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SEPARATION OF POWERS IN GERMAN CONSTITUTIONAL LAW - SOME REFLECTIONS ON THE BASIC CONCEPT AND RECENT DEVELOPMENTS

Arnold RAINER[1]

Abstract:

Separation of powers is a universal constitutional principle that is also an essential element of the rule of law in German constitutional law. The division of state functions secures freedom to a high degree and also guarantees that tasks are performed adequately and efficiently in the State. The case law of the Federal Constitutional Court in this regard is rich. A shift in the weightings intended by the constitution in the decision-making process of the state requires correction in order to satisfy the principle of the separation of powers. The restoration of the balance of powers can be achieved through jurisprudence or constitutional reform. In the practice of the Germany, the restoration of the constitutionally intended relationship between federal legislation requiring explicit consent of the Federal Council on the one hand and those exposed only to an overridable veto of this institution on the other hand should be emphasized as essential. The constitutional limitation of the executive's normative power is, furthermore, an example of an adequate distribution of functions between the administration and the legislature.

Key words: *constitutional principles; separation of powers; constitutional order; jurisprudence.*

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I. DOGMATIC REFLECTIONS ON THE CONCEPT OF SEPARATION OF POWERS

1. REMARKS ON THE HISTORICAL DEVELOPMENT

The principle of the separation of powers is an essential element of the rule of law and is firmly anchored in German constitutional law. Section 20(2) of the Basic Law (BL), which recognizes the fundamental principle of the sovereignty of the people, combines this statement with the indication that state power vested in the people is exercised by special legislative, administrative and judicial bodies. In other places in the Basic Law, such as in Article 1(3) and Article 20(3) BL, reference is again made to this threefold division of state power.

A comparable statement can be found in the Weimar Constitution of 1919[1] and in the Constitutions of the German *Länder* existing at that time, such as the Bavarian Constitution of 1919[2]. In essence, the institutional division of the exercise of state power is also found in the Reich Constitution of 1871[3], although this did not yet have the democratic environment that belongs to the idea of the division of powers in our modern sense.

The doctrine of the separation of powers, which can be traced back to the writings of Montesquieu, is inseparably linked to the democratic principle, which is also clearly reflected in historical constitutional documents. The central impulse came from the French Declaration of Human Rights of 1789[4], which states in its Article 16 that a society in which the guarantee of human rights is not ensured and the separation of powers is not established is no constitution at all. Accordingly, in the French Constitution of 1791[5] we already clearly see

[1] See Art. 5 of this Constitution and its structure with the distribution of state power among the various powers and their organs. Text: https://www.jura.uni-wuerzburg.de/fileadmin/02160100/Elektronische_Texte/Verfassungstexte/Die_Weimarer_Reichsverfassung_2017ge.pdf

[2] See §2 of this Constitution, http://www.verfassungen.de/by/verf19-i.htm.

[3] http://www.verfassungen.de/de67-18/verfassung71-i.htm. See Art. 5, 7, 36, 41, 48, 50 etc. The *Kaiserreich* of 1871 had a federal structure, with large autonomy of the singular States which formed it.

[4]https://www.legifrance.gouv.fr/contenu/menu/droit-national-en-vigueur/constitution/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789

[5] https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1791. See Art. 2 – 5 of this Constitution.

the division of powers in the organization of the state, and the US Constitution, which came into being two years earlier, also expressly assigns legislative power to Congress, executive power to the President and judicial power to special independent courts, which the people 'delegate' to these bodies[1]. Constitutions that are assigned to the monarchical principle, however, lack the separation of powers. An example of this is the Bavarian Constitution of 1818, the Constitution of the Kingdom of Bavaria created by Napoleon, according to which the king collects all rights of state power, as this is formulated, and then exercises them according to the provisions of the constitution[2]. Similarly, the Baden constitution of 1818 accumulates power in the person of the Grand Duke[3]. The 20th century constitutions establishing the Republic, such as the Bavarian constitution of 1919[4], are quite different.

2. THE CONCEPT OF SEPARATION OF POWERS.

Let us first take a look at the concept of separation of powers in general and then move on to selected examples from German constitutional law.

It should be noted at the outset that the terminology is not uniform and that different aspects are associated with the concept of separation of powers: Separation of powers, separation of functions, inhibition of powers, checks and balances[5]. It is also often emphasized that the classical model of the separation of powers is no longer realized in its pure form[6] (if that was ever the case!) and that not only a strictly

[1] https://www.senate.gov/civics/constitution_item/constitution.htm. See Articles I, II and III.

[2] http://www.verfassungen.de/by/verf18-i.htm.See § 1: "The king is the head of the state, unites in himself all the rights of state power, and exercises them under the provisions given by him in the present constitutional charter."

[3] http://www.documentarchiv.de/nzjh/verfbaden.html. See § 5 "The Grand Duke unites in himself all the rights of state power and exercises them under the provisions laid down in this constitutional charter".

[4] http://www.verfassungen.de/by/verf19-i.htm. See the new approach in §2: "The power of the state shall emanate from the people as a whole. In accordance with the provisions of this Constitution and the Constitution of the German Reich, it shall be exercised directly by the citizens and indirectly by the organs established in this Constitution".

[5] R. Zippelius, *Allgemeine Staatslehre*, 16th ed. (Munich: C.H.Beck, 2010, § 31), 244 – 256.

[66] FCC vol. 3. 225, 247.

normative approach is appropriate, but that the actual impact of a number of powers must also be included in the consideration[1].

The members of society, who - according to Jean-Jacques Rousseau and after him the Declaration of the Rights of Man and of the Citizen of 1789[2] - are born in freedom and equality, unite in a state by means of the social contract (i.e. by creating a constitution) and organize institutions that exercise the functions necessary for their protection and development in well-being. This organizational contract requires the restriction of the freedom of individuals, but without calling into question the principle of liberty. Freedom means participation in the establishment of the institutions, i.e. democratic participation, achieved through democratic elections. The principle that the freedom of individuals is primary, is prior to the function of institutions, is a consequence of the sovereignty of the people as the sum of the individuals of a society. They freely determine their representatives in the main institution, the parliament, which consequently exercises the primary function, legislation. The other functions, the executive and the judiciary, which are also exercises of state power, must also be attributable to the people as sovereign, even if this only happens indirectly, through the mediation of parliament (i.e. through the election of the head of government in parliamentary systems of government and through subsequent mediation to individual officials of the executive and the judiciary).

The individual powers, or we can say functions, that the state exercises as an organized community are already different in their specific nature and therefore objectively separate. We can distinguish two aspects, on the one hand the nature, the essence of the functions, and on the other the idea of legitimacy inherent in a function.

Order can only be established through the definition of general rules. The law is a general rule of conduct, this is the abstract formation of life. On the one hand, the generality of the rule creates the necessary broad impact in society and serves as a point of orientation; on the other hand, the abstract character of the rule means that it applies to everyone, i.e. it corresponds to the principle of equality. This general rule of conduct must be established by the individuals, i.e. by the people, since they, through their representatives in parliament, must consent to the restrictions and (even without restriction of freedom) the configuration of

[1] Zippelius (note 10), p. 255-256.
[2] See its Art. 1 first sentence.

their lives effected by the law. This is an act of self-determination derived from the principle of freedom. This legislative function is the main expression of popular sovereignty. Through it, therefore, the democratic legitimacy of the law is directly transmitted.

The other functions, the executive and judicial ones, are indirectly democratically legitimized; the fact that they need such democratic legitimization is a necessary result of the basic assertion of popular sovereignty.

As far as the executive function is concerned, it is not abstract, but concrete, the concrete formation of life on the basis of the law. It concretely fills the abstract framework of the law and means self-determination of the individual in the concrete case. There are also executive actions that are independent of the law, planning, distribution, administration, etc.[1] Executive action is essentially characterized by its concreteness.

The extent to which State leadership, as an activity of government, means executive function is not easy to discern. The highly political activity is of greater impact in its external and internal spheres than conventional executive activity. Nevertheless, the Government's[2] and even the State President's[3] role will have to be counted as part of the executive branch.

By its nature, the judiciary is an autonomous activity, clearly differentiated from the other two functions. The independence of the judge is essential to the proper nature of this function.

At the same time, it should be mentioned that the functions have so far been shown as isolated categories, but that a - partly necessary - cooperation[4], an interaction of these functions is required in order to be able to adequately fulfil the complexity of the State's tasks. It is not only

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[1] H. Maurer, *Staatsrecht I*, 6th ed. (München: C.H. Beck, 2010), 592; H. Maurer/Chr. Waldhoff, *Allgemeines Verwaltungsrecht*, 19th ed. §1 /27 (2017), 11, see also §1 /26 for the law-related executive action.

[2] J.A.Kämmerer, *Staatsorganisationsrecht*, 4th ed. (München: Vahlen, 2022), 141; Maurer (note 14), 592/593, 594 (State leadership - which is shared with Parliament - is not clearly separable from the executive activity of the Government in the proper sense.

[3] K.Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*,18th ed. (Heidelberg: C.F.Müller, 1991), 259 (=marg. note 655). See also Zippelius (note 10), 254.

[4] Which can also have the function of mutual control (rightly Zippelius (note 10), 250, 255.

a matter of the separate functions working together, but also of the necessary functional overlaps. This is also generally recognized. The limit in each case is that one function does not intrude into the core area of the other function.[1]

If we then ask why the tasks of the State are divided into individual functional areas, we can first of all expect them to be so different in nature that they must necessarily be performed by different agencies. They could not be performed cumulatively by the same function holders, if for no other reason than immanent objectivity[2]. Depending on the nature of the functional area, the structure of the agents is also very different: the legislature acts through representatives directly appointed by the people and determined in the political process, the executive through office holders whose training and functional path are tailored to executive tasks[3] and who are granted only derived democratic legitimacy, the judiciary characterized by its independence and sole attachment to the law.

In addition, however, there is a decisive idea: these functions are not only delimited according to their specific functional areas, but are supposed to complement, interact with and control each other.[4] The separation of functions is an essential element of the guarantee of freedom.

Individual power must be limited in itself, it must have and maintain the right relationship with the other power functions, the whole system of individual power functions in an institutional order must be tempered, well balanced. These are the requirements for the design of the institutional system in practice. Shifts of an factual nature must be corrected. Correction and control are inherent dimensions of the system of separation of powers and functions. Appropriate limitation of power must be achieved throughout the system, including within the institution itself and also between all persons working for the institution, i.e. power limitations of an interpersonal and inter-institutional nature[5].

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[1] FCC vol. 34, 52,59; vol. 95,1,15; vol. 139, 321, 362; Kämmerer (note 15), 65-66; Hesse (note 16), 197.
[2] Hesse (note 16), 197.
[3] See also Hesse (note 16), 199.
[4] Zippelius (note 10), 250 – 252. He speaks also of "organ-adequate division of functions", 251.
[5] Zippelius (note 10), 250-251 with reference to K. Loewenstein, *Verfassungslehre* (1959), 167 et seq., 299 et seq.(at 251).

It must be emphasized that in all these considerations one must include both the normative institutional system and its practical implementation. If the weights do in fact shift, then normative improvements must be made. Such an example exists in German constitutional law, when (albeit very late!) the relationship between the Bundestag and the Bundesrat was changed quite substantially in the legislative process in 2006 (more on this later!).

At this point, we must emphasize something that is of particular importance for German constitutional law: the separation of powers takes place horizontally on the one hand, but also vertically, especially in the German federal system. The vertical separation of powers in Germany is, on the whole, even more significant than the horizontal separation of powers. Even in centralized States, where, however, local autonomy is generally guaranteed, there is a vertical separation of powers, but it is weaker than the vertical separation of powers in a federal State. The more pronounced the federal system, the stronger the separation of powers. In the regional states (Spain, Italy), this type of separation of powers is also mentioned, but it is clearly less effective. In the European area, Germany, for example, is very pronounced in terms of the vertical separation of powers, albeit behind Belgium and ahead of Austria.

3. THE JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT (FCC)

At the outset, the Federal Constitutional Court[1] referred to the separation of powers as a "fundamental organizing principle of the Basic Law". Its meaning lies in "the distribution of political power, the intertwining of the three powers and the resulting moderation of state government". However, as the Federal Constitutional Court points out, this principle is nowhere purely realized.

Shortly afterwards, the Federal Constitutional Court[2] states that the meaning of the separation of powers does not lie in a clear separation of the functions of state power, but in the mutual control and limitation of the organs of the legislative, executive and judicial powers, so that "State power is moderated and the freedom of the individual is protected". "The distribution of weights among the three powers made in the Constitution must be maintained, no power may have a preponderance over the other

[1] Vol.3, 225, 247.
[2] Vol. 9, 268, 279, 280.

power not provided for in the Constitution, and no power may be deprived of the powers necessary for the exercise of its constitutional functions."

