliament must agree on the multiannual financial framework. The maximum number of deputies in the European Parliament was set at 751, representing citizens being provided according to decreasing proportionality. The maximum number of places for a Member State fell to 96 and the minimum number increased to 6. On 7 February 2018, Parliament voted to reduce its number of seats from 751 to 705 after the UK withdrawal from the EU and for the redistribution of some Among the places to be issued between Member States which are slightly underrepresented[2]

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[1] I. Boghirnea,"The Creation of the General Legal Norm", *Annales Universitatis Apulensis. Series jurisprudence*, t. 11 (2008): 23-31.

[2] EevaPavy, 04. 2021, https://www.europarl.europa.eu/factsheets/ro/sheet/5/treatat-de-lisabona#_ftnref8a. Namely, the United Kingdom withdrew from the EU on 1 February 2020. The new composition is applied, ie 705 deputies in the EP. Of the 73 seats issued following the withdrawal of the United Kingdom, 27 were reallocated to better reflect the principle of decreasing proportionality: the 27 seats were distributed to France (+5), Spain (+5), Italy (+3), Netherlands (+3), Ireland (+ 2), Sweden (+1), Austria (+1), Denmark (+1), Finland (+1), Slovakia (+1), Croatia (+1), Estonia (+1), Poland (+1) and Romania (+1). No Member State has lost a place.

● The European Council, according to the Treaty of Lisbon, is formally the EU institution. The chairman of this institution is the external representative of the Union without prejudice to the High Representative of the Union for Foreign Affairs and Security Policy. The European Council also does not meet legislative functions.

● Council. The Treaty of Lisbon maintains, as before, the principle of double majority in the votes (citizens and Member States). However, the previous voting rules remained valid until November 2014, the new rules applying from 1 November 2014. It should be noted that when it deliberates and votes a draft legislative act, the Council meets in public session. The Council's sessions are also divided into two sections, a section is devoted to deliberations on Union legislative acts, and the other section is reserved for non-legislative activities. Commented by the Council's presidency will change every 6 months[1].

● The Commission. According to the Treaty of Lisbon, the President of the Commission is now chosen and appointed based on the outcome of the European elections, its political legitimacy increases.

● The Court of Justice of the European Union. All Union activities are now within the jurisdiction of the Court, except for the CFSP Common Foreign and Security Policy). Also, access to the courtyard for individuals is simplified. There were only a few aspects of novelty brought by the Treaty of Lisbon, without the pretense to exhaust them, because we wanted to point how this treaty reformed mainly the original treaties, they laid down the foundation of the Union's construction, primary, initially it.

CONCLUSIONS

Note is that the provisions of the Treaties have not been fully exploited, therefore their content is completed, based on the provisions with a number of recommendations. Thus, on 16 February 2017, on 16

[1] The establishment of predetermined groups of three Member States that will ensure the presidency for 18 months will ensure a better continuity of the works. EevaPavy, https://www.europarl.europa.eu/factsheets/ro/sheet/5/treatat-de-lisabona#_ftnref8a.

February 2017, the European Parliament adopted a resolution on improving the functioning of the European Union, capitalizing on the potential of the Treaty of Lisbon[1] by formulating recommendations to unlock this potential in order to strengthen the Union's capacity to be able to the current global challenges. Brexit is among the challenges, which, why do not we recognize that the Union has gone through an unprecedented crisis since the establishment of the Communities, as the initial treaties did not provide for the possibility of withdrawing a Member State in the Union. Pandemic Covid 19 is one of the most aggressive challenges, we could say, with a view that people's health is threatened, and the sanitary system in each state. These crises, and not only have highlighted certain deficiencies in the current governance system, and hence the decision of the institutions to establish a conference on the future of Europe. Regarding the Conference, the Committee on Constitutional Affairs of the European Parliament, said that this, it can be an innovative process leading to proposals for concrete institutional and constitutional reforms so that the European Union becomes stronger, more democratic, more efficient, more transparent, with a greater capacity to act and serve the interest[2]. Furthermore, the European Parliament has also adopted a resolution on possible developments and adjustments to the current institutional structure of the European Union, which involves proposals for reform of the Treaty[3].

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[1] European Parliament resolution of 16 February 2017 on improving the functioning of the European Union, capitalizing on the potential of the Treaty of Lisbon (OJ C 252, 18.7.2018, 215). Valcu Elise Nicoleta,"Brief Consultations on The Area of Freedom, Security and ITS Applicability in The Union's Legislative Procedure According to The Lisbon Treaty", *Journal of Legal Studies*, No.1-2, Extra ISSUE 3, Year VII (June 2012): 139-150, http://edituralumen.ro.

[2] The Committee on Constitutional Affairs of the European Parliament, Opinion of 10 December 2019 on the Conference on the Future of Europe, Recital G.

[3] European Parliament resolution of 16 February 2017 on possible developments and adjustments to the current institutional structure of the European Union (OJ C 252, 18.7.2018, 201). https://www.europarl.europa.eu/factsheets/ro/sheet/5/treatat-de-lisabona#_ftnref8a.

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LIMITING SENIORS' RIGHT TO VOTE. BRIEF CONSIDERATIONS

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Abstract

The 21st century has brought more challenges to the legal space than all the other centuries combined. For this reason, much of the old law school is undergoing several transformations, because the doctrine must imagine answers to problems that the legislator did not think it would ever have to analyze.

Among these problems we find the electoral sphere, which is becoming increasingly important for the societies configuration in the decades to come. Here there are several directions for analysis; from them we have chosen – for this paper – one of the most delicate, but also important issues, namely the right of seniors to vote. Although it may seem like an intangible topic, there are biological grounds that bring this topic into discussion and jurists must formulate in advance a minimum set of principles that will operate in this area of electoral processes.

Even if many people would like to reject this topic, there is a major problem related to the aging population and the young people regulating interests, relative to the seniors' conceptions and actions. We do not expect everyone who will read this text to agree with all the presented ideas, but the role of science is to bring up topics that are relevant in real life – because the topic is an effective one and not an abstraction.

Key words: *Seniors, Voting; Protection of Society, Generational Conflict; Legal Projection of Future.*

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INTRODUCTION

Political power is always desired, but the ways in which it is obtained are not the same in every country, with the same situation on historical times. To this historical, legal and geopolitical truth is added the capacity of documentation that libraries make available to those interested in this topic – many examples show how leaders achieve superior positions and how they are replaced by other competitors.

After a number of years in which force has been the sole criterion for leading groups of people, specific needs have produced not only a division of professions (rudimentary, at the beginning of history), but also a way of selecting community leaders. Regardless of how this decision was reached, it should be noted that from that moment on, skills other than force were required. Over time, the techniques of gaining power began to be studied by different people, who came to their own conclusions, taught today in political sciences schools.

The community leaders' appointment has always been an operation that has given rise to major interests among its members, and in certain situations the attention has been shown from the outside[1]. The big problem that has arisen over time has been the number of people who can appoint a leader. To a large extent, the world history has been that of the conflict between those who wanted their number to be as small or as large as possible, as their interests may be. As Mesquita and Smith point out, it comes to power if there are a number of key people who support someone, and he responds to their expectations: "Staying in power, as we now know, requires the support of others. This support is only forthcoming if a leader provides his essentials with more benefits than they might expect to receive under alternative leadership or government.

[1] Everyone read about the U.S. 2016 election scandal, which presumed a foreign power intervention; literature on this topic is easy to find with just a click.

When essential followers expect to be better off under the wing of some political challenger, they desert"[1].

1. The appointment of leaders has always presupposed an equal relationship between those who have this power. Even though in antiquity and the Middle Ages the number of those who could express their will on this issue was lower, there was an equality of votes[2]. This became inevitable, because in this legal relationship' absence there would have been only a king/emperor absolutism. It is important to emphasize this, because even though absolutist monarchies have always existed, it happened that at certain times the dynasties were extinguished and the election of a new ruling family was made by a group of aristocrats who had an equal right at that time.

Again, we will not present the many situations that have arisen here – from obscure negotiations to wars that have lasted for decades – but we will emphasize that the principle of equality has prevailed and remains to this day in consolidated democracies. For the size of our study, it is only necessary to point out that after obtaining equality of votes in the various bodies appointing leaders, a struggle took place over several centuries to increase the number of those who have the right to participate in these (electoral) processes.

In all these struggles to expand the group of people who have the right to nominate future communities leaders, there had been no problem about the maximum upper age that they must have. Normally, this seemed to be contrary to human nature and the biological realities of the time, because the life expectancy of mankind until the 20th century was

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[1] Bruce Bueno de Mesquita and Alastair Smith, *The Dictator's Handbook: Why Bad Behavior is Almost Always Good Politics* (New York: Public Affairs, 2011), 46.

[2] For example, election procedure in the Roman Empire was larger described by Rachel Feig Vishnia in her book *Roman Elections in Time of Cicero. Society, Government and Voting* (London: Routledge, 2012), 133-186.

not very high. Even if the elites could hope for 70 years or even more[1], this was still not easy to achieve, due to the lack of hygiene, medical treatments and especially the diet used. The average population faces even lower life expectancy, as poor nutrition, hunger and almost total lack of education reduce the overall outlook for life, so that in Europe – the world's most developed continent – this average has not really exceeded 30 for years until the beginning of the 20th century[2], with an exception for Europe, where this item was higher.

This fixing the age threshold absence had two reasons, one of which was common to the establishment of pension systems. At first, it was too much to limit the appoint power through this temporal barrier, when the right to vote had become so difficult to be achieved. In addition, in the case of aristocrats, somehow limiting such a right could even lead to rebellion and/or foreign intervention, in relation to the political power of any of them. But the superior argument – common to pension systems – was given by this reduced life expectancy of which all discerning people of the time were aware.

2. Improving the quality of life has brought with it a remarkable result in terms of life expectancy, which will increase to a level of 72 years in 2019, the last year before Covid-19 pandemic[3].

This increase is remarkable and has been made possible by the improvement of two major areas of public service delivery: medicine and education. The increase in the two areas quality has brought with it an extraordinary increase in population – unique in mankind history – which

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[1] Neil Cummins, "Lifespans of the European Elite, 800–1800*"*, *The Journal of Economic History* 77, No. 2 (June 2017), Doi: 10.1017/S0022050717000468. Consulted at 28th of December 2021.