This highlights with particular clarity the most important detailed functions of the separation of powers: mutual control and limitation and thus moderation of State power and protection of the freedom of the individual. The distribution of weights, as it is made by the Constitution, cannot be changed (again, neither normatively nor de facto). Thus, an excess of weight of a certain power, if this is not intended by the Constitution, is to be avoided. Finally, the aim is also the preservation of powers, that is the preservation of the efficiency of the institution foreseen by the Constitution. This also means that no diminution of powers through ordinary legislation or jurisdiction shall take place. The weighting and balance of powers intended by the Constitution must be preserved. The separation of powers thus aims at limitation and balance as well as control.

A strict separation of functions is neither desired nor constitutionally possible. The complexity of the State's tasks and the constitutional duty to perform them efficiently require cooperation between the various organs. The 'typical tasks' of an organ, which the constitution assigns to it (or which, it may even be said, result from the nature of the activity of this organ, of this function) must be preserved despite the interlocking and interaction of the various organs [1].

It must also be said that this also has the consequence that, in view of the principle of democracy, there is no 'parliamentary monism by force', no 'all-encompassing parliamentary reservation' [2]. The principle of democracy also presupposes a democracy based on the rule of law and means that democracy is first and foremost a democracy that divides powers[3].

The division of powers and thus the allocation to different organs, which are best placed to fulfil their specific task according to their organization, composition, function and procedure, also ensures that the

[1] FCC vol.95, 1,15 with reference to vol. 34, 52,59.
[2] FCC vol. 49, 89, 124 et seq.,125.
[3] FCC vol. 68, 1, 87.

decisions of the State are efficient and that they are 'as correct as possible' [1].

The Federal Constitutional Court has also ruled on numerous detailed questions concerning the relationship between the legislative, executive and judicial powers. It is not possible to go into these issues in depth here.

II. SEPARATION OF POWERS AND THE CONSTITUTIONAL ORDER IN THE FEDERAL REPUBLIC OF GERMANY (SELECTED PROBLEMS)

In the following, however, two problematic cases will be identified in relation to the German constitutional system, which clearly show how important the principle of the separation of powers is for the resolution of these questions. In detail, these are the legislative competence in the Federation and the involvement of the Bundesrat (Federal Council) (1) and the relationship of the executive with the legislature in matters of regulations, an issue that has arisen particularly recently in the fight against the pandemic (2).

1. THE PARTICIPATION OF THE BUNDESRAT IN FEDERAL LEGISLATION: THE PREVENTION OF FEDERALIST DOMINANCE WITH THE CONSTITUTIONAL REFORM OF 2006.

Federal legislation consists of various acts: Central is the resolution of the Bundestag; legislation is the expression of the will of the people, shaped by the people's representatives in Parliament. This requires a legislative initiative, which in practice comes 70% from the Federal Government (which has the necessary experts to do so), partly from the Bundesrat and to a lesser extent from the Bundestag (Federal Parliament).

The participation of the Bundesrat (the body representing the governments of the 16 Länder) is mandatory in all cases. However, the Basic Law provides for two forms of participation, the "Objection Act" and the "Approval Act". The Approval Act, each of which requires the express consent of the Bundesrat, the absence of which causes the law to

[1] FCC vol. 68, 1, 86, referring to vol. 95, 1, 15 and subsequently confirmed by FCC vol. 139, 321, 361 and vol.152, 345, 372.

fail and cannot be replaced by the Bundestag, is the exception for cases of particular importance for the *Länder* (member States of the Federation). The exceptional character is recognizable from the fact that an explicit approval of the *Bundesrat* for federal legislation is only necessary if this requirement is expressly enshrined in the Basic Law. If there is no agreement between the *Bundesrat* and the *Bundestag* on a piece of legislation and no consensus can be reached via the mediation committee, the legislation fails. In such cases, the principle of federalism prevails.

According to the concept of the Basic Law, "objection acts" are the normal case. This means that after the *Bundestag* vote, the legislation is passed to the *Bundesrat*, which can approve it without comment or formulate an objection to it as a whole or to individual provisions. This objection can then be rejected by the *Bundestag* by an absolute majority. If the objection is raised by the Bundesrat with a two-thirds majority, i.e. if the *Bundesrat*'s objection to the legislation is supported by large group of *Länder*, so that the objection passes with two-thirds of the *Bundesrat*'s votes, it can only be rejected by the *Bundestag* with such a two-thirds majority.

The rejection of the objection, either by an absolute majority or by a qualified two-thirds majority, leads to the promulgation of the law. After countersignature by the political institutions of the Federal Chancellor and the Federal Minister, it is then signed by the Federal President and published in the Official Journal of the Federation. The Objection Act expresses the principle of democracy, since the Federal Parliament, the Bundestag, which is elected by the people every four years, has the final say.

The recognizable intention of the Basic Law, that the type of law against which the *Bundesrat* can raise an objection should be the rule and the type of law that requires *the Bundesrat's* explicit consent should be the exception, has been prevented in political practice for many years.

The reason for this was the former Art. 84 BL, according to which a federal law regulating an executive issue, even only by one provision (e.g. the competence of the authority for the execution of federal law, special procedural rules, etc.) always triggered the requirement for the explicit consent of the *Bundesrat*.

The former text of Article 84 BL was: "(1) If the Länder execute federal laws in their own responsibility[1], they shall regulate the establishment of the authorities and the administrative procedure, unless federal laws with the consent of the Bundesrat provide otherwise."[2]

This provision corresponded to an important fact of the vertical separation of powers, namely that federal laws are always executed by the *Länder* executive[3].

The principle is that the Federation can federalize legislation, in accordance with the provisions of the Basic Law, to a large extent. This is the case with the most extensive legislative competence, the concurrent legislative competence, according to which legislative competences originally in the hands of the Länder can under certain conditions - or according to this regulation also to a large extent without such conditions - be drawn to the Federation, which then leads to the enactment of a federal law.[4] On the other hand, the administration remains in the hands of the *Länder* themselves, which execute the laws of the *Länder* and also the federal laws with their own authority on their own responsibility (the federal administration itself is given only in exceptional cases, insofar as the Basic Law expressly permits this[5]).

This is the conceptual background to the rule, which existed until the great reform of 2006, that federal laws, if they were to interfere with the area of administration, which is the responsibility of the *Länder*,

[1] Which is the regular case according to article 83 BL.

[2] Today, the text of Art. 84 BL runs: "If the Länder execute federal laws as their own responsibility, they shall regulate the establishment of the authorities and the administrative procedure. If federal laws provide otherwise, the Länder may adopt regulations deviating therefrom. If a Land has made a provision to the contrary in accordance with the second sentence, any subsequent federal regulations relating thereto concerning the establishment of authorities and administrative procedure shall enter into force in that Land not earlier than six months after their promulgation, unless otherwise provided with the consent of the Bundesrat. The third sentence of Article 72(3) shall apply mutatis mutandis. In exceptional cases, the Federation may, because of a special need for uniform federal regulation, regulate the administrative procedure without any possibility of derogation for the Länder. Such laws shall require the consent of the Bundesrat…."

[3] See the principle laid down in Art. 83 BL:" The Länder shall execute the federal laws as their own affairs, unless otherwise provided or permitted by this Basic Law." "as their own affair" means "in their own responsability".

[4] See Articles 72 and 74 BL.

[5] See Articles 86 et ss. BL

through adopting provisions on executive matters, must then at least be approved explicitly by the *Bundesrat*, the representation of the *Länder*.

Numerous federal laws, especially with a socio-political impact, were enacted, particularly under the government of Chancellor *Schröder*[1], that contained provisions of an administrative nature and therefore required consent. A single provision was sufficient to make the whole law subject to the requirement of consent[2]. Thus, the *Bundesrat*, whose majority had a different political orientation from the Federal Government, often had been able to block these federal laws.

Such a policy of blocking had become possible because the Article 84 GG provided for such a strict legal consequence. Although Article 84 was a valid constitutional provision until its reform in 2006, in practice it shifted the emphasis from the *Bundestag* to the *Bundesrat*. In the general perspective of the Basic Law, however, this was not the intention of the constitutional legislator.

We see here a shift of weight, a shift of balance, which was also very problematic from the point of view of the separation of powers, especially from this perspective. This balance fault was finally corrected by a constitutional amendment. Whereas in the period before the reform 70-50% of all federal laws could be blocked by the *Bundesrat*, this ratio was reversed after the reform, so that today the number of consent laws is about 30% and the number of objection laws 70%. This rebalancing restored the originally intended relationship between the Federal Parliament and the *Bundesrat*, i.e. between the principle of democracy and the principle of federalism.

2. THE REGULATORY ACTIVITY OF THE ADMINISTRATION.

The administration acts on a case-by-case basis, it is separate from the legislature. However, normative actions of the administration are possible in German law and are frequently practiced. These are regulations and statutes (the latter concern institutions of autonomous bodies such as municipalities). In German law, however, there is no autonomous competence of the administration to adopt normative regulations (e.g. of the Government or even of the Federal President, who

[1] Chancellorship from 1998 – 2005.

[2] According to the then jurisprudence of the FCC vol. 37, 363, 379 et ss.; vol. 55, 274, 319.

in any case only has a representative function), as is the case in some other countries, such as France, Spain or Italy.

The issuing of regulations by the executive must be authorized by a formal law, adopted by Parliament. The law must precisely determine the content, purpose and scope of the authorization to issue regulations. This is a requirement of the Constitution (Art. 80 (1) BL). Without such a delegation of regulatory power from Parliament to the executive, the issuing of regulations is not possible. The case law of the Federal Constitutional Court has defined the finality of the authorization in more detail.[1]

The enactment of normative acts, i.e. regulations, by the executive (which in Germany, unlike France, is regarded as administrative action and not as legislative activity by the administration) means a shift of substantive legislation from Parliament to the administration. The separation of powers, and complementarily also the principle of democracy, require a precise authorization by Parliament so that the legislative acts of the executive do not violate the separation of powers and the principle of democracy. If the regulation is to authorize the administration to interfere with fundamental rights, the precision of Parliament's authorization must be particularly precise.

There is another important restriction in the sense of the principle of the separation of powers: essential decisions can only be taken by Parliament and not by the administration. This so-called *essentiality theory*, developed by the Federal Constitutional Court[2], aims to prevent the decision-making power of Parliament from being functionally emptied. It also prevents a shift of the substantive core of the legislative function from Parliament to the executive.

In the context of the pandemic, the federal legal basis for protective measures against infectious diseases was used by the administration (the governments of the 16 *Länder*) to issue regulations. The federal legal basis was improved and clarified in the sense of the principle of the rule of law and thus also of the separation of powers

[1] See vol.20, 296, 305 ; vol.38, 348, 357 ; vol. 55, 207, 226 ; vol. 137, 108, 180 ; vol. 150, 1,100.

[2] Vol.49, 89,126 ; vol.61, 260,275 ; vol. 80, 124, 132 ; vol. 83, 130, 142, 151 et sq. ; vol. 101, 1, 34. See in particular FCC vol. 150, 1, 90-103 regarding the requirements of the authorization by Parliament: 1)"self-decision reservation", 2)"program fixing obligation" and 3)"foreseeability requirement".

insofar as the general basis originally present, 'take all necessary measures', was formulated more specifically and with the innovation of all possible restrictive measures through various reforms of this law. On this basis (and also with the participation of Parliament, i.e. it had to establish an epidemic emergency of national dimension as a prerequisite for such measures), regulations were then issued, which had to be constantly adapted to the new infection situation. Formally, this procedure was correct, but functionally it shifted the weight of decision-making from Parliament to the executive. There were counterbalances, which were necessary for reasons of separation of powers: the temporal limitation of these measures and also of the declaration of the infection emergency by Parliament; the full justiciability of these measures ordered by regulation (which, however, for practical reasons depended on provisional legal protection, which was hardly successful), etc.

3. SOME OTHER ASPECTS OF THE SEPARATION OF POWERS.

Some other aspects can only be briefly enumerated.

a) One issue addressed by the Federal Constitutional Court is the further development of the law by the courts. Are the courts allowed to further develop the law or do they thereby arrogate to themselves a legislative function, which is contrary to the principle of the separation of powers?

The Federal Constitutional Court has regarded the fact that the law is further developed by the courts as part of the judicial function. [1]However, it has also set limits to this. This activity of the courts may conflict with the judge's commitment to the law, as expressed in Article 20 (3) of the Basic Law.[2] From Germany, we know the example of labor law, which was essentially determined by the jurisprudence of the Federal Labor Court when it was still essentially uncodified. The question of the further judicial development of the law and its limits is often the subject of constitutional jurisprudence, which has developed important detailed conditions in this respect. This cannot be explored further here.