[2] J. D. Montagu,"Length of life in the ancient world: a controlled study", *Journal of The Royal Society of Medicine* 87 (1), (Jan 1994): 25-26.

[3] Max Roser and Esteban Ortiz-Ospina and Hannah Ritchie, *Life Expectancy*, available at https://ourworldindata.org/life-expectancy, consulted on 28th of December 2021.

has managed to increase fourfold in less than 100 years: from 1.83 billion people in 1920 to 7.91 billion at the end of 2021[1].

But the last decade brings another problem to almost all governments: world at this moment is experiencing an unprecedented change in its global age structure; a phenomenon commonly referred to as population ageing. Specifically, population ageing is a dynamic process wherein a growing proportion of people occupy the older range within an age structure. The definition of the specific age at which a person turns old is unimportant since population ageing is occurring regardless of the criteria that define old age, including criteria that may be cultural, political or practical – as George Bernard Shaw said, "youth is an illness which is every-day cured".

It is not hyperbole to say that the ageing of the global population will be among the most important phenomena driving policy around the world over the next number of decades. Population ageing is a phenomenon that is therefore shared across countries and regions that exist thousands of miles apart. It is shared across countries that may have little else in common. It is happening in rich parts of the world and poor parts of the world. It is occurring in countries that are less developed, with newly emerging economies and in countries with long standing advanced economies. It is occurring in countries that have a very small proportion of their population in old-age and in those that already have a large share of older people[2].

3. The elderly population today, however, claims more problems from a legal point of view, including the electoral law. It should be noted once again that we do not want – and there is no room – to do an exhaustive analysis of the problem, because several concepts and fields of science should be discussed from a large point of view. Above all, the

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[1] See *United Nations Demographic Yearbook 1949 – 1950*, United Nation, 1951, p. 10 and World Population Clock, available at https://www.worldometers.info/world-population/, consulted on 28th of December 2021.

[2] Susan A. McDaniel and Zachary Zimmer, *Global ageing in the twenty-first century: challenges, opportunities and implications* (London: Ashgate, 2013), 1.

debate on the population aging issue and its consequences calls for recourse to ethics too, because the subject is both delicate and consistent, and opinions will not be based solely on these considerations. To be clear, it must be understood that human ethics does not exclude calculations of an economic nature, because a goal of each generation is to leave more to their descendants than they had at the beginning of life.

In addressing this issue, two issues are fundamental.

First of all, old age is not the same for each of us and is accompanied by different effects on the body and brain. Even if the physical aspect has its own importance, the human thinking and reason position at an advanced age is fundamental.

The ageing brain must be considered a special case within the domain of ageing. Most studies both *in vivo* and *post mortem*, suggest shrinkage of the adult brain as it ages, with a reported reduction of about 5% in brain weight per decade after the age of 40 years. The cognitive changes associated with ageing are the subject of intense research. It is reassuring that crystallised intelligence remains intact with age, although some cognitive abilities do show a gradual reduction. Ageing causes a decline in information-processing resources, such as working memory capacity, attentional regulation and processing speed[1].

This phenomenon has been well understood by human thought for thousands of years, and since then the rule of elderly keeping in a less socially and economically active line has been fixed, because the same economic and professional results can no longer be expected from them.

After all, the entire pension system should be understood not as a sanction for old age, but as a double measure of protection. First, the older person, who can no longer fully cope with the competition against younger co-workers, because the latter have more physical and mental strength, by the simple fact of the age differences between them. At the same time, institution where the pensioner worked is protected, because it is not (anymore) subject to risks that would be caused by the elderly person possible mistakes. Or, retirement actually means that this person

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[1] Perminder S. Sachdev, *The ageing brain. the neurobiology and neuropsychiatry of ageing* (Swets & Zeitlinger, member of Taylor & Francis Group, 2003), 5.

is taken to a position where he can use his professional skills only if he wants, but having a financial safety net in case the work desire as an employee has ceased.

Without confusing work with the legal framework in which it can be provided, we must not forget that the pension is also a necessary form of respect for seniors, because it is not acceptable to ask a person to work until the last day of his life. Again, let's not equate the idea that a man who has reached a certain age no longer wants to work according to a company/institution' program with work in a more flexible program, regardless of the remuneration level.

In the history of each nation there is the situation of "good and old people" who were helpful to the community through the accumulated wisdom. Is important to note that but this social group does not include any elderly person, because everyone's situation is appreciated in concrete terms. This is the reason for some expressions that emphasize that old age kind of thoughts, which are sometimes close to the children level of wisdom.

In fact, this is the great distinction between the ages relationship: if a person in childhood understands things and becomes wiser with each passing day – his physical and intellectual capacities increasing continuously – we must underline a different situations in the case of seniors. In the case of old age, it affects the whole body and the brain – of course, at different speeds – but the road to reduced capacity is just as inexorable. As if in a simplified real balance, what young people accumulate is partly what seniors begin to forget. In addition, we must not forget that the last century technological evolution has brought an emergence of tools that young people use faster, but which are more difficult to use by seniors, because their physical parameters are no longer at the highest level (weakening of seeing, decreasing speed of typing fingers, etc.).

The second issue that the aging population brings up is economic effects. Specifically, increasing the national average age means that the number of active people who have to pay higher taxes becomes lower than the retirees number. The latter are every day more numerous – is

time for Baby-boomers to retiree – but with higher expenses than the obtained income, and from here two questions arise:

1) What will be the taxes affordability level that the working age people can bear? The answer is different, depending on the abilities of each person, but it is clear that it is not unlimited. Hence, a pragmatic consequence: if the number of taxes imposed on the collection of income needed by pensioners will be considered unacceptable, part of the active population will emigrate, further weakening the budgetary possibilities of a country.

2) How will older people vote? Obviously, they are thinking about their children and grandchildren, but also about the needs of their age. The big problem is the right balance of interests, because a population with a high average age and a not very high standard of living is more vulnerable during old age. In this sense, it can lead to a severe conflict between generations, because the elderly will rather vote for projects that allocate money to their age group, without taking into account that the balance of tax payments is completely reversed.

4. Latent intergenerational conflict is a reality, but it can be controlled if the public finances proportion is balanced. Thus, a balanced budget means offering young people opportunities for professional and social development, but also allowing older people to have a peaceful and less worrying end of life.

However, there is no perfect equation for solving this age interest's balance, but it must be underline that the active population carries on its shoulders most of the public tasks, including those of defending the country in case of war. However, if the number of the active population decreases through immigration, it is clear that the main culprit for this phenomenon is the government policies. It is debatable whether or not those policies favoured older generations, especially as their vulnerability makes them more easily captive to certain budget allocations.

It is necessary to keep in mind that the active population is closer technologically to the labour market realities and development prospects. The older generation – no matter how much they want to be in the same mental state – cannot do it, because the differences in approach to the

next decade's labour market perspectives are very large. Those who have entered the labour market for a maximum of two decades see the future through the prism of their own physical and mental development, without being threatened by serious illness or death. On the other hand, health care and the desire to live a few more days require money, which someone must provide, and from a certain point comes the impossibility of sums for the elderly payment accepting, when the same money is much more useful for pay for the kindergartens and schools children.

For this reason, a legal framework must be created to prevent major conflicts between generations, and in this regard a reduction in the right to vote for some seniors who have almost no income from their own sources is to be considered. Also, the fact that mental degradation is a real phenomenon in the case of every elderly person must also be taken into account, because this is where several vulnerabilities arise – including those of altering the legal will expressed in various acts (successions, contracts, election votes).

Obviously, it can be imposed by constitutional changes an age threshold – maybe 80, or maybe 85 years – but it is obvious that an imbalance of the population age structure can lead to a major vulnerability for the whole society if the older generations are favoured and the main prejudice will belong to active people. It might be even more useful if after a certain age the psychiatric examination is mandatory and depending on its outcome the right to vote is kept or stopped.

In fact, reducing the right to vote for people with mental vulnerabilities achieves a balanced relationship between people, because no one can ask a free man to bear more than his threshold of mental and financial endurance allow. If these levels are exceeded, the result will be easy to predict: an increase in the number of people in care with one – that is an increase in the entire costs society has to bear, and finally an increase in general poverty.

CONCLUSIONS

The right to vote issue is more important in this century than ever, because the technological changes that have taken place in recent decades are forcing a major rethinking of the public law systems.

Within these great changes there is a problem that has developed in a way impossible to predict more than a century ago. If Jules Verne anticipated some of today's technological development, he – and other thinkers – did not have in mind the today population age structure of the most countries and he did not imagine the consequences of such age pyramid.

Generations change and do not always do so calmly – in fact, there has not been a year in the history without a war somewhere. From this perspective, the difficulties that today's active generations face are greater than ever, because in addition to the bad governance problems, the issue of spending on too many social rights has been added. In this paradigm, is necessary to create a solution for these expenses: either young people or children will be favoured – or very mature generations. In the second case, however, the consequences are not always favourable for a country, because it stimulates emigration and tax evasion. In this broad picture, the analysis of the right to vote reduction issue for a part of the very mature generations becomes not only an option to discuss.

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THE ARCHITECTURE OF THE COMMON LAW OF CONTRACTS AND ITS PRINCIPLES OF ORGANIZATION, INNOVATIONS OF THE LEGISLATOR IN THE CIVIL CODE OF 2009

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Abstract:

The Civil Code of 2009 organizes in distinct bodies the law of the contract and that of the general regime of obligations, this being an innovation of this legislator. For each of the two bodies of rules, however, their existing architecture is preserved in the old Civil Code, which, however, regulated them much more elaborate and better structured. However, the separate organization is misleading because apparently the general regime of obligations would mean that it applies to all obligations regardless of the source, although in reality some of the rules shown apply only to obligations arising from contracts, such as: termination and termination, execution by equivalent, and so on Because all the general regime of obligations is also applicable to contracts, the two bodies of rules form a unit that we call the common law of contracts. Another novelty of the Civil Code of 2009 in the field of contract law is the regulation of the general principles of contracts.

Key words: *Civil Code; contract; common law; obligation; source of law; principle of subordination*

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INTRODUCTION

The Civil Code organizes the law of obligations through two bodies of rules: that of the sources of obligations, of which the contract is of interest here as a source of obligations; and that of the effects of these sources, regulated under the name "Execution of obligations", in doctrine being called the "general regime of obligations", which organizes the rules common to all obligations, regardless of sources, but some of them are intended exclusively for obligations arising from contracts.

Contract law (A) and the general system of obligations, from the point of view of **contractual obligations (B)**, constitute the common law of contracts.

A. CONTRACT LAW

In the fifth book, "About obligations", Title II "Sources of obligations", Chapter I. "The contract" is regulated as a source of obligations (section 2 – section 9) **(a)**. At the same time, section 1 "General provisions" of the chapter shown, regulates the guiding principles of the contract **(b)**.

a. THE CONTRACT AS A SOURCE OF OBLIGATIONS

1. THE USEFULNESS OF THE CONTRACT.

According to the definition of the contract, this is an instrument intended to be used for the birth, modification or termination of a legal relationship (Art 1166 Civil Code). The legal definition of the contract has a degree of maximum generality and abstraction.

Simply put, the contract is defined by the way it is created: agreement of wills in order to produce legal effects. These effects, specified in the definition, the birth, modification or extinction of legal relations, translate into the birth, modification or extinction of obligations to give, do or not do something (they are elements of the content of legal relations).

Other effects of the contract must be recalled: those constituting associations, with or without legal personality, or extinguishing disputes,

etc. However, the impact of these effects is smaller in relation to the effects of economic exchanges (giving, doing or not doing something), so to simplify the explanation of the effects of the contract we will refer less to them.

2. THE REGULATION OF THE CONTRACT AS SOURCE OF OBLIGATIONS

The new Civil Code abandoned the legal regulation of the matter of obligations on the logic of the contract structure, as provided in the Civil Code of 1864. According to the latter structure, the regime of obligations (effects and execution of obligations) were subdivisions of contract law, its rules being considered the common law of obligations or, as the case may be, the common law of the contract if they were considered together with the rules on the formation and general effects of the contract[1].

The Civil Code of 2009 transposes into legislation the two elements of the contract resulting from the definition: the **formation** (agreement of will) and the **effects pursued by the parties to the agreement**, through their regulation, in the Fifth Book on "Obligations", in two distinct bodies of rules: on the one hand, the "Contract as Source of Obligations", (Title II "Sources of Obligations", Chapter I "The Contract"); and, on the other hand, the general regime of obligations (Title V "Execution of obligations"), the latter including, as will be shown, rules other than the execution of obligations.

Regarding the rules of the contract, in the chapter shown, sections 2-9, are established: *the substantive and formal conditions, the formation, the sanctioning regime for the violation of the shown conditions, the general effects, the representation and termination of the contract*.

[1] Dan Chirică, *Tratat de drept civil. Contracte speciale, Vol 1. Vînzarea și schimbul*, 2nd Edition (Bucharest : Hamangiu, 2017),1.

In opposition to the old Civil Code, in positive law the regime of obligations is organized by a body of rules distinct from that of the contract[1], as part of the law of obligations.

b. GUIDING PRINCIPLES OF THE CONTRACT[2]

3. THE REASONING OF THE GUIDING PRINCIPLES OF THE CONTRACT

In Section I "General provisions" (Art 1166-1170) are enshrined the guiding principles by which its junction with the law of special contracts is organized, a novelty in our civil law, establishing the relationship between contract law and special contracts named or not, such as and there with individual contracts.

4. THE PRINCIPLES OF THE FREEDOM OF CONTRACTS

The parties are free to conclude any contract and to determine its content, within the limits imposed by law, public order and morals" (Art 1169).

According to the principle of contractual freedom for the realization of economic exchanges, the parties may conclude any contract regardless of whether it is defined by law or organized by contractual practice. They may also organize any content of the contract, not being obliged to keep the one regulated in the named contracts, being able to modify it according to their interests. The only limitation of this freedom is public order and morals, as well as the law of the contract, as expressly provided in the principle of subordination of contracts.

5. THE PRINCIPLE OF SUBORDINATION OF EVERY CONTRACT TO THE CONTRACT LAW

The principle of subordination of all contracts is mitigated by the particular cases of derogatory contracts.

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[1] In the Civil Code of 1864 the regime of obligations was included in the title on the contract and conventions (Title VII)

[2] Ioan Popa, *Contracte civile, de la teorie la practică* (Bucharest: Universul Juridic, 2020), 38-44.

5.1. The rule of principle

"All contracts are subjected to the general rules of the current chapter" (Art 1167 Para 1 of the Civil Code).

From the opposition between the texts of art.1167 and art.1168, the latter organizing the unnamed contracts, it results that the phrase "All contracts", used in Art 1167 of the Civil Code except for some of them, which may have particular rules, in the sense that they may even contradict it, but being expressly provided for in the special regimes of the various contracts.

5.2. Exception to the principle of subordination. Exceptions should be expressly provided for by special law

However, the relationship of subordination is not absolute, the Code also recognizes the exceptional hypotheses in which certain contracts may have particular regimes if they are regulated in the code or in special laws (Art 1167 Para 2), namely they may derogate from the general regime.

This rule therefore refers to the special contracts named, as they could have "... particular regimes if they are regulated in the code or in special laws".

Contrary to the category of so-called subordinate contracts, there are also special named contracts whose particular regime, provided in the code or special laws, which escapes, to the extent of these legal derogations, the general regime.

From the above paragraph it is understood that within the limits of the particular rules provided by law, special contracts are evaded from the principle of subordination provided for in paragraph 1 of the same text for "all contracts".

We consider that, within the limits of these derogations, unnamed contracts may also use the particular rules shown to organize the regime of an unnamed legal transaction.

5.3. Subordination of the unnamed contracts (Art 1168 of the Civil Code)

According to the text shown: "The provisions of this chapter apply to contracts not regulated by law, and if they are not sufficient, the special rules regarding the contract with which they most resemble".

The existence of unnamed contracts is the expression of the principle of freedom of contract[1] (Art 1169) without being absolute because it is limited by the very general framework of contract law: ["(...) all contracts are subject (...) to the general rules (...) of this chapter" (Art 1167 Para 1 of the Civil Code)].

Unlike named contracts, which are subject to common law, but each have a special legal regime, unnamed contracts have their own regime, organized by the parties, but each of them is recognized as a contract if they comply with the general rules of the contract. Even these contracts do not escape the subordination of contract law. Even if they are not organized by special legal rules, such as named special contracts, but by contractual practice, the stipulations of unnamed contracts cannot ignore the law of the contract (1st thesis of Art 1168 of the Civil Code), under the sanction of not being recognized as being contracts[2].

If they contain certain provisions which go beyond the common law, their rules must be able to approximate those of a special contract in order to establish a legal regime applicable to them. Second thesis of Art 1168 of the Civil Code, "(...) and if they are not sufficient (...)" obliges, first of all, as an unnamed contract that is not covered by the contract it must be possible to make it subject to at least the rules of a special contract, meaning that these are the original rules of the special contracts. Implicitly, this thesis also organizes the qualification of contracts[3].

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[1] Vasile Pătulea and Gheorghe Stancu, *Dreptul contractelor* (Bucharest: C.H. Beck, 2008).
[2] Liviu Stănciulescu, *Curs de drept civil, contracte* (Bucharest: Hamangiu, 2012), 90.
[3] Ion Turcu, *Vânzarea în Noul Cod civil* (Bucharest: C.H. Beck, 2011), 24-61.

B. GENERAL REGIME OF OBLIGATIONS

The general regime of obligations means, mainly, the rules of execution of the obligations to give, to do and not to do and also the sanction of their non-execution. In addition to the contract as a source of obligations that organizes the conditions of formation and the general effects of the contract, the Civil Code also regulates the execution and sanction of non-performance of contractual obligations, the general regime of obligations.

As it results from the explanation given to the legal definition of the contract, this is the instrument destined to produce the effects: a) the transfer of the property or of other real rights, announced since art. 557 of the Civil Code (obligation to give) and b) creation of debt rights, (obligation to do or not to do).

The contract is therefore the *sine qua non* instrument in achieving legally protected economic exchanges, more precisely, its effects translate into economic exchanges. These effects are regulated on two levels: a general one, that of the contract, which organizes its general effects (binding force, relativity and opposability) and the translational effect of the contract (performance of the obligation to give), and that of the general regime of all obligations (especially to do and not to do); and another, with a lesser degree of generality, also called special, that of special contracts, which organize different categories of effects, consisting of specific assemblies of obligations to give, to do (not to do), such as the transfer property (obligation to give) in exchange for price (obligation to give) – sales contract –, transfer of use of a good (obligation to do) in exchange for price (obligation to give) – lease contract –, etc.

The effects of special contracts would not be binding if there were no general effects shown, which attach to them the binding force, etc.

Execution of these effects produces material consequences: the execution of a service (obligation to do), the transfer of a real right (obligation to give).

The Civil Code regulates these general effects. On the one hand, in Book V, Chapter I “The contract”, Section 6 “Effects of the contract”, the binding force, relativity and enforceability of the contract are

regulated, and under the marginal name "Establishment and transfer of real rights", the translational effect of the contract is also regulated, namely the execution of the obligation to give (Art 1273-1275). On the other hand, the execution of the obligation to perform (debt rights) is regulated in the same Book V, in Title V, "Execution of obligations", as a general regime of all obligations, regardless of their source, including contractual obligations.

An important part of these rules of execution (Title V) regulates exclusively the regime of contractual obligations, such as the rules of indirect enforcement of obligations (contractual liability), sanctioning the non-performance of obligations arising from synalagmatic contracts (exception of non-performance, termination/termination of contracts, contract risk). Another part of these rules is common to all obligations, regardless of the source, such as the rules on voluntary performance and enforcement in kind. They also apply to contractual obligations, even if they also apply to obligations arising from other sources, such as those arising from lawful acts (quasi-contracts), and so on.

In a broad sense, the general regime of obligations includes, in addition to Title V "Performance of Obligations", and Title VI "Transmission and conversion of obligations" and Title VII "Settlement of obligations".

CONCLUSIONS

The new Civil Code organizes the law of the contract and that of the general regime of obligations in a different structure from that of the old Civil Code. In the new Civil Code, contract law is organized as one of the sources of obligations, being composed, as in the old Civil Code, of its structural elements and general effects. However, the general regime of obligations is organized in a separate body and not on the structure of contract law as in the old Civil Code.

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ISSUES REGARDING THE LEGAL MEANS OF PROTECTING THE IMPARTIALITY OF THE JUDICIARY AND THE INDEPENDENCE OF JUDGES

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Abstract:

Protecting the independence of the judiciary from any pressure or manipulation is a necessary element in maintaining the impartiality of the judge and the efficiency that the public expects from him.