[1] FCC vol. 34, 269, 288, 289 ; vol. 96, 375,394.

[2] FCC vol. 96, 375, 394 ; vol. 109, 190,252 ; vol. 113, 88, 103,104 ; vol. 128, 193,210. See also K. Schlaich and S.Korioth, *Das Bundesverfassungsgericht,* 11th ed. (München: C.H. Beck, 2018), 10 et ss., 21 et ss.

However, this issue also plays an important role in constitutional jurisprudence (constitutional rules such as fundamental rights, which must be interpreted in an evolutionary way[1], development of unwritten principles (in German law: the principle of federal loyalty[2], the principle of proportionality[3], the principle of loyalty to organs[4], the principle of integration responsibility[5], etc.). However, the procedural practice of the Federal Constitutional Court also shows tendencies that tend to work in favor of the separation of powers, such as the declaration of unconstitutionality instead of the annulment of a law, often combined with a request to the legislature to render the unconstitutionality of the provision itself constitutional by amending the law (often within a specific time limit)[6].

Other aspects of the separation of powers that are addressed in the literature are, in particular, the relationship between the legislature and the government, where the opposition is the counterpart to the bloc of government and the majority parties in parliament[7]. The rights of parliamentary control, the rights of questioning, the right to a budget, the demand for a committee of enquiry are of great importance[8]. In general, intra- and inter-institutional political and legal control mechanisms are of great importance, as is, in a special way, the judiciary. [9]

[1] R. Arnold, ed., « La structure des droits fondamentaux-aspects choisis. La estructura de los Derechos fundamentales-cuestiones seleccionadas", *Comparative Law Studies* vol.12 (Regensburg 2021):10 et ss.
[2] FCC vol. 1, 299, 315; vol. 8, 122, 138; vol. 12, 205, 254; vol. 41, 291, 308, 310; vol. 81, 310, 337; vol. 133, 241, 217; vol. 139, 321, 353.
[3] FCC vol.19,342,348, 349; vol. 30, 292, 316,317; vol.35, 382, 400,401; vol. 70, 1, 26; vol. 76, 1, 50, 51;
[4] FCC vol. 12, 205, 254; vol. 35, 193, 199; vol. 45, 1, 39; vol. 90, 286, 337; vol. 139, 259, 281.
[5] FCC vol. 123, 267, 356; vol. 126, 286,307; 129, 124, 181; vol. 132, 195, 238, 239; vol. 146, 216, 250.
[6] Schlaich and Korioth (note 33), 367 et ss.
[7] FCC vol. 142, 25.
[8] Kämmerer (note 15), 90 – 93.
[9] For these other aspects of separation of powers see Zippelius (note 10), 244 et seq., 254-256.

CONCLUSIONS

We can thus conclude that the separation of powers is an elementary constitutional principle in German law as well, which safeguards freedom but also places demands on the institutional structure of the State in terms of appropriateness, efficiency and functional legitimacy. A partial overlapping of functions is a phenomenon that can also be found in other countries. In Germany, the vertical division of powers between the Federation and the Länder plays a particularly important political and legal role.

The very complex figure of the separation of powers permeates many areas of constitutional law. It is essential that, despite many overlaps, an adequate overall balance of functions is achieved through corrections and the development of counterbalances.

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THE CONTRIBUTION/LEADERSHIP OF THE EUROPEAN UNION IN DEVELOPING AND DISSEMINATING CLIMATE LAW

Mircea DUȚU[1]

Abstract:

Initiated early and consistently promoted, EU policy action to combat climate change is characterized by consistency, exemplary, and stimulating to create the legal framework for the national, regional and global response to the challenges of global warming, resilience and adaptation. climate change. Standing at the forefront of the appropriate response, the Union has shown political, diplomatic, strategic and legal leadership by approving the Framework Convention on Climate Change (1992) and the Kyoto Protocol (1997) without waiting for their entry into force, by to adopt an ambitious and relevant energy-climate package on 23 April 2009, while in December of the same year in Copenhagen, COP-15 failed to make new post-2012 commitments, to play a "locomotive" role in negotiation and adoption of the 2015 Paris Agreement, and in the face of general uncertainty caused by the (temporary) withdrawal of the US from it during the Donald Trump administration, to announce the Green Deal (2019) as a new growth strategy. The adoption of the European Climate Law (Regulation 2021/1119) and the "Fit-for-55" legislative package has led to the structuring of a representative legislative body, which is booming, with rapid trends towards the establishment of an "EU climate law", an incentive for the development of international and comparative law and a major influence on strengthening the relevant regulations in the domestic law of the Member States.

Key words: *EU climate law; Green Deal; European Law for Climate; "Fit-for-55"; EU leadership; international climate law; comparative climate law.*

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INTRODUCTION

In the (relatively short) history of just over three decades of international negotiations on cooperation and regulation of the climate issues, European Union (EU) has a special status, with historical leadership recognized as such in the academic literature[1]. After periods, with the associated particularities, it has played a driving role in this multilateral, global and permanentized process by acting to reach agreements with the most ambitious objectives and by unilaterally adopting higher emission reduction targets, with a mobilizing, exemplary effect for the rest of the world. From this perspective, over time, first the European Community (EC) and then EU signed the Framework Convention on Climate Change (1992), Kyoto Protocol (1997) and Paris Agreement (2015) (the only group of States which have become party as such to those treaties), climate being one of the rare dossiers in which EU diplomacy can claim to have made a lasting impression, especially at the 26 meetings of the Conference of the Parties.

At the same time, in taking up, assuming and implementing international commitments in the EU framework, successive "climate-energy packages" of political-institutional and legal measures have been adopted, culminating in the *Green Deal* launched in December 2019 as a new growth strategy, the European Climate Law (2021) and the "Fit-for-55" legislative package (2021) which is a genuine "EU law" of climate. This, transposed into the national law of the 27 Member States, has generated and requires new political and legal developments to strengthen and adapt mitigation, adaptation and resilience measures to specific national conditions, so that it now constitutes, in the form of a relatively coherent set of regulations, the defining core of climate law.

1. AN UNDISPUTED ECOCLIMATIC LEADERSHIP. PERMANENCE, CONSISTENCY, PROMOTIONAL TOOLS.

The manifestation of EU *leadership* in the promotion of the ecoclimatic issues and the establishment of the legal regime for action to

[1] Stefan C. Aykurt and Amy Dahan, *Gouverner le climat ? La référence sur les négociations climatiques*. (Paris : SciencesPo Les Presses, 2014), 214 and the works quoted therein.

mitigate global warming and to adapt and be resilient to the effects of climate change has taken concrete forms, highlighted as such in the related contexts. In this respect, expert analyses reveal that the declarations of the European Councils after 1990 show a progressive enrolment and increase of the frequency of presence and intensity of climate change messages. For a first period from 1990 to 2015, if at least one third of the statements mentioned climate change in the early 1990s, every second Council meeting dealt with climate in the early 2000s, and almost every top European meeting also spoke out on climate policy after the adoption of the Paris Agreement and the endorsement of its targets with strategic priorities, the ecoclimatic issues have become permanent and gained prominence in all EU action plans. As noted later, the central focus of the theme in the communication of the EU institutions shows that, in addition to the fact that the Union's commitment has become total, it has been important, even decisive at times, for the overall process in the field, the climate has also become a structuring element for political Europe. Indeed, attacked in the 1990s for a "democratic deficit" and its fixation on the single market, European construction has succeeded in finding in the field of environment in general and in the field of climate in particular a favorite, coagulating area in which it speaks with a single voice and for a cause presumed to be just[1]. Moreover, the combination of ecoclimatic concerns with those aimed at reducing dependence on fossil fuels and energy imports from Eastern Eurasia has also added a strong geostrategic dimension, with the associated significance for Euro-Atlantic solidarity and identity.

In the context of reshaping global balances and restructuring the world order, ecoclimatic leadership gives the EU its own identity and is one of the important leverages for maintaining and affirming its status as a *soft power* at international level.

With regard to the leverages for promoting this EU ecoclimatic leadership, the typologies that can be used in this respect show that Brussels opts for a "structural" leadership, based on its political or

[1] Aykurt and Dahan, *Gouverner le climat? ,* 215. As the two authors point out, the use of the now classic distinction of F. Scharpf (1999) attempted to compensate for the "lack of legitimacy" through *inputs* (democratic deficit) through a "legitimacy through *outputs*" (results). The process is deemed a *success story* for EU which has thus forged part of its identity thanks to a *soft power* image in environmental and international law matters.

economic power. For instance, working for the entry into force of the Kyoto Protocol (signed in December 1997 and made operational in 2004) after the refusal of ratification by the US Congress (2001) or towards the further implementation of the Paris Climate Agreement (signed in 2016 and entered into force the same year), from which the US withdrew in 2020, EU has managed to persuade other States Parties to follow it in its constructive efforts, but indirectly. It was mainly the use of so-called "instrumental leadership", based on a clever manipulation of the diplomatic game, creating links between different subjects (*issue-linkage*), making targeted concessions to recalcitrant countries and using the institutions of the climate arena to achieve those objectives. An important element in this equation has been the shift of the global consensus to the Washington-Beijing axis (since the Copenhagen Accord in 2009) and the relative stability and predictability of the latter's position on environmental and climate issues. The transformation of the Conference of the Parties of the Framework Convention into regular ecoclimatic summits, the growing involvement of private actors, local communities (creation of the Cities for Climate Network) or civil society have managed to recalibrate the interruptions and hesitations of the American presence and to keep the institutionalized global action afloat. Organizing these meetings in a diverse format, allowing access to a range of prerogatives over agenda and procedures, has been an important way of exercising this type of influence. Of the 26 COP meetings that have taken place so far, 13 have been held in Europe and many of them (such as COP-21 in Paris in 2015 and COP-26 in Glasgow, i.e., those for adopting and making operational the Climate Agreement respectively) have been crucial moments of global progress in this field. Because of the obstacles that had arisen with regard to the system of internal governance and the circumstantial alliances prefigured at international level, it was necessary to use, both as a substitute and as a complement, a third type of leadership based on the launching of exemplary ideas and attitude in order to convince other actors to follow the EU model. As noted in the relevant analyses, such "directional leadership" involves establishing and applying new processes, technologies or regulatory frameworks and promoting them internationally. "This dimension has been claimed by the European Union, which has designed itself as a miniature world, bringing together States with very heterogeneous energy systems and levels of development". And the fact that the 27 Member

States have taken over and promoted ecoclimatic action mainly collectively at EU level has facilitated such perspective. By creating the largest carbon market (EU ETS), it has been at the forefront of promoting the use of market instruments in the ecoclimatic policies. Trade policy and strategies through appropriate legal forms have become a truly effective tool for the consistent promotion of ecoclimatic targets. As the world's largest trading bloc, EU uses the trade leverage to promote environmental and climate protection in its economic relationships with its partners. Facing the blockages at WTO, EU has integrated ecoclimatic issues into the trade agreements it negotiated and concluded. At the same time, being more flexible, the unilateral measures allow EU to influence the development of third countries by promoting the establishment of conditions for sustainable growth. Finally, mainly through the regulation of its own market, the Union becomes increasingly capable of encouraging the adoption of a more environmental and climate friendly regulations by its trading partners[1]. Such the widespread, permanent and consistently promoted ecoclimatic attitude is also reflected in the discourse of the Community institutions, without exception, all the more so since the appropriate organizational framework (Directorate-General, specialized Commissioners, etc.) has been created for this approach, including a first (executive) Vice-President of the European Commission with responsibility in this area. The Climate Pact (2021) has in this respect also strengthened the relevant EU concept, strategy and practices. A central point to this new systematic approach is the EU's new carbon border adjustment mechanism, which should allow it to impose its environmental rules on foreign companies exporting within EU. The idea was launched by the Union in 1991, a year before Rio Earth Summit (1992), but only managed to get on EU agenda in 2019. Concretely. The mechanism allows for the application of additional costs according to the carbon emissions of companies located in third countries. Goods imported into the territory of the Union and whose production has a carbon balance above this threshold should be subject to a surcharge. With this approach, the Union is also making an exemplary contribution to enforcing environmental law.

[1] Tom Salmon, "La prise en compte de l'environnement dans la politique commerciale de l'Union européenne", in *Revue de l'Union Européenne*, no. 654 (Janvier 2022): 38 et les suivantes.