Independence and impartiality are common values of judicial ethics that strengthen public trust and allow a better understanding of the role that the judge has in society.

However, the concept of independence also refers to the situation of magistrates in the activity they carry out and implies the possibility of effectively performing the judicial function without interference from other persons or public authorities, while the impartiality of justice also implies the impartiality of members of the courts.

Key words: *impartiality; independence; justice; judge.*

INTRODUCTION

In domestic law, according to the provisions stated in Art 124 of the Constitution, justice is administered in the name of the law, is unique,

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impartial and equal for all, and judges are independent and subject only to the law.

According to the provisions of Art 133 Para 1 of the Constitution, "The Superior Council of Magistracy is the guarantor of the independence of the judiciary".

In the application of the constitutional provisions, Law no 317/2004[1] on the Superior Council of Magistracy enshrines in Art 1 Para 1 the role of guarantor of the independence of justice of the Superior Council of Magistracy, and in Art 30 Para 1-2 provides the following: "(1) The Superior Council of Magistracy has the right and obligation to be notified ex officio to defend judges and prosecutors against any act that could affect their independence or impartiality or create suspicions regarding to these. The Superior Council of Magistracy also defends the professional reputation of judges and prosecutors; (2) The judge or prosecutor who considers that his independence, impartiality or professional reputation is affected in any way may address the Superior Council of Magistracy, which, as the case may be, may order the verification of the reported issues, publication of its results, may notify the competent body. on the measures that are required or may be ordered by any other appropriate measure, in accordance with the law".

The deontological code of judges and prosecutors, adopted by the Decision of the Plenum of the Superior Council of Magistracy no 328/2005[2], based on Art 38 of Law no 317/2014, establishes in Art 3 the obligation of judges and prosecutors to defend the independence of justice to exercise its function with objectivity and impartiality, having as its sole basis the law, without giving in to pressures and influences of any kind.

Also, Art 9 of the code stipulates that judges and prosecutors must be impartial in the performance of their professional duties, being obliged to decide objectively, free from any influences, and must refrain from any behavior, act or manifestation of a nature to undermine confidence in

[1] Published in the Official Gazette of Romania, Part I, no 599/2 July 2004, republished in the Official Gazette of Romania, Part I, no 628/1 September 2012

[2] Published in the Official Gazette of Romania, Part I, no 815/8 September 2005

their impartiality. On the other hand, if defamatory statements have been made against them in press articles or in audiovisual programs, judges and prosecutors have the right to express their opinion publicly, thus exercising their personal right of reply (Art 19 of the code).

In view of the above-mentioned legal provisions, the independence of the judiciary has both an *objective component*, as an indispensable feature of the judiciary, and a *subjective component* concerning the person's right to have his or her rights and freedoms established by an independent judge. Without independent judges, rights and freedoms cannot be respected in a fair and legal way. Therefore, the independence of the judiciary is not an end in itself. This is not a personal privilege of judges but is justified by the need to allow judges to fulfill their role of protectors of the rights and freedoms of citizens.

Apart from the regulations on the status of judges and prosecutors, the principles of impartiality of justice and independence of judges are also protected by civil law, which provides for tortious liability.

At the same time, the independence of the judge is regulated by Art 2 Para 3 of Law no 303/2004[1], as amended by Law no 242/2018[2], which stipulates that: restrictions, influences, pressures, threats or interventions, direct or indirect, from any authority, even judicial authorities".

The phrase "even judicial authorities" refers to the inappropriate conduct, contrary to legal regulations, of persons holding various positions [management/execution] in the judiciary or of certain institutions which are part of the judicial authority and which, by administrative decisions, take their position or activity, creates a fear of the magistrate in the exercise of his function, of the nature of influencing the decisions. The norm expresses a principle, that the independence of the judge, in resolving the case he judges, cannot be limited by any person or authority of the state. Of course, the independence enjoyed by the judge does not mean arbitrariness, as he must obey the law.

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[1] Published in the Official Gazette of Romania, Part I, no 576/29 June 2004, republished in the Official Gazette of Romania, Part I, no 826/13 September 2005

[2] Published in the Official Gazette of Romania, Part I, no 868/15 October 2018

INTERNATIONAL REGULATIONS

The principle of the independence of the judiciary also finds ways of protection in the international documents to which Romania is a party. Thus, the right to an impartial and independent tribunal is guaranteed at European level, first and foremost by Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("1. Everyone has the right to a fair trial in public and within a reasonable time of his case, by an independent and impartial tribunal established by law, [...]").

Apart from the Convention for the Protection of Human Rights and Fundamental Freedoms, the document with the highest authority on judicial independence at European level was Recommendation (94) 12 of the Committee of Ministers on the independence, efficiency and role of judges.

According to this document, "in the decision-making process, judges must be independent and be able to act without any restriction, subjective influence, pressure, threats or interference, direct or indirect".

Recommendation (94)12 has been replaced by Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and accountability, which expressly states that the "independence of judges is a fundamental aspect of the rule of law" (Para 4), and "if judges consider that their independence is threatened, they should be able to have recourse to a judicial council or other independent authority, or they should have effective means of redress" (Para 8).

Another relevant international document is Opinion no 1 of the Advisory Council of European Judges (CCJE) on Standards on the Independence of the Judiciary and the Immovability of Judges, adopted for the attention of the Committee of Ministers of the Council of Europe in Strasbourg on 23 November 2001. This act states that "freedom against unwanted external influences is a unanimously recognized general principle […] As a general principle, freedom from undesirable influence and the need to impose sanctions in extreme cases are indisputable (see the balance between the general principle of freedom of expression and the exception – where measures are needed to maintain judicial authority and impartiality – from Art 10 of the Convention for

the Protection of Human Rights and Fundamental Freedoms). Moreover, the CCJE has no reason to believe that they are not properly provided for in the laws of the Member States. On the other hand, their operation in practice requires caution, attention and, in some contexts, political coercion. Discussions with judges from various states and the understanding and support they have shown can be very helpful in this regard. The difficulty lies rather in deciding what is an undesirable influence and in striking a balance between, for example, the need to protect the judiciary from distortions and pressures, either political or from the press or other sources, and the interest of public debate. of matters of public interest in public life and in the free press. Judges must accept that they are public figures and that they must not be too susceptible or too fragile".

Also, another document of the Council of Europe is the European Charter on the Statute for Judges, which was approved in Strasbourg in July 1998. According to the provisions of Art 1.4 of the Charter, "the statute offers all judges who consider that their statutory rights or, more generally, their independence or that of the judiciary are threatened or disregarded in any way, the possibility to refer such an independent court, which to have the actual means to remedy or propose to remedy it".

In the Report on the Independence of the Judiciary (Part I: Independence of Judges), adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), on Specific Aspects of Judicial Independence – Absence of inappropriate external influences, it has been shown that judicial independence involves two complementary aspects. *External independence* protects the judge from the influence of other state powers and is an essential element of the rule of law. *Internal independence* guarantees that the judge decides only on the basis of the Constitution and the laws, and not on the basis of instructions given by higher-ranking judges. "It is undisputed that judges must be protected from undue external influences. To this end, they shall enjoy functional immunity – but only functional immunity (immunity from prosecution for acts committed in the exercise of their functions, with the exception of intentional offenses, such as bribery)" (Para 61). The Venice

Commission argued in favor of a limited functional immunity of judges: "Magistrates (...) should not enjoy general immunity, as provided for in the Bulgarian Constitution".

According to general standards, they do need to be protected from civil proceedings for acts performed in good faith in the course of their duties. However, they should not enjoy general immunity, which would protect them from prosecution for their crimes, for which they should be held accountable to the courts. (CDL-AD (2003) 12 – Memorandum on the reform of the judiciary in Bulgaria, adopted by the Venice Commission at its 55th plenary session, in Venice, 13-14 June 2003, paragraph 15.1). "In order to protect judicial proceedings from undue pressure, the application of the *under trial* principle, which must be carefully defined so as to strike the right balance between the need to protect the work of the judiciary, on the one hand, and the freedom of the press and debates in matters of public elsewhere" (Para 64 of the Report on the Independence of the Judiciary).

The Constitutional Court of Romania found that: "the impartiality of justice and the independence of judges benefit from the protection of domestic civil law, in two forms. First of all, the one provided by Law no 317/2004, which enshrines the role of guarantor of the independence of justice of the Superior Council of Magistracy. According to the law, this body has two means by which it can exercise its constitutional role: the first aims to defend judges and prosecutors against any act that could affect their independence or impartiality or would create suspicions about them, and the second has the purpose of defending the professional reputation of judges and prosecutors. The second form of protection is that provided by the provisions of Law no 287/2009 on the Civil Code, which enshrines tortious civil liability, according to which any person has the duty to comply with the rules of conduct required by law or local custom and not to prejudice, by his actions or inactions, the rights or legitimate interests of other persons; any damage entitles to repair[1].

[1] Decision of the Constitutional Court of Romania no 629/4 November 2014, published in the Official Gazette of Romania, Part I, no 932/21 December 2014

On the other hand, the Court notes that the defense of the independence of the judiciary can only be achieved within the framework provided by the Constitution, thus respecting all the fundamental rights and freedoms of the person. The protection of this constitutional value cannot affect the existence of other rights and freedoms, exercised in good faith, within the limits established by the constitutional norms[1].

CONCLUSIONS

The independence of judges means the resolution of cases without any interference from any state body or from any person, being necessary to guarantee the impartiality of the judge towards the parties in the process, this being an essential feature of judicial activity and the very foundation of the judicial function.

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[1] Decision of the Constitutional Court of Romania no 685/7 November 2018, published in the Official Gazette of Romania, Part I, no 1021/29 November 2018

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LEGAL REGULATIONS ON THE CONCEPT OF CIVIL SERVICE INTEGRITY

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Abstract:

The integrity of the civil service and the civil servant in the modern democratic society is a fundamental concept closely linked to the idea of trust in the rulers. The elimination of corruption is not only a desideratum for any public authority, but also involves taking concrete measures and implementing them at all levels of the central and local public administration because corruption is still a cause that limits Romania's development prospects.

Improving the performance of the public administration involves defining the ethical standards of the civil service, standards that can inspire and shape the behavior of the civil servant.

In this context, this article aims to make a brief analysis of integrity as a fundamental value of the civil service, by analyzing the normative aspects.

Key words: *public office, integrity, civil servant, administrative code, public administration, trust*

INTRODUCTION

Derived from the Latin "integer, integra", which means whole and complete, integrity presupposes "the character of integrity; the feeling of dignity, justice and conscientiousness, which serves as a guide

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in human conduct; honesty, honesty, probity[1]. Thus, at the administrative level, integrity presupposes the fairness, legality, impartiality, morality and objectivity that persons holding a public office demonstrate in the exercise of their duties in the interest of citizens and the rule of law.

The concept of integrity in the civil service and the civil servant is closely linked to the idea of professionalism and efficiency, together creating the necessary premises to ensure the trust of citizens in the administration. Moreover, in the literature it is considered that moral integrity must be a quality of the civil servant, which is why it is necessary to be a condition of the recruitment of the future civil servant[2].

The priority of the public interest requires the representatives of the public authorities and institutions to adopt regulations that allow the early identification and timely removal of the premises that may lead to the occurrence of corruption. The importance of integrity in public life was also noted in the European Commission's Progress Report on the Cooperation and Verification Mechanism[3], which noted: "Integrity should be the guiding principle in public life, and the legal framework and institutions for integrity to promote this goal".

Professionalism and professional integrity in the public service clearly led to the trust and predictability of the public administration. The professional integrity of the civil service is based on impartiality and professional independence, values that must be assumed by every civil servant. Impartiality in this context refers to the absence of personal preferences. In the field of public administration, preference means favoring a certain aspect of a given situation, causing as a consequence an unjustified and unjust detriment to the general interest or the rights of

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[1] Annex 1 at the Order of the General Secretariat of the Government no. 600/2018 on the approval of the Code of internal managerial control of public entities, published in the Official Gazette no. 387/7 May 2018

[2] Diana Marilena Popescu Petrovszki, *Statutul funcționarilor publici din România și din Uniunea Europeană. Principii, drepturi și obligații* (Bucharest: I.R.D.O, 2011), 103-104

[3] Report from the Commission to the European Parliament and The Council on progress in Romania under the co-operation and verification mechanism {swd(2017) 701 final} Brussels, 15.11.2017 com(2017) 751 final

other interested parties. Legal issues that prohibit civil servants from engaging in decisions that relate to issues that they may have a personal interest in are enacted precisely to strengthen the value of impartiality[1].

THE CONCEPT OF INTEGRITY OF THE PUBLIC OFFICE

This principle of integrity is a fundamental principle in the European Union and is found as such regulated in Regulation no. 31 of the European Economic Community on the Staff Regulations and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community[2] where in Art 27 states that "recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity".

In the European Code of Good Administrative Behavior[3], integrity is one of the principles of public service that should guide European officials. According to this document, integrity refers to the following issues:

• Officials must be guided by a sense of fairness and must in all cases behave in a manner that could be subject to the most thorough public scrutiny. This obligation is not considered to be fulfilled only by acting in the spirit of the law.

• Civil servants must not assume any financial or other obligations that could influence them in the exercise of their functions, including by

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[1] SIGMA – Support for Improvement in Governance and Management, OECD, 1998 available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/SIGMA(2018)3&docLanguage=En accessed on 10.11.2021

[2] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1962R0031:20140101:EN:PDF accessed on 10.11.2021

[3] The European Code of Good Administrative Behavior is available at https://www.ombudsman.europa.eu/ro/publication/en/3510 accessed on 10.11.2021

accepting gifts. They must promptly declare any private interests related to their duties.

• Civil servants must act in such a way as to avoid conflicts of interest and the occurrence of such conflicts. They must take swift action to resolve any conflicts that arise. This obligation is incumbent on them even after the end of their term of office.

The Administrative Code[1] adopted in 2019 by the Romanian legislator defines in Art 368 the principles applicable to the professional conduct of civil servants and contract staff in the public administration, among them being mentioned in letter f and moral integrity. This ethical value is defined as the principle that persons holding different categories of functions are prohibited from seeking or accepting, directly or indirectly, for themselves or for others, any advantage or benefit in view of their position or abuse in some way of this function.

Unlike the European regulations, in Romania, integrity is not a principle of the recruitment of the civil servant, but it is a principle of his activity, being fully included in the management of the civil servant's career.

LEGAL REGULATIONS ON THE INTEGRITY AS A DUTY OF THE CIVIL SERVANT

In the literature, integrity is analyzed from a threefold perspective, namely from the perspective of conduct and image skills of the person exercising public office, from the perspective of public service beneficiaries and from the perspective of the obligations of the state in ensuring integrity, which implies creating mechanisms to support integrity.

By reference to the normative acts that regulate the principle of integrity of the civil servant, it results that this is in fact a duty, an obligation with a wide content.

[1] Government Emergency Ordinance no. 57/3 July 2019 on the Administrative Code published in the Official Gazette no. 555/5 July 2019

Integrity from the perspective of the Administrative Code is a duty of the civil servant because the way in which it is fulfilled depends on the public trust in the integrity, impartiality and effectiveness of public authorities and institutions[1].

The scope of the civil servant's duties regarding the observance of the integrity standard is also completed by Art 447 Para 1 of the Administrative Code which states that "In their relations with natural persons and with the representatives of legal persons who address the public authority or institution, civil servants are obliged to behave based on respect, good faith, fairness, moral and professional integrity".

The provisions of the Administrative Code are completed with the provisions of Law no. 188 of December 8, 1999 republished and amended, regarding the Statute of civil servants[2] which in Art 43 mentions that "civil servants must refrain from any act that could harm natural or legal persons or the prestige of the body of civil servants" and of Art 47 which stipulates that "Civil servants are prohibited from soliciting or accepting, directly or indirectly, for themselves or for others, in consideration of their public office, gifts or other benefits. (2) At the appointment in a public position, as well as at the termination of the employment relationship, the civil servants are obliged to present, in accordance with the law, to the head of the public authority or institution the declaration of assets. The declaration of assets is updated annually, according to the law".

The duties of civil servants in connection with the observance of the principle of integrity are also found indirectly in Law no. 7 of February 18, 2004 on the Code of Conduct for Civil Servants[3] as follows:

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[1] See in this regard Art 433 Para 2 of the Administrative Code which states that "In the exercise of their office, civil servants have the obligation to behave professionally, as well as to ensure, in accordance with the law, administrative transparency in order to gain and maintain public confidence in the integrity, impartiality and effectiveness of public authorities and institutions".

[2] Law no. 188 of 8 December 1999 on the statute of civil servants republished in the Official Gazette no. 365/29 May 2007 with subsequent modifications

[3] Law no. 7 of 18 February 2004 on the Code of behavior of civil servants republished in the Official Gazette no. 525/2 August 2007 and amended

• Art 14 stipulates that "Civil servants must not solicit or accept gifts, services, favors, invitations or any other advantage intended for them personally, family, parents, friends or persons with whom they have had business or political relations, which may influence their impartiality in the exercise of their public office or may constitute a reward in respect of such office".

• Art 17 stipulates that "(1) It is prohibited the use by civil servants, for purposes other than those provided by law, of the prerogatives of the public office held. (2) Through the activity of decision-making, counseling, elaboration of draft normative acts, evaluation or participation in investigations or control actions, civil servants are prohibited from pursuing the obtaining of benefits or advantages in personal interest or the production of material or moral damage to others".

From the analysis of the above mentioned regulations corroborated with the provisions of Art 2 of Law no. 78/2000 for the prevention, detection and sanctioning of acts of corruption[1], persons exercising a public office, regardless of how they have been invested, within public authorities or public institutions, who perform, permanently or temporarily, according to law, a function or an assignment, insofar as it participates in decision-making or may influence them, in public services, autonomous administrations, commercial companies, national companies, national companies, cooperative units or other economic agents, which exercise control attributions, according to the law, etc. "Are obliged to perform their duties in the exercise of their functions, duties or tasks, in strict compliance with the laws and rules of professional conduct, and to ensure the protection and realization of the rights and legitimate interests of citizens, without exercising their functions, duties or the assignments received, for interest the collection of money, goods or other undue benefits for themselves or for other persons". In this context, it follows that integrity in public administration is closely linked to compliance with the following principles:

[1] Law no. 7 of 18 February 2004 on the Code of behavior of civil servants republished in the Official Gazette no. 525/2 August 2007 and amended

- The supremacy of public interest
- Legality
- Responsibility
- Decisional transparency
- Celerity and good administration
- Impartiality

LEGAL MECHANISMS OF PROTECTING THE INTEGRITY OF THE CIVIL SERVANT

Ensuring integrity is not only a duty of the civil servant, but also an obligation of the state to adopt legal rules to eliminate any vulnerability, any attempt to corrupt the civil servant in office. In this sense, laws[1] have been adopted in Romania that have the role of eliminating the risks associated with the civil service, but their implementation is still done with syncope. Among the mechanisms for defending the integrity we mention: the integrity warning, the establishment of the National Integrity Agency, the regulation of ethics advisers.

Ethical rules on the conduct of public office, including integrity, are complemented by national law and the provisions on conflicts of interest and incompatibilities[2], together with an institutional framework to ensure transparency and trust in civil servants and consequently in public administration.

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[1] Law no. 161 of 19 April 2003 on certain measures to ensure transparency in the exercise of public dignity, public functions and in the business environment, prevention and sanctioning of corruption, published in the Official Gazette no. 279/21 April 2003; Law no. 571 of 14 December 2004 on the protection of public officials complaining about violations of the law, published in the Official Gazette no. 1214/17 December 2004; • Law no. 144 of 21 May 2007 (**republished**) (*updated*) on the establishment, organization and functioning of the National Integrity Agency published in the Official Gazette of Romania, Part I, no. 375/16 May 2008, renumbering the texts.

[2] See more about the conflict of interests and incompatibilities in Art 7, Art 227 and Art 460-463 of the Government Emergency Ordinance no. 57/3 July 2019 on the Administrative Code, published in the Official Gazette no. 555/5 July 2019

Establishing the obligation to submit declarations of assets and interests[1] by certain categories of civil servants is also a legal mechanism for defending integrity as it helps to increase the transparency of public administration and to promote integrity in order to prevent cases of conflict of unjustified interests, incompatibilities and wealth by monitoring variations that may occur in the wealth of a person holding a public office, be it a politician or a civil servant.