2. AN EXEMPLARY, CONSISTENT AND WORLD-LEADING POLITICAL AND LEGAL ACTION IN THE CLIMATE FIELD.

European Union is among the pioneers and has proven to be the undisputed leader of the overall global action against climate change, by undertaking ambitious targets and adopting appropriate measures to reduce GHG emissions and adapt to climate change, as well as by consistently promoting them. It must be said that European Union (and before Community) have committed early and consistently to action against climate change; a resolution of 21 June 1989 was already dedicated to the greenhouse effect [1], and in 1990 European Council, gathered in Dublin, insisted that targets and strategies to limit GHG emissions be adopted as soon as possible. Without waiting for the entry into force of the Framework Convention on Climate Change (1992) nor the conclusion of *Kyoto Protocol* (1997), EC has taken the first very diverse relevant measures outlined in a European Climate Change Programme, either general or relating to energy, transport or industry, combined with a GHG emissions trading system (ETS) and establishing links between these ones and the mechanisms of the new international framework for action, minimum efficiency requirements for consumer equipment, incentives for combined heat and power production, etc.[2] However, classic sectoral regulation and financial and market incentive instruments were used, with different variations and nuances. In 1996, European Union environment ministers had already set 2°C as the limit not to be exceeded[3], and to achieve such targets the first relevant European instruments were adopted in the 1990s: Council Decision of 24 June 1993 for a monitoring mechanism of Community CO2 and other greenhouse gas emissions, and European Climate Change Progress adopted in 1999, traditionally presented as establishing an EU climate policy.

[1] *Résolution du Conseil, du 21 juin 1989, concernant l'effet de serre et la Communauté*, JOCE du 20.07.1989, no. C183.

[2] *Communication concernant les politiques et mesures proposées par l'UE pour réduire les émissions de gaz à effet de serre : vers un programme européen sur le changement climatique* (PECC), COM (2000) 88 final.

[3] Even though the implications of this objective at that time were less than today, with different baselines.

It should therefore be noted that Community action, and then EU action in this area has always gone beyond the international obligations formally committed to or envisaged as part of an exemplary climate policy, despite the international community's apparent inability to match its ambitions. European Union has often acted as a world leader in general action against global warming, passing on this role only temporarily to the U.S. and President Obama's multilateralism (2009–2015), clearly in the global ecoclimatic interest, and returning in the spotlight after 2017 (in the context of the American setback related to the Trump administration) and again in competition with the U.S. after the election of J. Biden (2021).

The first EU climate and energy package was adopted in 2008 and set targets for 2020: reducing greenhouse gas emissions by 20% compared to 1990 levels, moving to a 20% share of renewables in the energy mix and improving energy efficiency by 20% (3x20). To achieve this, \ EU adopted, and subsequently reformed, its own emissions trading system (EU ETS), aimed at reducing GHG emissions, in particular those attributable to energy-intensive industries and power plants. In the buildings, transport and agriculture sectors national mitigation (emission) targets have been set by the Effort Sharing Regulation. The implementation of the energy-climate package (2009) has made it possible to achieve these medium-term objectives and the possibility of more ambitious targets for the future. In 2014, the 2030 climate and energy action framework was adopted and with it a more ambitious set of targets for the period 2021-2030, led by the goal of reducing emissions by at least 40% by 2030 compared to 1990 levels. This framework set out policies and targets to make the EU economy and energy system more competitive, more secure and more sustainable. It has enabled and undertaken a reform of the EU ETS, the introduction of monitoring and reporting rules, and the affirmation of the need for long-term national climate and energy plans and strategies. Finally, in the context of global ecoclimatic developments of the implementation of the Paris Agreement (2015), of the new international background and the reassessment of own development horizons, the objective of climate neutrality for 2050 has been set, with the 2030 milestone of reducing emissions by at least 55% compared to 1990 levels (2020–2021).

The legislation implementing this objective includes Directive 2003/87/EC of the European Parliament and of the Council[1], establishing EU ETS, Regulation (EU) 2018/842 of the European Parliament and of the Council[2], which introduced national targets to reduce greenhouse gas emissions by 2030, and Regulation (EU) 2018/841 of the European Parliament and of the Council[3], which requires Member States to balance greenhouse gas emissions and removals from land use, land use change and forestry.

Greenhouse gas emission allowance trading system (EU ETS) is a fundamental element of the Union's climate policy and its crucial instrument for reducing greenhouse gas emissions in a cost-effective manner.

In its Communication of 28 November 2018 entitled "A clean planet for all - A European strategic long-term vision for a prosperous, modern, competitive and climate-neutral economy", the Commission presented a vision for achieving net zero greenhouse gas emissions in the Union by 2050 through a socially equitable and cost-effective transition.

By the package "Clean energy for all Europeans" of 30 November 2016, the Union has pursued an ambitious decarbonization agenda, in particular by "building a strong energy union, including the 2030 targets for energy efficiency and the use of renewable energy set out in the Directives 2012/27/EU[4] and (EU) 2018/2001[1] of the European

[1] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (JO L 275, 25.10.2003, 32-46).

[2] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) no. 525/2013 (JO L 156, 19.6.2018, 26).

[3] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework and amending Regulation (EU) no. 525/2013 (JO L 156, 19.6.2018, 1).

[4] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (JO L 315, 14.11.2012, 1).

Parliament and of the Council, as well as by strengthening the relevant legislation, including Directive 2010/31/EU of the European Parliament and of the Council[2].

3. EUROPEAN CLIMATE LAW – THE OVERALL LEGAL FRAMEWORK FOR EU ACTION TO IMPLEMENT THE PARIS AGREEMENT, THE BASIS FOR THE DEVELOPMENT OF THE NEW EU CLIMATE LAW.

As an expression and in fulfilment of its overall commitment to step up its efforts to combat climate change, European Union is implementing the Paris Agreement "guided by its principles and on the basis pf the best available scientific knowledge, in the context of the long-term temperature goal…" (Preamble, point 1), and adopt its own appropriate regulations.

(Self) characterized in this sense, it established "the overall framework for the Union's contribution to the Paris Agreement", Regulation (EU) 2021/1119 ("European Climate Law") is the basic legislative act in this field and aims to ensure that, through the regulations and measures it provides for, to ensure that both the Union and the Member States contribute to the global response to climate change, according to the new global framework for action agreed in 2015 (Preamble, point 8). The new legislation was adopted under the conditions of Article 192 para. (1) of TFEU and defined by the actions undertaken by the Union to achieve its environmental targets, thus confirming the consistent approach of the EU institutions so far to incorporate and integrate climate policy and legal concerns into the broader environmental approach. In the same perspective, and in the two Council Decisions relevant to the Union's acceptance of the Paris Agreement, adopted under the United Nations Framework Convention on Climate Change – decision (EU) 2016/590 of 11 April 2016 on the signing, and decision (EU) 2016/1841 of 5 October 2016 on its conclusion, on behalf of the European Union –, it is considered that the

[1] Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (JO L 328, 21.12.2018, 82).

[2] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (JO L 152, 18.6.2010, 13).

treaty "is consistent with the Union's environmental objectives as set out in Article 191 of the Treaty" (namely, the preservation, protection and improvement of the quality of the environment; the protection of human health, as well as the promotion at international level of measures aimed at finding solutions to regional or global environmental problems "and in particular combating climate change"). In addition, the first of these states that existing EU legislation in this field will "need to be revised in order to implement certain provisions of the Agreement" (point 6).

Recourse to EU regulation, including in relation to the Paris Agreement, is justified, firstly, by the fact that climate change is, by definition, a trans-boundary challenge and therefore coordinated action at EU level is necessary to complement and effectively strengthen the relevant national policies of the Member States. Then, since the objective of achieving climate neutrality in the Union by 2050 cannot be sufficiently achieved at Member State level, and in view of its effects, it can be better achieved at Union level, which may adopt measures in accordance with the requirements of the principle of subsidiarity and having regard to the principle of proportionality.

3.1. SUBJECT MATTER AND OBJECTIVES.

In general terms, the EU framework regulation takes up and particularizes the vision endorsed at international level by the Paris Agreement, according to which the efforts to achieve the targets should be a progress in time, by stages, with the aim of reaching the maximum global value of GHG emissions as soon as possible, followed by early reduction measures in line with the best available and latest scientific knowledge in order to achieve a balance between anthropogenic GHG emissions by sources and removals by sinks in the second half of this century, based on equity and in the context of sustainable development and poverty eradication concerns.

As it follows from its provisions, the purpose of the European Climate (Law) Regulation is to establish the EU legal and institutional framework for action to achieve climate neutrality, namely "the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law" (Article 1-1), as well as for "achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement (by enhancing adaptive capacity, strengthening resilience and reducing

vulnerability to climate change). It is therefore the expression of the integrated approach, which involves, on one hand, *mitigation* by reducing greenhouse gas emissions, with its corollary of achieving climate 6, established to be "irreversible and gradual" and involving performance obligations, and, on the other hand, *adaptation*, which is governed by the requirement "to make progress", suggesting rather a duty of care (of means).

In this respect, binding EU climate targets are foreseen and established, long-term and global compliance targets taken from the Paris Agreement are invoked, and a mechanism for linking their meanings in terms of content and time is envisaged. Thus, the general target of achieving climate neutrality in the Union by 2050 becomes binding, combined with the one of the same character, but for 2030, on net domestic reduction of greenhouse gas emissions, both with a view to meeting the long-term temperature objective laid down in Article (1) a) of Paris Agreement (namely, holding the increase in the global average temperatures to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, and only this would significantly reduce the risks and impacts of climate change).

The particularization and concretization of the generally accepted international strategy in this area are obvious and consist both in speeding up the achievement of certain objectives, reassessing others with a view to strengthening them and establishing a comprehensive, firm and therefore more effective mechanism for action in this regard, which makes the EU the undisputed world leader in this field. First, if, according to the provisions of Article 4 (1) of Paris Agreement, the achievement of a balance between anthropogenic emissions by sources and removals (their net sum, climate neutrality) is foreseen "in the second half of this century", it acquires a fixed reference point in European law, namely 2050, which has led, by way of example, to the quasi-generalization at international level of such a target (with the notable exception of China, the Russian Federation and Saudi Arabia, which have opted, for their own reasons, for the 2060 horizon). This reassessment of the option took account of the scientific assessment and was required in interdependence with some "downward" revision of the long-term temperature target, i.e. the "threshold", the maintenance of the global average temperature increase which, from "well below 2°C above

pre-industrial levels..." gradually became firmly specified at no more than 1.5°C. While limiting warming to 2°C already appeared difficult to achieve, the option of increasing the global ambition without reviewing the amount of commitments appeared unrealistic, especially as trajectories towards the 1.5°C target had been little studied in the scientific literature. The requirement to base the global response to the threat of climate change "the best available scientific knowledge" required a special report from IPCC which by *Global Warming to 1.5°C* (SRI.5), published in October 2018, affirmed the new target, reinforced by the new IPCC Fourth General Report of 2021 and practically legally established under the new EU regulations[1]. At the same time, these revisions in the scientific perspectives have also had repercussions in terms of strategic foresight and have acquired by *European Climate Law* the first general legal dedication[2].

3.1.1. EU climate neutrality target has been determined in such a perspective in "accelerated", but imperative terms, and became "Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter".

With regard to the mechanism for action, following the model applied to energy, the relevant Union institutions and Member States shall take the necessary measures at Union and national level respectively to enable the collective achievement of the target of climate neutrality taking into account the importance of promoting both equity between Member States and cost-effectiveness in achieving this target. As intermediate climate targets for the Union, the first is the mandatory domestic reduction of greenhouse gas emissions, for 2030, of greenhouse gas emissions (emissions after removals) by at least 55% below 1990 levels [Article 4 (1)], for the accomplishment of which both the relevant

[1] Mircea M. Duțu-Buzura, "Spre un tratat privind neproliferarea combustibililor fosili. O nouă inițiativă științifică internațională", in *Studii și Cercetări Juridice* nr. 3 (2021): 381 and the following.

[2] Mircea Duțu and Mircea M. Duțu-Buzura, "Noul cadru de acțiune juridico-instituțională europeană privind schimbarea climatică. Fundamentele dreptului UE al climei instituite prin regulamentul (UE) 2021/1119 (Legea europeană pentru climă)", in *Studii și Cercetări Juridice* nr. 4 (2021): 439 and the following.

Union institutions and the Member States give priority to reducing emissions rapidly and predictably while increasing removals by natural sinks. Roughly and somewhat provisionally, an evolutionary approach sets the contribution of net removals to the EU's climate target at 225 million tons of CO_2 equivalent to ensure sufficient reduction efforts by 2030. In achieving this target, the relevant Union institutions and Member States shall give priority to reducing emissions rapidly and predictably while increasing removals by natural sinks. An objective of regular review of the relevant EU legislation, first by 30 June 2021 to enable the achievement of the intermediate targets (achieved through the adoption of the regulation-law), is laid down in Article 4(2), thus creating a procedure for continuous adaptation of the related regulatory framework. According to it, in the reviews the Commission shall in particular assess the availability in Union law of appropriate instruments and incentives to mobilize the investments needed and propose measures if necessary. It also involves monitoring the legislative procedures for the various proposals, and in the event of non-compliance with the 55% reduction target being challenged, further action is taken, including legislative actions[1]. In another perspective, in order to meet the 2050 climate neutrality target, a climate target for 2040 is set at Union level which will take into account the results of the regular EU and global assessments, which requires a major legislative review by amending Regulation 2021/1119. This legislative proposal presented no later than six months after the first global assessment under Article 14 of Paris Agreement, to amend the Climate Law to include the 2040 target will be accompanied by the publication, in a separate report, of the estimated indicative Union GHG budget for the period 2030-2050, defined as the indicative total volume of emissions (expressed in CO_2 equivalent). Setting the climate target for 2040 takes place by taking into account several aspects, such as: the best available and most recent scientific evidence (including the latest reports of IPCC and Advisory Board), the social, economic and environmental impacts (including the costs of inaction), the need to ensure a just and socially fair transition, the cost-

[1] At COP-26 (Glasgow, November 2021), EU expressed its preference for a common 5-year time frame for the NDCs of all Parties to be applied by the Union from 2031, but only if all Parties to the Agreement were required to do so in a manner compatible with European climate law.

effectiveness and economic efficiency, competitiveness of the Union's economy, the best available technologies, the energy efficiency and the "energy efficiency first" principle, the fairness and solidarity between and within Member States, the need to ensure environmental effectiveness and progression over time, the international developments and efforts to achieve the long-term objectives of the Paris Agreement and the ultimate objective of the Framework Convention on Climate Change and so on [Article 4(5)]. In turn, the review provisions shall also be reviewed "in the light of international developments and efforts undertaken to achieve the long-term objectives of the Paris Agreement, including with regard to the outcomes of international discussions on common time frames for nationally determined contributions" [Article 4(7)].

The Commission should ensure a sound and objective assessment based on the latest scientific, technical and socio-economic findings, supported by a representative body of independent experts, and base its assessment on relevant information, including information submitted and reported by the Member States, on the European Environment Agency reports (EEA), the Advisory Board and the Commission's Joint Research Centre, on the best and latest scientific evidence available, including the latest reports of the IPCC, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and other international bodies, as well as on Earth observation data provided by the European Union's Earth observation programme "Copernicus". In addition, The Commission should base its assessments on an indicative, linear trajectory which, when adopted, links the Union's 2030 and 2040 climate targets to the Union's climate neutrality objective and which serves as an indicative tool for assessing and evaluating towards achieving the Union's target of climate neutrality. The indicative, linear trajectory is without prejudice to any decision to set a Union climate target for 2040. As the Commission is committed to exploring how the EU taxonomy can be used by the public sector in the context of the European Green Deal, it should include information on environmentally sustainable investments, both of the Union and of the Member State, which observe Regulation (EU) 2020/852 of the European Parliament and of the Council (14), where such information is available. The Commission should make use of European and global statistics and data, where available, and request expert analysis. The European Environment Agency should provide

assistance to the Commission, as appropriate, in accordance with its annual work programme.

3.2. Adaptation to climate change.

With regard to the overall adaptation objective, by enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to ensuring an appropriate response in this field, in the context of the temperature objective set out and regulated in Article 7 of Paris Agreement, by a provision of principle Article 5(1) states that "The relevant Union institutions and the Member States shall ensure continuous progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change". Thus, the global adaptation target is integrated into EU law. To this end, the Commission shall adopt a Union strategy on "adaptation to climate change" and "regularly review in the context of the review (by 30 September 2023 and every five years thereafter) the consistency of the measures with ensuring progress in this field" [Article 5(2)][1]. At the same time, for the same purpose, the relevant EU institutions and the Member States must ensure that Union and national adaptation policies are coherent, mutually supportive, provide related benefits for sectoral policies and work towards better and consistent integration of climate change adaptation into all policy areas, including relevant social and economic and environmental policies and actions, as appropriate, as well as in the external management of the Union, focusing in particular on the most vulnerable and most affected populations and sectors and identifying shortcomings in this regard, in consultation with civil society. In implementing the EU response and expressing domestic specificities, Member States shall adopt and implement national adaptation strategies and plans "based on robust climate change and vulnerability analyses, progress assessments and indicators, and guided by the best available and most recent scientific evidence". In developing these strategies, Member States shall take into account the particular vulnerability of relevant sectors, including agriculture, water and food systems, as well as food

[1] On 24 February 2021 the European Commission has adopted, as one of more than 50 key actions implementing the *Green Deal*, the new EU Strategy on Adaptation to Climate Change - *Building a climate resilient future* - for 2050. It was developed following an evaluation of the 2013 strategy in this area carried out in 2018, and an open public consultation carried out between May and August 2020.

security, and promote nature-based solutions and ecosystem-based adaptation. They will be updated periodically and include the related current information in the report to be submitted pursuant to Article 19(2). (1) of Regulation (EU) 2018/1999. In order to provide a useful tool, to standardize the approach by 30 July 2022, the Commission shall adopt guidelines establishing common principles and practices for the identification, classification and prudent management of significant physical climate-related risks when planning, designing, implementing and monitoring projects and programs for projects.

3.3. Other issues. Initially called for as a methodological uncertainty (insufficiency), the measure envisaged in the proposed regulation-law in Article 3 to the effect that intermediate targets - essential to ensure the credibility of the other targets - should be set by means of a delegated act has been removed, as the current Article 4 of Regulation (EU) 2021/1119 regulates the related operations and gives this power to revisions of legislation in accordance with the relevant procedures. However, such perspective is not entirely excluded, with regard to certain aspects, and to exactly define the subject, it should be recalled that Article 290 TFEU allows the Union legislator to delegate to the Commission the power to adopt non-legislative acts of general application, supplementing or amending certain non-essential elements of a legislative act, by means of so-called delegated acts. Indeed, such principle automatically removes Parliament and the Council from the decision-making process, their role being limited to approving or rejecting the text in its entirety. Waiving such perspective was the result of the importance of the issues, the need to ensure the "ecological pact" as complete as possible and the desire to remove any suspicion of a democratic deficit. Last but not least, it should also be noted that the targets for 2030, 2040 and 2050 are set and will be determined for the Union as a whole. Climate neutrality of the EU does not therefore mean, from the perspective of legal and instrumental action, that of each of the Member States. There are no country-specific targets, but the solidarity between countries is taken into consideration. However, a mechanism is foreseen to monitor each country's action in order to contribute to the common objective, based on the information provided in national energy and climate plans, national long-term strategies and biennial progress reports. If the Commission finds, taking due account of the collective progress assessed, that the measures taken by a Member

State are not consistent with the objective of neutrality and adaptation, it may address recommendations to that Member State (Article 7).

3.4. The principle of non-regression and the rule of constant progression has taken over or developed, through specific provisions in EU law from general environmental law and the Paris Agreement, the principle of non-regression and the rule of constant progression in mitigation, stipulating "the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals" (Article 1-1), as well as the rule of constant progression in mitigation, Article 5 (1) providing the requirement for the relevant institutions of the Union and the Member States to ensure "continuous progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change". Unfortunately, the first review of GHG emission reduction commitments 5 years after the entry into force of the Paris Agreement and in view of COP-26 (2-21) shows that the principle and the rule are not respected by all States[1].

A key driver in the development of climate law in general, reflected also in this new regulation, is the principle of non-regression, understood in the sense that environmental climate policies and the measures adopted to implement them are irreversible. The natural imperative and the will to stabilize the climate express *a contrario* the refusal of any setback and any return to a measure to protect the planetary system (e.g., to reduce GHG emissions). This is what the UN bodies interpret in the relevant international documents as the "progress" requirement attached to human rights.

[1] According to the annual stocktaking of climate action, only 140 countries (out of 191 Parties to the Paris Agreement, i.e., 190 countries and the EU) have reported new nationally determined contributions to the UN. Of these, only half are more ambitious than before. Among the G-20 members, representing 80% of global GHG emissions, only 10 have increased their reduction pledges, two have even reported a lower volume of reductions than before (Brazil and Mexico), 2 show no progress (Australia, Indonesia), and the rest have reported no new plans. China announced on 28 October 2021, in the spirit of the same "baby steps" policy, revised new nationally determined contributions, reconfirming targets of peaking emissions before 2030 and carbon neutrality before 2060, but without clarifying the overall mitigation trajectory for the decade.

The principle of non-regression takes on special significance in this area, given the irreversible nature of the effects of climate change and even the possibility of a transition to a new state of the climate system. From this perspective, the requirement of non-regression is correlatively complemented by the obligation of regulatory progress, through a continuous and regular review of the matter in order to achieve the objective of avoiding environmental catastrophe. Irreversibility and progress thus become a dominant principle of climate change law.

Indeed, the existence of a "tipping point" (set at an increase in the global average temperature of the atmosphere to above 2°C), beyond which human adaptation to the new ecoclimatic conditions would become impossible and the Earth's system would change its balance and move, through a planetary catastrophe equivalent to the 6th general extinction of life on Earth, towards a new state, are the fundamental benchmarks for action and the new philosophy of conceiving the role of law in this regard. If the transition were to be made to a temperature 2°C above average, this would also imply a new equation of life on Earth of which we do not know if humanity, and in any case in the current formula, would still be a part. In any case, to live in the Anthropocene is to live in a world that is subsidiary and little predictable in terms of the responses of the planetary system to disturbances caused by the action of the human species.

In such context, ensuring progress in recognizing and guaranteeing a human right to a climate suitable for the perpetuation of the human species and the development of its civilization is a natural imperative and an obligation of the entire human community, justified by its status as the only alternative for its survival.

The legal "source" of inspiration and regulatory basis is also the Paris Agreement, which established the vision of a continuous progress (strengthening) of the global response to the threat posed by climate change, an approach that is supported by special provisions such as: holding the increase in the global average temperatures to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, and *pursuing* the efforts to limit the temperature increase to 1.5°C [Article 1(1)a)]; the requirements that the efforts of all Parties (to achieve the overall climate objective of limiting global temperature increase) represent a progression over time (Article 3); Each Party's successive nationally determined

contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition [Article 4(3)]; an overall trajectory to reduce GHG emissions, marked by the Parties' responsibility to aim to reach global peaking of greenhouse gas emissions as soon as possible, and to undertake rapid reductions thereafter, to achieve a balance between anthropogenic emissions and removals thereof (climate neutrality), net zero emissions, followed by the prospect of negative emissions [Article 4(1)]; finally, in terms of adaptation the idea of steady progression is induced rather than openly stated, but interdependent with progressive emissions reduction, the Parties recognizing "that the current need for adaptation is significant, and that greater levels of mitigation can reduce the need for additional adaptation efforts …" [Article 7(4)].

3.5. Promoting voluntary commitments. In line with the new vision of the States undertaking climate responsibilities, as established in the Paris Agreement (especially from the desire of its initiators to imprint and ensure a universal openness), Article 3 of Regulation 2021/1119 provides for the use of "soft law" tools for its implementation. Therefore, Article 10, *Sectoral roadmaps,* provides: "The Commission shall engage with sectors of the economy within the Union that choose to prepare indicative voluntary roadmaps towards achieving the climate-neutrality objective… The Commission shall monitor the development of such roadmaps. Its engagement shall involve the facilitation of dialogue at Union level, and the sharing of best practice among relevant stakeholders".

Being an innovative form of voluntary climate commitments, *nationally determined contributions* (NDCs) are a legal figure in the process of crystallization and practical affirmation, which will enrich and accentuate the originality of the climate regime. As a result of the international negotiations that led to the adoption and entry into force of the Paris Agreement (2015), the new concept does not yet enjoy an explicit and precise legal status, on the one hand, its qualification as such being absent in positive climate law, and, on the other, the analysis of general international law only allows it to be defined by what it is not. From this last point of view, they appear to us rather as unilateral State acts conditioned in substance and form by conventional rules, namely those of the Paris Agreement. Their legal nature remains latent and can

only be determined by successive indicators, to be specified progressively every 5 years. Conventional conditioning of these acts may be more or less strict; in terms of form, is generally weak, the formalism required in concrete NDCs proving it; on the contrary, it is stricter in substance, in order to guarantee the effects of the Treaty. However, if some see in NDCs mere promises devoid of any legal effect, it should be noted that they are promises made within the framework of an international treaty, binding at least from a moral and international standpoint.

Therefore, the related legal regime has yet to be completed and defined, and in this respect a boost may come from the climate litigation, potentially called upon and interested in specifying the legal effects of the new concept. In any case, NDCs are part of the intrinsic philosophy of the new international climate law, representing the "keystone" of the Paris Agreement, without which it can neither be implemented nor achieve its defining objectives, and the process of autonomizing a climate law even indispensable.