Prevention of corruption can be achieved effectively only to the extent that the civil servant is fully aware of the importance of the position and has assumed ethical values, but honestly fulfilling the duties, obligations and legal restrictions on the status of these subjects depends on the degree of responsibility of each.

CONCLUSIONS

A functional ethical infrastructure has the role of supporting the environment in which the public administration operates, an environment which, in turn, encourages the adoption and maintenance of standards of behavior. The adoption of legal rules governing the conduct of civil servants is a sine qua non for good administration and consequently for the achievement of the public interest. In this regard, an integrated approach is needed at the level of all public authorities in terms of implementing and promoting ethical values and professional integrity. Although an important role belongs to the public authorities to which the Romanian legislator has created integrity monitoring mechanisms, the prevention measures cannot offer an absolute protection against fraud. In this context, the responsibility and professionalism of the civil servant are the most important attributes that lead to defending the integrity and increasing the quality of public service which could harm individuals or

[1] Law no. 176 of 1 September 2010 regarding the integrity in exercising the public officials and dignities, in order to modify and complete Law no. 144/2007 regarding the establishment, organization and operation of the national integrity agency as well as for the modification and completion of other normative act published in the Official Gazette no. 621/2 September 2010

legal entities, civil servants contribute to ensuring the prestige of the body to which they belong, but also the trust of citizens in administrative activity.

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A LOOK AT THE TRANSPORT OF PERSONS UNDER NATIONAL LAW, IN THE CONTEXT OF THE CORONAVIRUS PANDEMIC

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Abstract:

Against the background of the current circumstances caused by the coronavirus pandemic, this study brings to light the field of transport, more precisely the transport of persons in domestic traffic. It is a well-known fact that all areas of social activity have suffered, and others are still experiencing it, the transport sector being equally affected, but with a tendency to recover. The study is intended to be a small gateway to optimism, since, after a brief analysis of the concept of "transport", including its classifications, and a research into the freedom of movement, within the limits it can bear, it is reflected the measures and rules set out in this field, making an overview of these legal rules, according to each type of transport, classified according to the modes of transport used: road, railway, sea and air.

Key words: *transport; transport of persons; national law; coronavirus pandemic; protective measures.*

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INTRODUCTION

In this period that we are going through, all the attention has been concentrated around a single issue, which has spread its consequences on all social areas, very well known as the coronavirus pandemic. From the very beginning, this harmful virus has created numerous problems, drawing attention to the unbalanced situation of the entire system of the States, whether we are referring to the field of health, which was and still is the most requested, or we refer to the cultural, educational or economic fields.

Along the way, people began to adapt to the new situation generated and the measures imposed to prevent the spread of the Sars-CoV-2 virus, and many areas have resumed their natural course, of course in compliance with the legal norms determined by Covid-19, but that does not mean that everything has returned to normal, at least not yet. At national level, since the virus entered our country and subsequently began to spread its tentacles all over its surface, Romania has gone through a period when it was in the state of emergency, followed by a state of alert, the current period, a state of alert that has been extended[1].

In these circumstances, the present study will examine a part of the economy, namely the part of transport, since "the role of transport must be regarded as a whole, as a complex element that concerns economic, social, state policy aspects, etc."[2], transport representing, from an economic perspective, "the infrastructure element without which both production and trade would become meaningless (...), the necessary

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[1] According to the Article 1 of the Government Decision No 1090/2021 on the extension of the state of alert on the territory of Romania starting with October 10, 2021 and the measures applied during it to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, No 962 of October 7, 2021, "starting with October 10, 2021, the alert status is extended by 30 days throughout the country".

[2] C. Stanciu, *Dreptul transporturilor. Contracte de transport de bunuri* (Bucharest : Universul Juridic, 2015), 8.

accessory of other economic activities"[1]. Thus, through this study, the notion of transport will be analyzed, making a detailed classification of them, following that the transport of persons will receive a dominant place of the study, by analyzing it in the form of manifestation internally, in the context of restrictions generated by the coronavirus.

1. TRANSPORT

1.1. Concept, importance, subject matter of transport law

Transport is one of the areas that reflect a vital area, the importance of which could be seen much better in this pandemic context, where the transport of goods, but also of people, played an important role in maintaining a balance, in terms of supply and access to these goods. Thus, "transports are economic activities of moving people and goods into space. Natural persons, movable tangible property, intangible goods, energies, electromagnetic waves, information move through the air, land or water."[2]

"The economic and social importance of transport is undeniable. Transport is undoubtedly an important element of material production, a «condition» of production; they are the glue between production and consumption and, at the same time, a catalyst for national income and the idea of economic growth. In other words, transport influences the entire economic and social life and their development is an imperative as long as it is desired to have an economic development and an alignment of the national economy with the Community economy, a compatibility with it."[3]

"The transport represents a provision of services performed by the carrier[4]/ transporter/ operator, at the request of the beneficiary (consignor

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[1] Gh. Piperea, *Dreptul transporturilor*, second edition (Bucharest: All Beck, 2005), 1-2.
[2] A. Cotuțiu, *Contractul de transport* (Bucharest: C. H. Beck, 2015), 1.
[3] Stanciu, *Dreptul transporturilor*, 8.
[4] Currently, the notion of "carrier" is no longer used, as a result of the repeal of the Commercial Code, this notion being replaced by the Civil Code (Law No 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, No 505 of July 15, 2011, as amended and supplemented) with that of "transporter", as it results from the provisions of Article 1955 of the Civil Code, regarding the transportation contract,

or consignee), for a price, by which the carrier undertakes to move the goods and passengers to the destination, with appropriate vehicles and in complete safety. This activity was considered, according to the Commercial Code of 1887, as being of a commercial nature."[1]

The object of regulation of transport law is represented by the social relations regulated by the transport law that arises on the occasion of the organization of transport activities or the execution of transport and related activities. In other words, the subject matter is emphasized by the legal relationships that are established in the process of organizing and executing the transport of goods and persons.

"Transport activities, as an object of transport law, are those activities which consist of a movement of persons or goods in space by means of transport and by the use of an appropriate transport route. Transport is therefore defined by 4 elements: it is a movement in space; the object of this movement is the persons or goods; the movement is made with means of transport (vehicle), on a transport route."[2]

Therefore, not all movements in space are the object of the transport activity, but only those that take place on a communication route, otherwise transport cannot be discussed. Pursuant to Article 9 Para 1 of the Government Ordinance No 19/1997[3], "Transport infrastructure shall be intended for the pursuit of transport activities, transport-related activities and the management of the infrastructure in question. Transport infrastructures are of national and European interest and together with traffic management systems and positioning and navigation systems constitute transport networks that may be of national or European interest. The infrastructures intended for carrying out transport activities are the means of communication by road, rail, water and air", from which it appears that the only means of communication are those of road, rail, water and air.

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where it is ordered that the person who undertakes to transport a person or a good is called the transporter.

[1] Stanciu, *Dreptul transporturilor*, 21-22.

[2] Piperea, *Dreptul transporturilor*, 2.

[3] Government Ordinance No 19/1997 on transport, republished in the Official Gazette of Romania, Part I, No 552 of November 11, 1999, as amended and supplemented.

1.2. Transport classification

"The classifications are generally based on certain criteria which support the idea of distinguishing between different categories of transport, thus highlighting the differences of the legal regime between them. Each of the classifications is not only of theoretical interest, but also of a practical one because, often, the qualification of transport as belonging to a certain category makes that category of transport produce distinct legal consequences, which generate a specific legal regime. The classification of transport can therefore be developed according to different criteria."[1]

A first criterion, as well as the main one, is designated by the object of the transport performed by the transporter, which divides the transports into: transports of persons, which represent a fragment of the whole transport activity, and freight transports (transport of goods), which constitute the dominant part of this activity.

A second criterion is represented by the route or means of transport used, which separates the transports into: land transport; waterborne transport; air transport; extraterrestrial (extra-atmospheric) transports, with the specification that this last type of transport is not of a commercial nature, so it cannot take the form of a provision of services. Land transports can also be classified into: road transport and rail transports, and waterborne transports in: maritime, river and inland water (rivers, waterways, lakes). Moreover, according to Article 5 Para 1 of the Government Ordinance No 19/1997, depending on the modes of transport (the method of transport used for the movement of goods and passengers), sometimes codified, the transports are: by road, by rail, by sea, by air and multimodal and combined.

"Multimodal transport, also referred to as «door-to-door transport», shall be carried out with at least two modes of transport, on the basis of a single document, under the coordination of a multimodal transport operator. The combination of means of transport is road-air, road-rail, road-sea/ river. The presence of road transport is explained by the easy access to the infrastructure of this mode of travel and the presence of

[1] Stanciu, *Dreptul transporturilor*, 35.

road infrastructure at all terminals, ports, airports, railway stations, farms, livestock farms, warehouses, production units and others. The great advantage of multimodal transport is the full safety of goods which are the responsibility of a single transporter."[1]

A third criterion is given by the type of transport used, separating them into: transport carried out by a single type of transport (successive transport) and transport in combined traffic. Article 1957 Para 2 of the Civil Code defines these two types of transport: "successive transport is that carried out by 2 or more successive transporters using the same mode of transport, and combined transport is that in which the same transporter or the same successive transporters use different modes of transport."

A fourth criterion is mirrored by the itinerary traveled within or outside the borders of the state, that is, depending on the exceeding of the territory of a state, where we distinguish between: transports in domestic traffic and transports in international traffic. Some clarifications need to be made regarding international transports. Thus, ordinary international transport requires that the place of dispatch and the place of destination be in different countries. In addition, these transports may in turn be divided into: "transport in international transit traffic where transport takes place in a State only by transit, as a fraction of an international transport between two different states and peage transports – when the transports have points of departure and arrival situated in the territory of the same State, but the course of the transport passes through the territory of another neighboring country."[2]

A fifth criterion is outlined by the periodicity of the journey, dividing the transports into: transports with regular periodicity – "it is the case of the railway transports, of the one executed in bus networks, of the air transport, liner shipping, the transporter being in a permanent state of offer to contract, the transport contract being terminated by a simple adhesion from the customer"[3] and occasional transports (charter) – "the

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[1] Cotuțiu, *Contractul de transport*, 27-28.
[2] Stanciu, *Dreptul transporturilor*, 36.
[3] Piperea, *Dreptul transporturilor*, 4.

journey is organized and carried out on itineraries, on the date and under the conditions negotiated between the transporter and the interested user. In sea transport, the movement of goods in massive quantities and over long distances is usually carried out by occasional transport, by chartering of cargoes"[1].

A sixth criterion is highlighted by the served interest, according to which we identify: transport in the public interest (public transport) and transport for own account (private transport), as it results from Article 20 Para 1 of the Government Ordinance No 19/1997. According to Article 20 Para 2 of the Government Ordinance No 19/1997, "transport performed by legal or natural persons, under non-discriminatory conditions of access for third parties, under a transport contract, for payment, shall be transport in the public interest, hereinafter referred to as public transport.", and according to Article 21 Para 1 of the Government Ordinance No 19/1997, the legislator subclasses transport for own account in transport for personal purposes and transport for own use: "transport for personal purposes, performed by natural persons in order to ensure the movement of persons or goods, as well as transport for own use, organized by natural or legal persons for their own authorized activities, by means of transport which they own or use under a rental or leasing contract, is transport for own account."

Other criteria by which transports are divided are:

– depending on production and consumption: supply transport, distribution transport, business travel, home-to-work travel, leisure travel, special project travel (courses, specializations);

– by the economic sector served: industrial transport, construction transport, agricultural transport, multifunctional (non-specialized) transport, tourist transport, etc.;

– according to the range of services offered: specialized transport, adaptive transport, multifunctional transport;

– by the impact on environmental factors and health: polluting transport, non-polluting transport;

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[1] Piperea, *Dreptul transporturilor*, 4.

– according to the propulsive driving force: motorized transport, non-motorized transport driven by natural forces (wind, solar energy, etc.), non-motorized transport driven by human or animal forces, hybrid transport.

"The classification by category of transport is important, because each category of transport corresponds to a certain transport contract which, in addition to the features of any transport contract, has a series of specific characteristics, of particularities determined by the domestic or international character of the transport, by the transport routes used, by the number of means of transport used, etc."[1]

2. THE RIGHT TO FREE MOVEMENT

2.1. Notion, legal nature.

In the field of transport law, the free movement of persons and goods is seen both as a specific principle of this branch of law and as one of the main objectives[2] of the national transport system, based on the constitutional regulations contained in Title II – "Fundamental rights, freedoms and duties", Chapter II – "Fundamental rights and freedoms", Article 25 – "Freedom of movement" of the Romanian Constitution[3].

"Before it is a legally regulated possibility, free movement is an objective reality. Human beings move regardless of how they cross landforms or borders between localities or States. From this perspective, the legal protection of the human being's ability to circulate presupposes that state intervention in this area is limited to the minimum necessary, at most, in terms of establishing the conditions under which this human activity can be carried out. By establishing conditions for the exercise of this right, State authorities cannot affect the substance of the right to free movement. That is why, therefore, the right to free movement is often classified by doctrine in the first generation of rights, that is, in the category of those for whom the full guarantee by the state power requires

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[1] Stanciu, *Dreptul transporturilor*, 38.

[2] Article 3 letters b-c of the Government Ordinance No 19/1997.

[3] The Romanian Constitution, republished in the Official Gazette of Romania, Part I, No 767 of October 31, 2003.

not its active intervention, but the abstention from anything that might limit the person's ability to move."[1]

According to the constitutional provisions, the right to free movement is a guaranteed fundamental right, which ensures the citizen's freedom of movement, under its double aspect, which, moreover, also forms its content, namely the free movement within the Romanian territory and the free movement outside the territory of the country, with the specification that this is not an absolute right, the law establishing the concrete conditions under which it is to be exercised. However, the right to free movement also refers to the freedom of citizens to establish their domicile or residence anywhere in the country or abroad, in compliance with the laws in force, thereby guaranteeing the right to free movement in the full extent of its constituent elements.

"The Constituent has not expressly stated, but it is in the domain of evidence and it is in the legal regime of exercising any fundamental right that the free movement of any person is based on its unfettered will. (…) Equally, even in the absence of an express specification, the constitutional text cannot be interpreted as referring to the material means that can compete in the movement of persons; par excellence, fundamental rights protect human behavior in relation to state authority and not relations which can be established between qualified or unqualified persons to carry out certain activities subject to a state authorization regime."[2]

2.2. The conditions for limiting the right to free movement

As previously pointed out, the right to free movement is not an absolute right, which means that it is susceptible of restrictions, the conditions of which may be drawn from Article 53 of the Romanian Constitution, which allows the limitation of certain fundamental rights and freedoms, but only by way of exception, temporarily, conditioned and without affecting the very substance of the right. "Any restrictions on

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[1] Coord. I. Muraru and E. S. Tănăsescu, *Constituția României. Comentariu pe articole* (Bucharest: C. H. Beck, 2008), 237.
[2] Muraru and Tănăsescu, *Constituția României. Comentariu pe articole*, 239.

the exercise of this right shall be aimed at safeguarding economic and social values, fundamental rights and freedoms, the normal functioning of social relations and respect for international conventions."[1]

From the content of this constitutional text, several essential conditions are detached, which allow the restriction of the exercise of some fundamental rights and freedoms and which must be fulfilled cumulatively, otherwise they may lead to an arbitrary interference of the state authorities in their exercise:

– the restriction can only be achieved by law, justified by the existence of normatively determined situations, strictly interpreted, which concern the public interest and the protection of fundamental rights, namely: to defend national security, order, health or public morals, rights and the freedoms of the citizens, to prevent the consequences of a natural disaster, a disaster or a particularly serious disaster;

– the restriction must be necessary in a democratic society, since measures of a clearly anti-democratic nature aimed at reducing public opportunities of manifestation in the public sphere are used, and must be proportionate to the situation that has led to it;

– the restriction must be temporary, applied in a non-discriminatory manner and must not affect the substance of a fundamental right or freedom, "without prejudice to the existence of a right or freedom", and may only apply to the exercise thereof.

"The restriction of the exercise of certain rights can only operate in one of the exhaustive assumptions listed in Article 53 of the Constitution. In other words, the Constitution limits the possibility of intervention of the law only to those situations in which the reconciliation of equally imperative interests must be carried out without affecting the substance of any of them. These are either objective aimed at the very survival of the State and its constituent elements, or at the need for harmonization between the guarantees offered to several fundamental rights at the same time. (…)

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[1] M. Andreescu and A. N. Puran, *Drept constituțional. Teoria generală și instituții constituționale* (Bucharest: C. H. Beck, 2016), 272.

Article 53 of the Constitution requires the establishment of a proportionality relationship between the regulatory measure establishing the restriction of the exercise of certain rights and one of the limited cases listed in which this may occur. There is a big difference between a legitimate and, therefore, constitutionally justified restriction and one that is proportionate to the cause that motivates it. Thus, there may be restrictions on the exercise of certain rights which, although justified by the specific cases mentioned in the Constitution, are disproportionate to them and, as a consequence, become unconstitutional."[1]

"The principle of proportionality is a constitutional guarantee, which allows the Constitutional Court to sanction the arbitrary interferences of the Parliament or the Government in the exercise of these rights. Therefore, the measures adopted by the State restricting the exercise of fundamental rights or freedoms in order not to be abusive must be not only legal, that is, ordered by law or by a normative act of an equivalent legal force to the law, but also legitimate (just), that is, necessary in a democratic society, non-discriminatory, proportional to the situation that determines them and not affect the substance of the right. Proportionality and necessity in a democratic society are criteria for assessing, for both the legislator and the judge, the legitimacy of restricting the exercise of certain fundamental rights and freedoms."[2]

Therefore, in view of these aspects, the restriction on the exercise of the freedom of movement of citizens cumulatively meets all the requirements imposed by the provisions of Article 53 of the Romanian Constitution, namely: restrictive measures are ordered by law, based on the cause of public health, which designates the health protection of the entire population, taking into account the high risk of disease generated by this contagious virus; the restrictions are imposed only during the existence of the virus, so it is temporary, even if at present it is not possible to know for sure how long it will last, the fact is that when this risk of disease no longer exists, restrictions will no longer exist either; the restriction is necessary in this democratic society, determined by the care

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[1] Muraru and Tănăsescu, *Constituția României. Comentariu pe articole*, 539, 542.
[2] Andreescu and Puran, *constituțional. Teoria generală și instituții constituționale*, 258.

of the state for its citizens; the measures ordered are legitimate and proportionate to the situation which generated them; the measures are applied equally to all citizens, without discrimination or privilege, without prejudice to the substance of the right, but only to the exercise of the right.

Thus, according to Article 5 Para 3 letters b) to f) of Law No 55/2020[1], "the measures to mitigate the impact of the type of risk are: b) restricting or prohibiting of the movement of persons and vehicles in the places and, where appropriate, in the established time intervals; c) the prohibition of departure from the established areas and, where appropriate, within the established time intervals or the establishment of quarantine on buildings, localities or geographical areas; d) restriction or prohibition of road, rail, sea, river, air or metro transport by operators on routes and, where appropriate, at established time intervals; e) temporary closure of some state border crossing points; f) temporary limitation or suspension of the activity of certain institutions or economic operators.

3. TRANSPORT OF PERSONS — PRELIMINARY CONSIDERATIONS ON LEGAL SUBJECTS

Transport of persons is that type of transport classified by the object of the transport carried out by the transporter, which constitutes only a small fraction of the entire transport activity. Being, thus, one of the important parts of the transport activity, which is not given much attention, probably due to the fact that it does not have a very pronounced commercial nature, this type of transport can be covered by all types of classification, as set out in Chapter 1, sub-chapter 2, entitled "Transport Classification", of this paper.

Transport of persons is much more closely related to the individual and his personality, compared to freight transport, as the former can take the form closest to the natural person, the only subject of law benefiting from this type of transport, being thus adaptable to their preferences.

[1] Law No 55/2020 on some measures to prevent and combat the effects of the Covid-19 pandemic, published in the Official Gazette of Romania, Part I, No 396 of May 15, 2020, as amended and supplemented.

Therefore, the subjects of law present in this matter are: transport operators (transporters) and beneficiaries (passengers or travelers), as identified by the legal norms contained in the Romanian Civil Code and in the Government Ordinance No 19/1997.

According to Article 9 Para 3 of the Government Ordinance No 19/1997, "the transport operators are transporters, Romanian or foreign, who have equal and non-discriminatory access to the infrastructure open to public access. Transporters are natural or legal persons, authorized to carry out domestic or international transports of persons or goods, in the public interest or in their own interest, by owned means of transport or under a rental or leasing contract."