3.6. Public participation. Throughout the design, adoption and implementation of the *Green Deal*, including the related legislative framework, citizens and communities have an important role to play in driving the transformation (climate transition) towards climate neutrality, which involves creating the necessary framework to give them the opportunity and the means to "to take action towards a climate-neutral and climate-resilient society, including through the European Climate Pact" (Preamble, point 38). The participation may be defined in general as "a form of citizens' association and intervention in the preparation and taking of administrative decisions" and represents today a principle recognized at international, EU and national level[1]. In this respect, according to the Regulation, as "manager" of the implementation of the *European Climate Law*, the European Commission is required to organize public participation, working with all segments of society "to enable and empower them to take action towards a just and socially fair

[1] The principle is present in the Stockholm Declaration (1972), Council of Europe Recommendation of 28 September 1977, Principle 23 of the World Charter for Nature (1982), Rio Declaration of 1992 (principle 10), and the Aarhus Convention of 25 June 1998 transforms the principle of public participation into a subjective procedural right contributing to the protection of the right to a healthy environment.

transition to a climate-neutral and climate-resilient society", facilitating "an inclusive and accessible process at all levels, including at national, regional and local level and with social partners, academia, the business community, citizens and civil society, for the exchange of best practice and to identify actions to contribute to the achievement of the objectives" legally established, and at the same time drawing on "the public consultations and on the multilevel climate and energy dialogues as set up by Member States" [pursuant to Articles 10 and 11 of Regulation (EU) 2018/1999]. In order to involve citizens, social partners and stakeholders and to promote dialogue and dissemination of scientific information about climate change and its social aspects "the Commission shall use all appropriate instruments, including the European Climate Pact" (Article 9). In the latter respect, in the context of "general mobilization to promote the objectives of the Green Deal" it is worth mentioning initiatives such as *European Stakeholder Platform on the Circular Economy*, *Multi-stakeholder Platform on Sustainable Development Goals* and especially *European Climate Pact* [1]. Initiated by the European Commission, it is a form of collaboration with different stakeholders and civil society to engage them in climate action and more sustainable behavior. To this end, it is designed to create a dynamic space for information exchange, debate and action on the climate crisis, meant to provide support for the development and strengthening of a European climate movement and will focus on raising awareness and supporting relevant action.

3.7. The potential for conflict and the need for strict compliance with the new climate legal framework. An important dimension, somehow following the previous one of the issues in implementing the new climate regulatory package, is the management of its potential for conflict, also from a legal point of view. Indeed, the particular radicalization of the measures concerning the climate mentality and the diversity of the related national contexts, against the general background of the tense relationships between the jurisdictions of some States and of EU and, above all, on the subject of the relationship between EU law and

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Climate Pact*, COM/2020.788 final.

domestic rights, is predisposing to the emergence of political and legal dissensions. Already, at the Council of Energy Ministers on 26 October, the group of mainly Eastern countries, led by Poland, used the pretext of the energy price crisis to question the legislative package proposed by EC on 14 July 2021 in application of Regulation (EU) 2021/1119 and ask for support in overcoming the difficulties involved in the absolutely necessary energy transition. On the judicial front, the dispute between the Czech Republic and Poland in the Turow mine case (one of the few cases in EU history in which a breach of EU law claim has been brought by one Member State against another), in which, on 21 May 2021, the CJEU ordered the immediate suspension of its polluting activity in order to prevent "the risk of serious and irreparable damage to the environment and human health" is illustrative for the potential for conflict in implementing the climate package. Of course, it is generally accepted that the primacy of EU law, affirmed in the case law of the Luxembourg Court in 1964, has been accepted by all Member States since it was included also in a declaration enclosed to the Lisbon Treaty (2009) under the well-known wording "the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States…". In recent reactions, specialists in the field have pointed out that once a State intends to no longer respect this primacy, it is doing nothing more than violating the treaty it has ratified, as well as the principles and mechanisms laid down therein. Rather, it is a political stance that its supporters must take, and accordingly demand the withdrawal from the EU according to its own constitutional rules. Moreover, European rules are themselves the expression of the choices of the Member States and of the European Parliament acting in 'co-decision', expressing the dual legitimacy of the state and the people. Primacy is therefore the assurance that the will of Europe's citizens and States will be respected[1].

CONCLUSIONS

The report by UNEP and several research institutes, published on 20 October 2021, underlined that in order to stay below +1.5°C the

[1] "Nous, universitaires, refusons le discours opposant souveraineté nationale et primauté du droit de l'Union européenne", Tribune *Le Monde* (26 October 2021).

global fossil energy production must start to decline immediately and sharply. Overall, if taken as a whole, the production projections for 2030 are more than double (110%) of that compatible with limiting warming to +1.5°C and by 45% more than what would be compatible with the +2°C threshold. According to the IPCC Sixth 2021 report, in order to stay below +1.5°C, the world must reduce CO_2 by 55% by 2030, compared to 2010; the document points to the risk of reaching this threshold already around 2030, 10 years earlier than predicted. Despite such warnings that time is running out to act and avoid the impact of global warming, the magnitude of the fossil energy production gap remains "broadly unchanged" according to the assessments of the same researchers after 2019, notes the report. The physical reality of climate change demonstrates the urgency of action. The widespread conclusion is that limiting the average temperature increase to 1.5°C cannot happen without a sharp and global decrease in GHG emissions, and to 2°C depends on climate policies.

Establishing concrete, clear and effective milestones for the global response to climate change in the application of the general framework established by the Paris Agreement becomes an existential challenge and an absolute necessity. The ultimate objective of this legal mechanism is climate neutrality, which has already been assumed by most countries for the 2050-2060 horizon. By the "Green Deal", EU proposes and tries a model that could subsequently be extrapolated to the global level, consisting of more than 50 key actions and as many new or revised pieces of legislation under what will become "EU climate law". At the same time the exemplary attitude is also expressed in terms of concrete action and actual results[1]. Such developments are part of the global effort of environmental law to seek and provide legal and

[1] The State of the Energy Union Report for 2021, published on 26 October 2021, shows that in 2020 the renewables overtook fossil fuels as the number one power source in EU for the first time, generating 38% of electricity, compared to 37% for fossil fuels. Up to present time, 9 EU Member States have already phased out coal, 13 others have committed to a phase-out date, and 4 are considering possible timelines. In 2020, EU-27 greenhouse gas emissions fell by almost 10% compared to 2019, an unprecedented drop in emissions due to the COVID-19 pandemic, which brought overall emission reductions to 31%, compared to 1990. Although there are some encouraging trends, greater efforts will be needed to reach the 2030 target of reducing net emissions by at least 55% and achieving climate neutrality by 2050.

institutional responses to the major challenges posed by *Planetary Boundaries* accredited by science, on the verge of becoming official concerns, with climate change coming first, followed by biodiversity erosion, global water use, depletion of the planet's ozone layer, and so on.

The complex, interdependent nature of the causes, consequences and possible solutions gives the related regulations a mix of content, often involving an interference in varying proportions, but predominantly "green", of environmental law provisions with those of economic law (general or specialized), thus resulting in novel regulatory-institutional compositions. An example of this is the evolution of waste law towards a circular economy law, also marking a paradigm shift related to a profound change in lifestyles and consumption patterns. The ecological transition has thus imposed the circular economy with its regulatory expression built around Directive 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste, which codified the relevant legislation and legally established the EU targets in this field, laying down obligations of the Member States towards EC and towards natural and legal persons, independent of the direct effect of its provisions[1]. In turn, climate change seems to have triggered a particular legal response, which is in the process of manifesting and asserting itself.

A "FRAMEWORK LAW" CLIMATE REGULATION. By its very name, Regulation (EU) 2021/1119 presents itself as a legislative act of such a legal nature, one that establishes 'the framework for achieving climate neutrality' and adopts as its secondary title "European Climate Law". The first question that arises is why the choice was made and what the legal significance is of using a regulation rather than a framework directive, an instrument that has traditionally been used in the construction of the last wave of basic EU regulations and the structuring by fields. The stake is that, as is well known, while the Regulation is addressed to the Member States, institutions or individuals, the Directive

[1] Nicolas De Sadeleer, " De l'élimination des déchets à l'économie circulaire. Analyse critique de la directive 2018/851 du 30 mai 2018", in: Maxime Boul, Remi Rediguet *(dir.), Du droit des déchets au droit de l'économie circulaire. Regards sur la loi du 10 février 2020* (Paris: Institut Francophone pour la Justice et la Démocratie, 2021), 18 and the following.

is addressed solely to the Member States, which are responsible for taking appropriate measures to achieve the targets it sets out. This is therefore an instrument of indirect legislation or "double-storey legislation". At first glance, the scope of regulation and the specific nature of the legal ecoclimatic action were supposing rather the use of a directive, and even a framework directive. Obviously *Regulation-law* is not a category established as such by the EU law in force. At the same time, Regulation (EU) 2021-1119 by its contents, having for subject matter "establishes a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law", and for scope the climate neutrality in the Union by 2050, respectively a social and economic target, intermediate climate targets, adaptation to climate change, assessment of the Union progress and measures, assessment of national measures, anticipates the structure of a directive. With this wording, the EU legislator clearly wished to avoid and correct the shortcomings of the Directive and to capitalize on the advantages of the Regulation. Seeing the European Climate Law - Regulation as the basic regulation laying down the foundations of EU climate law, designed to express the new legal-institutional-operational vision of the Paris Agreement at regional level and as a model of global leadership, it has given it not only a specific title but also a particular structure. Indeed, the Directive binds the Member States by leaving to them the choice of the form and means that should ensure its effective enforcement. It imposes an absolute obligation of result requiring the State to take all general or specific measures to achieve the objectives laid down in the Framework Directive, an obligation imposed on all authorities, and in particular on the jurisdictional ones. In practice, the Directive is characterized by the flexibility given to the national authorities responsible for its transposition and application. This tool therefore leaves to the national courts the form and means. However, their room for maneuver is not unlimited, as it diminishes in proportion to the precision of the result expected by the Union legislator. At the same time, Member States are not required to adopt in their national legal order a framework legislation or an equivalent formal framework for the transposition of this Directive. Nor can it be ignored that the Framework Directive does not require its provisions to be transposed exclusively by the legislator, as they only require to be transposed "with the specificity, precision and clarity

required in order to satisfy the requirements of legal certainty" or that its reflection in national law does not necessarily require a formal and textual restatement of its provisions in an express and specific legal and regulatory provision, but can be satisfied in a general legal context, since it effectively ensures the full application of this Directive in a sufficiently clear and precise manner. By proceeding in this way, the European Union legislator has managed to avoid such shortcomings in favor of a regulatory structure which emphasizes the priority of action at Union level, the need for unity of response at this level and the construction of a complex regulatory device with a basis expressed in firm, binding objectives, with mechanisms for expressing, regenerating and maintaining the framework thus established. Its development and completion with the necessary regulations, by revising what exists and adding others, proven necessary, will result in a strategically coherent structure, tending to coagulate into a legal system.

Indeed, it is the first major instrument of climate policy legislation under the European *Green Deal*, which defines the general legal framework for EU climate action and marks the founding step, completed by the Climate Package prefigured and announced on 14 July 2021. In this way, a large-scale systematic integration has been sought and achieved, a complex action over three decades on the basis of a uniform, firm and binding legal regime, operational at the level of the "Community bloc", without the need for an internal transposition. The European framework law also sets the benchmarks for the Union's external action in this area, in particular as regards the adoption and implementation of the vision and objectives of the 2015 Paris Agreement in the EU context.

INTERDEPENDENCE, CLIMATE CHANGE, BIODIVERSITY. Basically, the ecoclimatic issues are closely interlinked with those of biodiversity erosion and the policy and legal approaches are related and need to be linked as such. In the relevant international action plan, evident globalist strategic positions are noticed. While the EU is the undisputed model leader on climate, Chinese competition and pre-eminence is evident on biodiversity. Climate neutrality and harmony with nature (protecting at least 30% of the Earth's surface) become flagship

targets[1]. The process inaugurated by the *Kunming Declaration* (October 2021) to negotiate an effective global political and legal framework ("The Global Biodiversity Framework"), accompanied by the necessary resources (including the establishment of a special fund) and a mechanism to monitor and assess progress to be adopted in the second part of COP-15 of the Convention on Biological Diversity scheduled to take place in April 2022 in China. The goal: to prepare and enforce a model of a world "living in harmony with nature" by 2050, protecting at least 30% of land and oceans by 2030.

In both approaches, the presence of human rights remains indispensable. If in ecoclimatic matters the interactions go as far as the crystallization of a right to a stable climate, in the environmental rights system, the recommendation of a UN report published in August 2021 on biodiversity remains significant that in the COP-15 process States move beyond a "fortress-like conservation" approach of restoring a "pristine wilderness" without human inhabitants, which would have negative human rights implications.

At the same time, in general conceptual and operational terms, the concept of *ecological transition,* accredited by Western vision and practice, and that of *ecological civilization*[2] respectively, issued and promoted by the Chinese conception and even constitutionalized in Beijing, are in rivalry. In a world with clear bipolar tendencies, but with increased globalization, including through interconnectivity and

[1] On 13 November 2021, 60 States and EU, accounting for more than half of the world's emissions and GDP, had pledged to achieve climate neutrality by the middle of this century; then other new countries adopted such a target: Australia and South Africa (for 2050), Turkey (for 2053), Russian Federation and Saudi Arabia (2060), India (2070). In the G-20, this was not pledged just by Indonesia and Mexico. UNEP points out that many countries are pushing climate action beyond 2030 "raising doubts" about the ability to reach carbon neutrality in the next 30 years. Beyond that, some of them do not specify whether they cover all sectors of activity and all greenhouse gases, and most of them do not say clearly whether they include the maritime and aviation sectors and whether they rely on carbon offset.

[2] A principle established by China's Constitution since 2018, expressing a political vision that focuses on modernity and industrial development, in which technological and digital innovations take center stage in response to environmental concerns. Also relevant is the theme under which COP-15 is taking place: "Ecological Civilization: Building a Shared Future for All Life on Earth".

digitalization, the environmental convergence is self-evident towards legal and institutional syntheses such as the Paris Climate Agreement. Reaching a "Kunming" Biodiversity Agreement, following the same legal-action reasoning, is a clear sign of "balanced competition", open to a universal, generally accepted and therefore sustainable approach. The related legal "emulsion" will undoubtedly mark the evolution of law in general, and of environmental law in particular, through significant specificities for the area of regulation and particular conceptualization of ecoclimatic aspects. It remains to be seen whether the geostrategic "contamination" of the legal substance will be limited to conjunctural, especially procedural, aspects, in favor of the universalist and globalist model established under the Paris Climate Agreement. By accepting the political and diplomatic dialogue, by being aware of and noting the nuances of the situation and by promoting a mixed approach in identifying solutions, a universally accepted and generally applied "climate law" can also be achieved. It will be combined and intertwined with "biodiversity law" in the new *environmental, climate and biodiversity law*.

Of course, the post-crisis recovery could be an opportunity to include, in a necessary interdependence and possible action integration also the priorities related to the ecoclimatic transition[1].

Finally, in all cases the determination of States to take action and meet their ecoclimatic commitments to which they have subscribed is essential. Unfortunately, as the experiments of the past, reinforced by recent developments, show, the political will to do so is still insufficient; targets for achieving climate neutrality by the middle of this century are "hopeful" but remain "vague, often incomplete and not aligned with most short-term plans", as noted in the UNEP report on this subject of 26 October 2021[2].

[1] According to the latest UNEP report the vast majority of countries have missed the opportunity to use recovery plans to accelerate the green transition. Only between 17% and 19% of the investments made in this context (USD 390-440 billion out of a total of USD 2,250 billion) could contribute to reducing GHG emissions.

[2] UNEP's 26 October 2021 report estimated that, at that stage, pledges for 2030, despite "some progress" remain "very insufficient"; the new plans would only result in a 7.5% decrease in the GHG emissions projected for 2030 compared to previous pledges. Countries' efforts would thus need to be multiplied by a factor of four to keep the 2°C

Setting the "architectural" framework of the regulatory package to be reviewed and developed to achieve climate neutrality and to adapt to climate change, Regulation (EU) 2021/1119 ("European Climate Law") has laid the legal foundations and outlines the main benchmarks to be followed in this approach, and through its openness and intrinsic evolutionary vocation opens the way to a genuine EU climate law.

STRENGTHENING THE EU'S LEADERSHIP ROLE IN GLOBAL ACTION AGAINST CLIMATE CHANGE. From the earliest moments of starting the multilateral international cooperation in this field, EU has taken on the role and then consistently shown itself as a world leader in pursuing and affirming the global response to the challenges of climate change. Through its positions expressed at international meetings, agreements reached in this field and the example of its own action, European leadership has definitively established itself and continues to boost environmental multilateralism. Among the latest examples of this kind is the strong climate dimension of the new "renewed partnership for solidarity" established with the African Union following the 6th Summit between the two regional organizations on 17-18 February 2022 in Brussels. The final political declaration mentions, among the priorities for cooperation, important objectives relating to the promotion of the targets of the environmental transition, in particular energy transition[1]. At the same time, the legal device developed in application of the *Green*

target within reach and by a factor of seven for the 1.5°C target. And this in the next 8 years.

[1] According to estimates in this field, the African continent was responsible for 3% of global CO_2 emissions between 1751 and 2017. Its strong vulnerability to climate warming and the severity of its consequences for the population have been revealed particularly in terms of agriculture and access to water. In addition, poor infrastructure weakens adaptation to the effects of climate change. Africa's carbon footprint will increase until 2050, when it will stabilize. Lately we are witnessing the crystallization of an African model of energy transition, based on a cross-border approach (the field being one of the rare subjects on which a consensus can be found), on the continent's own wealth and the economic potential it brings. The traditions of cooperation between the two organizations favor the impact of the European ecoclimatic model and the direct thematic cooperation strengthens the field. The success of the African initiative *Grande Muraille Vert*, which provides for the afforestation of a territory stretching from Senegal to Djibouti to act against desertification, is a favorable premise.

Deal has an important influence on developments in the appropriate international cooperation [1].

Clearly, as thus envisaged, the legal mechanism of the Green Deal will constitute a true "hard core" of climate law, radiating through its provisions as a regulatory model outside the Union, both in comparative law and in international law.

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THE INTERNATIONAL CONFERENCE
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POST-PANDEMIC EMPLOYMENT LAW IN POLAND - A DRAFT OF A NEW REGULATION ON REMOTE WORKING

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Abstract:

Until the onset of the coronavirus pandemic, teleworking was not a popular form of work organization. Although there were regulations allowing employees to use electronic means of communication, in practice it did not happen often. Probably one of the reasons for this state were quite complicated legal regulations, the condition for the introduction of telework was the consent of the employee himself, and moreover, the rules of its use had to be established with trade unions. It seems, however, that bigger obstacles to the use of telework were mental barriers. Employers were distrustful of telework, treating it as an ineffective form of work organization due to the lack of direct supervision over the employee. There were also widespread concerns about the poor quality of work performed outside the workplace, especially in those cases where it was difficult to verify (e.g. office work, educational work, etc.).

Key words: *employment; law; remote working; work.*

INTRODUCTION

Until the onset of the coronavirus pandemic, teleworking was not a popular form of work organization. Although there were regulations allowing employees to use electronic means of communication, in practice it did not happen often. Probably one of the reasons for this state were quite complicated legal regulations, the condition for the introduction of telework was the consent of the employee himself, and

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moreover, the rules of its use had to be established with trade unions. It seems, however, that bigger obstacles to the use of telework were mental barriers. Employers were distrustful of telework, treating it as an ineffective form of work organization due to the lack of direct supervision over the employee. There were also widespread concerns about the poor quality of work performed outside the workplace, especially in those cases where it was difficult to verify (e.g. office work, educational work, etc.).

However, the coronavirus pandemic changed this attitude. Admittedly, in many cases, concerns about the quality of remote work were confirmed, but with worker mobility severely restricted, it was often the only way for many employers to stay in business. State authorities were very quick to introduce special regulations for the duration of the epidemic giving them the name "anti-covid shield". One of these special legal instruments was the possibility for an employer to entrust an employee to perform, for a specified period of time, work specified in the employment contract, outside the place of its permanent performance and without the consent of the employee. Similar regulations were introduced for officers of the so-called uniformed services, who do not have the status of employees within the meaning of the labor law (e.g., police officers, special services, Border Guard, State Fire Service, Prison Service, etc.). It is estimated that this form of work was used permanently or at least on an ad hoc basis at the peak of the pandemic by more than 3 million workers, i.e. about 20% of the employed[1]. The prevalence of remote working varied considerably between sectors. The proportion of people working remotely in the information and communication sector was as high as 80 %, but in industry, hotels and restaurants it was less than 16 %.

Since early spring 2022, we have seen an improvement in the epidemic situation. The number of infections is steadily decreasing, and although at the moment it is difficult to forecast whether this is a permanent improvement and whether new mutations of the dangerous virus do not appear later, especially in autumn and winter, sanitary restrictions are gradually being lifted, the so-called "normality" is being restored. Therefore, we should expect the repeal of a special legal

[1] Report of Confederation Lewiatan https://kadry.infor.pl/wiadomosci/5320586,Praca-zdalna-a-kolejne-fale-pandemii-RAPORT.html, access 20.04.2022.

regime, prepared for the time of the epidemic, which means, among other things, that the regulation on remote working will soon cease to apply.

Meanwhile, in the last two years, employers and employees have become so accustomed to remote working that they expect it to become a permanent element in the practice of at least some employers. Of course, the legislature may decide to extend the legal regulation of remote work in the anti-covid shield. It is actually only one provision, the main purpose of which was to waive the Code's requirement of the employee's consent for each time the work is assigned outside the workplace. If there was a legitimate need, especially after the introduction of sanitation restrictions, the employer could independently direct the employee to work off-site, even when the employee objected. Thus, if remote work were to become a "normal" form of work organization, it undoubtedly needs to be "regulated."

Two years of experience with remote work have revealed a number of practical problems, some of which probably require legal regulation, because the Labour Code, focused on traditional forms of work, does not solve them. According to a quite common opinion - we are not convinced that it is entirely accurate - remote work requires a new and deeper legal regulation. Therefore, in February 2022, a draft amendment to the Labor Code in this area was prepared. The legislative process is currently underway. It is worth taking a look at these proposals, because if they are adopted, we would be dealing with the first post-pandemic labor law regulations. We do not mean that they are introduced after the pandemic, but that they take into account the experience resulting from the pandemic.

Firstly, the new regulations on remote work (16 separate articles in total) are to replace the previous regulations on telework, which, as we mentioned above, did not work in practice. According to the draft, work can be performed fully or partially in a place indicated by the employee and agreed with the employer in each case, including the employee's home address, in particular using means of direct remote communication. The draft provides for two types of remote work: a) regular and b) occasional.

Ad a) In the first case we deal with a situation when remote work is treated as a regular element of the organization of work of a given employer. In that case, it will be necessary to determine the permanent principles of such work in an agreement with trade unions, and in the

absence of trade unions or in the absence of the possibility of reaching an agreement with them within 30 days - in regulations. The regulations will be set by the employer, however, taking into account the arrangements made with the trade unions in the course of reaching an agreement. If the employer does not have trade unions, the regulations will have to be consulted with employee representatives selected in accordance with the procedure adopted by the employer (e.g. employee delegates). If an agreement is not concluded or regulations are not issued, the employer will determine the principles of performing remote work in the order to perform remote work or in an agreement concluded with the employee. The content of the agreement or regulations should, in particular, set out: the groups of employees who may be covered by remote work, the principles of coverage by the employer of the costs of remote work, the principles of communication between the employer and the employee performing remote work, including the manner of confirming the presence of the employee performing remote work at the work place, the principles of control by the employer of the conditions of performing remote work, etc.

Thus, the creation of a legal framework for remote work in an agreement, regulations or order will give the right to apply this system to a specific employee. It will be possible with the consent of the employee (by means of an employment contract or later concluded agreement with the employee) or without the consent of the employee (by means of an order of the employer). The draft provides that in the case of employees in special personal situations (e.g., pregnant women, persons caring for children, persons with disabilities, etc.), the employer will have to grant the employee's request to perform remote work, unless it is not possible due to the organization of work or the type of work performed by the employee. The performance of remote work at the employer's request (i.e., without the employee's consent) may only take place during a state of emergency, state of epidemic threat or state of epidemics and in the period of 3 months after their cancellation or in the period when due to force majeure it is temporarily impossible for the employer to ensure safe and hygienic working conditions at the employee's current workplace. In these cases, it is necessary for the employee to submit, immediately prior to the issuance of the order, a statement that he/she has the premises and technical conditions to perform remote work.

The employer will be able to revoke the order to perform remote work at any time with at least one day's notice. The employer will be obligated to revoke the order in the event of a change in the premises and technical conditions that make it impossible to perform remote work.

The draft provides for the possibility to resign from remote work at the request of either party to the employment relationship. The parties will be obliged to determine the date from which the previous conditions of work performance will be restored, which will not be longer than 30 days from the date of receipt of the request. In the absence of an agreement, the restoration of the previous conditions of work performance will take place on the day following the expiration of 30 days from the date of receipt of the request. In the case of the employee's refusal to consent to remote work or request to cease performing such work, the employer will not be able to indicate this as a reason justifying the employer's termination of the employment contract.