Regarding a definition for the notion of passenger, "none of the mentioned laws define it, but it is obvious that it can only be the natural person benefited from the movement in space with a mean of transport, by the transport operator. It follows from the definition that the passenger's main obligation is – to pay the price of transport. Article 2005 Para 2 of the Civil Code also adds its obligation to submit, during the transport, to the measures taken by the transporter's employees."[1]

Consequently, having clarified the notions of "transporter" and "passenger", the subjects of law specific to legal relations concerning the transport of persons, an exposure of the measures to prevent and combat the Sars-Cov-2 virus, measures adopted at national level by the Romanian legislator, taking into account the recommendations of the World Health Organization, can be further achieved.

4. MEASURES TAKEN TO COMBAT THE CORONAVIRUS PANDEMIC IN THE FIELD OF TRANSPORT OF PERSONS

4.1. General considerations

According to Article 2 of the Government Ordinance No 19/1997, the national transport system has a strategic character, being an integral part of the economic and social system, in all the activities generated by the transport activities, the protection of human life and the protection of the environment being a priority. Thus, providing by this ordinance the

[1] Cotuțiu, *Contractul de transport*, 66.

fact that the protection of human life is a priority and taking into account the pandemic context, the ordering of measures and possible restrictions are welcome, even if the fundamental right of free movement is limited.

Article 32 Para 1 of Law No 55/2020 states that the measures and restrictions adopted to prevent contamination with the new coronavirus, in the transport and infrastructure field, have been put in place for each type of transport: land, rail, sea or air, in order to ensure the smooth operation of passenger transport. These measures to reduce the risk of infection in the internal transport of persons are provided by the Joint Order of the Minister of Transport and Infrastructure, the Minister of Internal Affairs and the Minister of Health[1], as it results from Annex No 3 to Government Decision No 293/2021 – Measures to reduce the impact of the type of risk.

4.2. Measures adopted in the field of road transport

In accordance with Article 9 point 3 of Annex No 3 to Government Decision No 293/2021, during the alert state, "road transport is carried out in compliance with the measures and restrictions regarding the hygiene and disinfection of the means of transport and the procedures and protocols within the means of transport, the degree and mode of occupancy of the means of transport, the rules of conduct for the staff of the operators and for passengers, as well as the provision of information to personnel and passengers, in order to prevent contamination of passengers and staff working in the field of road transport".

Annex No 2 to Order No 1082/97/1112/2020 – Measures and rules to be implemented for the carrying out of passenger transport by road, freight transport by road, transport by taxi, rental transport with driver and alternative transport during the alert state, in order to prevent the spread of COVID-19, divides these measures into three categories:

[1] Order of the Minister of Transport, Infrastructure and Communications, of the Minister of Internal Affairs and of the Minister of Health No 1082/97/1112/2020 on measures and rules in the field of transport, during the alert state, to prevent the spread of COVID-19, published in the Official Gazette of Romania, Part I, No 526 of June 19, 2020.

measures in the field of road transport of persons; measures in the field of taxi transport, alternative transport and rental transport with driver and measures in the field of road freight transport.

Some of the measures envisaged in the field of road transport of persons are:

1. During the course of the journey, the driver shall wear a protective mask so as to cover his mouth and nose.

2. For access on board of the means of transport and for the whole journey, passengers shall be required to wear a protective mask so as to cover their mouth and nose.

3. The space intended for the driver of the means of transport shall be physically separated or the first row of seats shall be kept free in order to avoid social interaction.

4. The drivers of the means of transport have the obligation to keep social distance, during breaks on the road, and to avoid contact with other people.

5. When embarking/disembarking, passengers shall respect a minimum safety distance from each other.

6. Passenger access to the means of transport shall be made through the front door and the exit shall be made on the other door(s), if any.

4.3. Measures adopted in the field of rail transport

Article 9 point 2 of Annex No 3 to the Government Decision No 293/2021 provides that, in the state of alert, "rail transport is carried out in compliance with the measures and restrictions relating to the hygiene and disinfection of common areas in railway stations, flag stations, stations or stopping points, and of train equipment and fittings, the procedures and protocols within railway stations, flag stations, stations or stopping points, but also and within wagons and train fittings, the degree and mode of occupancy of rolling stock, the rules of conduct for the staff of the operators and for passengers, as well as for informing personnel and passengers, in order to prevent contamination of passengers and staff working in rail transport".

Annex No 4 to Order No 1082/97/1112/2020 – Measures and rules in the field of railway and metro transport, during the state of alert, in

order to prevent the spread of COVID-19, classifies these measures and rules into three categories: measures and rules at the level of railway operators; measures and rules at the level of railway station managers and measures and rules for metro transport.

Some of the measures and rules at the level of railway operators are:

1. Wearing a protective mask is mandatory for access on board of the trains and throughout the journey.

2. The train manager or the conductor has the obligation to view the travel ticket, without touching it.

3. Train sets must be cleansed and hygienic before departure for each journey.

4.4. Measures adopted in the field of shipping

According to Article 9 point 4 of Annex No 3 to the Government Decision No 293/2021, during the state of alert, "shipping is carried out in compliance with the measures and restrictions relating to hygiene and disinfection of passenger ships, the procedures and protocols inside passenger ships, the degree and mode of occupancy of passenger ships, the rules of conduct for operators and passengers, as well as for informing staff and passengers, in order to prevent contamination of passengers and personnel working in the field of shipping".

Annex No 3 to Order No 1082/97/1112/2020 – Measures and rules in the field of passenger transport on board ships, during the state of alert, in order to prevent the spread of COVID-19, provides two categories of measures: measures taken by the manager of the passenger embarkation/disembarkation place and measures taken by the economic operator carrying out the transport of passengers and/or goods.

Some measures taken by the economic operator carrying out the passenger shipping are:

1. Hygiene and disinfection of the vessel with biocide substances is mandatory.

2. The economic operator shall determine the frequency of hygiene and disinfection of the ship, according to its technical characteristics and

the duration of the voyage, and shall inform passengers and the authorities thereof.

3. The economic operator is obliged to ensure that the temperature of the crew members is checked on the beginning of the shift.

4. The economic operator is obliged to equip the crew members with protective masks and gloves.

5. The economic operator is obliged to take measures to prohibit access on board for passengers who do not wear a protective mask.

4.5. Measures adopted in the field of air transport

Article 9 point 1 of Annex No 3 to the Government Decision No 293/2021 states that during the alert state, "air transport is carried out in compliance with measures and restrictions relating to hygiene and disinfection of common areas, equipment, means of transport and aircrafts, the procedures and protocols within airports and aircrafts, the rules of conduct for the staff of airport and air operators and passenger, as well as for informing staff and passengers, in order to prevent contamination of passengers and personnel working in the field of air transport".

Annex No 1 to Order No 1082/97/1112/2020 – Measures and rules in the field of air transport to prevent the spread of COVID-19, divides these measures into three categories: measures and rules at the level of air operators; measures and rules at airport level and other measures that air operators flying to/from Romanian airports, airport managers and other airport service providers may have at their disposal, where necessary.

Some measures and rules at the level of air operators are:

1. Passengers are instructed to check-in online.

2. Air operators shall provide protective equipment for crew members.

3. Pilots are required to wear a protective mask so as to cover their nose and mouth, in case of leaving the cockpit, and to sanitize their hands, by washing with soap and water or disinfecting with alcohol-based disinfectants, after completing the tasks outside the cockpit.

4. The flight crew is obliged to sanitize their hands, by washing with soap and water or disinfecting with alcohol-based disinfectants, after each interaction with passengers or their belongings.

5. In-flight movements in the aircraft shall be kept to a necessary minimum.

6. Passengers shall be grouped by family as far apart as possible, in accordance with health protection measures.

7. The aircraft must be disinfected after each rotation.

8. Passengers are required to wear a protective mask when boarding and throughout their journey.

CONCLUSIONS

Transport is a part of the engine of a country's economy, an essential part of society, an element of infrastructure without which production, trade and tourism would be pointless, constituting a sensor for analyzing the degree of civilization and development of infrastructure, which reflects the degree of development of a society. Transport is also the subject matter of transport law, the main classification of which is made according to the object of transport carried out by the transporter in passenger and freight transports.

With the advent of the virus and its spread, which soon materialized in the declaration of the coronavirus pandemic, the transport field has suffered as much as the other areas of human activities. But even if the transport sector has been affected, on this occasion, the high degree of importance that it has in the state, in particular the freight sector, has also been recognized, but transport of persons should not be neglected, as it also makes a significant contribution to the performance of all human activities.

Therefore, the domestic transport of persons has suffered greatly as a result of the Covid-19 pandemic, but, after the State and the people have understood the gravity of the situation and adapted to it, by invoking and implementing rules and measures to prevent and combat this contagious virus, even if those measures have been and are likely to restrict the exercise of fundamental rights, such as, free movement, the

field of passenger transport is taking small steps towards a return to what was before, but only with respect of these rules by all participants in social life.

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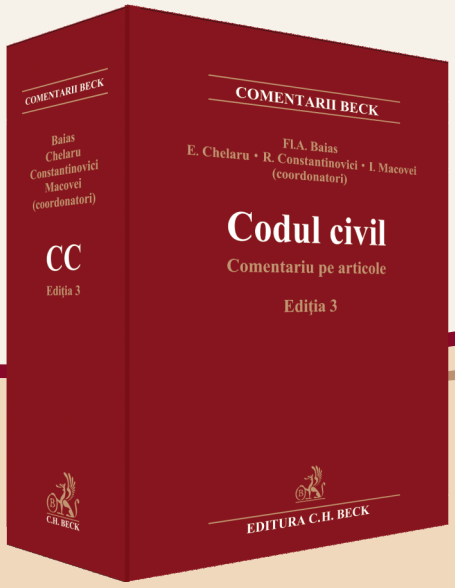

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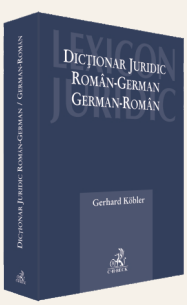

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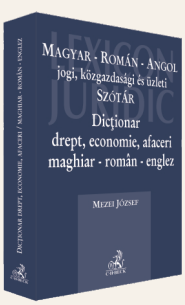

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