In connection with the performance of remote work, the employer - in addition to general obligations provided for in the labor law - will also be burdened with a number of specific obligations, including for example the provision of appropriate materials and technical tools, covering the costs related to the installation, service, operation and maintenance of technical equipment necessary to perform remote work, as well as the costs of electricity and necessary telecommunication services, providing the necessary training and technical assistance). The employee and the employer will be able to establish rules for the use by the employee of tools or equipment not provided by the employer. In such a case, the employee will be entitled to an appropriate cash equivalent. The employer will also be obliged to inform the remote worker which organizational structure the employee's workplace is located in, as well as who is responsible for cooperation with the employee and who is authorized to conduct inspections at the place of remote work.

Ad b) As regards occasional remote work, the draft assumes that it may be performed at the request of the employee for a period not exceeding 24 days per calendar year. The control of the performance of occasional remote work, including in terms of health and safety at work and compliance with personal data protection procedures, will take place on the principles agreed upon with the employee. Thus, without complying with the requirements described above, the employer will be

able, with the consent of the employee, to assign him to perform work outside his permanent place of work.

The draft provides a number of specific rules that should apply to all cases of remote work, both permanent and occasional. First of all, the employer's obligation to provide the employee with safe and healthy working conditions should be pointed out here. Moreover, the employer will be obliged to determine procedures for the protection of personal data, as well as to provide instructions and training in this respect, as required. The employee performing remote work and the employer will be obliged to communicate the necessary information to each other by means of direct remote communication or in another manner agreed with the employer.

Because most remote work will be performed in the employee's home, it will be necessary to establish rules for the employer's exercise of inspection powers with respect to health and safety and compliance with data protection procedures. The employer will have the right to inspect the performance of remote work at the place where it is performed, during the employee's working hours and in consultation with the employee. The regulations will provide that the employer will tailor the manner in which it conducts the inspection to the location where the remote work is performed and the nature of the remote work, and the performance of the inspection activities will not be allowed to invade the privacy of the remote worker and others or impede the use of the home premises as intended. If during the inspection the employer finds irregularities, he will either oblige the employee to remove them or revoke his consent to remote working. The employer who wants to implement remote work in his organization, and thus control its course in a transparent manner, will be obliged to regulate additional data protection procedures in the internal regulations of the company. As part of these procedures, the employer should train employees and then collect statements from the trained remote workers to the effect that they have been acquainted with these procedures and undertake to abide by them.

The draft assumes that remote work will not include work that is particularly hazardous, in conditions where the permissible standards for physical factors specified for living quarters are exceeded, work with hazardous chemical factors or associated with the use or release of harmful substances. On the other hand, occupational risk assessment will

have to take into account, in particular, the impact of work on vision, the musculoskeletal system and psychosocial conditions of remote work. The admission of an employee to remote work will be conditional on the employee making a statement confirming that the remote workstation in the place indicated by the employee and agreed with the employer provides safe and healthy working conditions. The draft also provides for the procedure to be followed in the event of an accident at work. The site of the accident will be inspected upon notification of the accident at the time agreed upon by the employee or his household member. If the circumstances and causes of the accident are not in doubt, the inspection may be dispensed with.

People working remotely are particularly vulnerable to the risk of exclusion from the working community. Therefore, the draft provides certain guarantees for the protection of employee rights. First of all, an employee working remotely cannot be treated less favourably with regard to the establishment and termination of the employment relationship, terms and conditions of employment, promotion and access to training for the purpose of improving professional qualifications than other employees engaged in the same or similar work, taking into account the peculiarities associated with the conditions of remote work. An employee may not be discriminated against in any way for performing remote work or for refusing to perform such work. The employer shall allow an employee performing remote work, on the principles adopted for all employees, to be present on the premises of the workplace, to communicate with other employees and to use the employer's premises and facilities, the company's social facilities and social activities. A favourable solution is also the introduction of the obligation for the employer to take into account in the occupational risk assessment the psychosocial conditions of remote work related to the mental health of employees. Thus the employer should assess the risk of alienation of the employee in the team caused by the lack of contact with other colleagues and with superiors.

As can be seen, the new proposal for remote work repeats some of the errors that currently exist in the provisions on telework. First of all, the draft imposes a great deal of formal rigor that may discourage employers from using remote work. It is probably a mistake that remote work is to be regulated as a separate form of work organization, while it should be an ordinary form, to which the general provisions of the labor

law apply, with possibly some modifications where necessary. We do not claim that the residual regulation from the anti-covid shield is sufficient, but we also do not believe that there is a need for such extensive legal rationing as the draft under review.

CONCLUSIONS

When evaluating the draft it should be pointed out that there is still a lack of specific, detailed regulations reported by employers. The legislator shifts part of the responsibility to employers, who will be obliged to make decisions at their own risk and solve many issues by internal regulations. Such situations are not viewed favorably by entrepreneurs. There are also issues that will continue to raise difficulties in applying the new regulations. These include the problems of: frequent change of the place of providing remote work, unsystematic provision of remote work, which each time will require arrangements with the employer and making declarations, which seems to be lifeless. There also remains the issue of providing remote work from outside the territory of Poland, when the jurisdiction of other countries comes into play. There are also unregulated issues of the right to disconnect and the determination of hours of remote work. These are issues that employees are concerned about. Therefore, it is necessary to carry out a comprehensive review of the entire process of remote work and its individual elements in order to look for the most optimal solutions.

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REFORM OF THE SYSTEM FOR THE PROTECTION OF ADULTS. SPECIAL GUARDIANSHIP

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Abstract:

The existence or non-existence of discernment is taken into account by the legislator when it divides people into two categories: those who have legal capacity to exercise and can therefore conclude civil legal acts on their own and those who do not have the legal capacity to exercise, which is why they must be put under the protection of other people, which are to represent them at the conclusion of acts. The second category includes minors and adults who lack discernment because of mental deficiencies.

If in the case of minors the Civil Code takes into account the fact that the forming of discernment is an evolutionary process and acknowledges a limited capacity to exercise discernment to those who have reached the age of 14, thus allowing them to conclude certain legal acts on their own, when it comes to adults, it is much more rigid. For adults, there is only one protection measure which deprives them of the capacity to exercise and puts them under the protection of a guardian, who will represent them at the conclusion of civil legal acts, respectively the judicial interdiction. According to the rules in force, the adult with mental deficiencies either does not have discernment and is placed under judicial interdiction, or has discernment, so it does not require the establishment of a protection measure.

This nuanced way of dealing with the matter is contrary to the provisions of the UN Convention on the Rights of Persons with Disabilities and was declared unconstitutional by the Romanian Constitutional Court.

The reaction of the legislator took the form of the development of a draft law on protection measures for people with intellectual and psychosocial disabilities, which takes into account the degree of impairment of the discretion of adults in need of protection and the need to allow them, in certain conditions, to participate directly in civilian life.

The main provisions of this draft refer to the setting up of two new measures for the protection of adults, namely special guardianship, which will replace judicial interdiction and judicial counselling.

Key words: *Legal capacity; discernment; interdiction; legal advice; special guardianship.*

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INTRODUCTION

Modern civil law recognizes the legal personality of all individuals.[1] As a result, any natural person has the quality of a subject of civil law, therefore can hold civil rights and obligations. This is also a form of manifestation of a fundamental right, namely equality in eyes of the law.

Though they are equal, people do not have the same ability to exercise their rights in such a way as not to have their interests harmed. This is not about personal capacities, which have a limited interest in civil law[2], but about the person's capacity to represent the legal consequences of his/her acts and deeds.

The division of civil capacity into capacity to use, which is the general and abstract aptitude of the person to have civil rights and obligations, and capacity to exercise, which is "the ability of the person to conclude legal acts on their own" (Article 37 of the Civil Code)[3] illustrates this fact. While any person is the beneficiary of the legal capacity to have civil rights and obligations, hence (s)he has the capacity to use, not every person can, in concrete terms, acquire rights or assume obligations, concluding civil legal acts by oneself.

The criterion of this distinction is the existence of discernment, understood as the ability of the individual to correctly represent the legal consequences of his/her manifestation of will, which depends on either the stage of mental maturation or the state of his/her mental health.[4]

Depriving certain categories of persons of the capacity to exercise and thereby of the possibility of concluding civil legal acts by themselves is the expression of the legislator's will to protect these vulnerable

[1] According to Article 28 paragraph 1 of the current Civil Code, which entered into force on October 1, 2011, "All persons are acknowledged to possess civilian capacity."

[2] The regulation of damage as a vice of consent is one such example. According to Article 1221 paragraph 1 of the Civil Code, which regulates the conditions under which damage can be invoked by adults, "Damage occurs when one party, taking advantage of the state of need, lack of experience or lack of knowledge of the other party, stipulates in his /her favour or in another person's favour a benefit of a considerably higher value, at the date of the conclusion of the contract, than the value of his/her own benefit."

[3] Law no. 287/2009, published in the Official Gazette of Romania, Part I, no. and republished in the Official Gazette of Romania, Part I, no. 505 of July 15, 2011.

[4] For the connection between discernment and the ability to exercise see G.A. Ilie, in *Drept civil. Persoanele (Civil law. Persons)*, coordinator *M. Nicolae.* (Bucharest: Universul juridic, 2016), 183.

persons from the harmful consequences they could suffer if they concluded by themselves legal acts whose meanings and consequences are not accessible to them. Possible negative consequences could affect either the assets or the people themselves.

This also results from the determination of the categories of persons who are deprived of the capacity to exercise, respectively minors who have not reached the age of 14 and the mentally ill persons placed under judicial interdiction.

The regulation on disability must strike a difficult balance between protecting the weak and securing the civil circuit.[1]

Persons affected by an inability to exercise are not deprived of their rights, but only prevented - more or less - from exercising their rights on their own: as the case may be, they are either represented or assisted with this effect.[2] Because they cannot be removed from civilian life, it was necessary to devise legal means that would allow these persons, in a mediated manner, to conclude civil legal acts. These means are part of the legal institution of protection of the natural person.

1. PROTECTION OF THE NATURAL PERSON LACKING THE CAPACITY TO EXERCISE

The legislator presumes that minors who have not reached the age of 14 have not yet reached a degree of mental maturity that could allow them to represent to themselves the legal consequences of the legal acts they would conclude. However, mental maturation is an evolutionary process, and the legislator considers that the minor who has reached the age of 16 has a partially formed discernment and recognizes his/her restricted capacity to exercise. So that all these minors are not prevented from acquiring rights or assuming obligations related to such rights, the legislator places them either under the protection of their parents or, if this is not possible, they will be appointed a guardian.

If in the case of minors there is an objective criterion according to which the legislator presumes that they are indiscriminate or have diminished discernment, as the case may be, in the case of mentally ill

[1] Ph. Malaurie and L. Aynès. *Droit civil. Les persones. Les incapacités*, 5th edition. (Paris: Cujas, 1999), 238.
[2] J.-L. Aubert and E. Savaux. *Introduction au droit et thèmes fondamentaux du droit civil*, 2nd edition. (Paris: Dalloz, 2010), 200, note 4.

adults a subjective assessment is used, in the sense that the competent authority must establish, for each case, the non-existence of discernment.

In cases where it finds that the mentally ill person does not have discernment, the court of guardianship may order the respective person's placing under interdiction. Not every lack of discernment can lead to the adoption of this protective measure, but only that which is lasting and is caused by insanity or mental weakness.[1]

The protection of natural persons suffering from mental disorders due to other causes is achieved through the means regulated by the Law no. 487/2002 on mental health and protection of persons with mental disorders, republished,[2] which have no effect on the exercise capacity of the protected person.

In our civil law, however, the traditional means of protecting individuals whose discernment has been abolished by a mental illness is to put them under interdiction[3]. Thus, Article 435 of the Civil Code of 1864 provided that "An adult who is in an ordinary state of imbecility, folly or madness with rage must be put under interdiction even when the respective person has lucid intervals." This legal provision has been repealed by the Family Code[4], which, by Article 142 provided the following: "The person who has no discernment to take care of his/her interests, because of insanity or mental weakness, will be placed under interdiction".

The current Civil Code, which entered into force on October 1, 2011, did not deviate from this conception and, by Article 164 paragraph 1 of the Civil Code, stipulated that "The person who does not have the necessary discernment to take care of his/her interests, due to insanity or

[1] For example, interdiction cannot be ordered in the case of diseases that do not cause lack of discernment, such as vascular dementia, which involves a deterioration of blood vessels and is not equivalent to senile dementia, which involves a mental impairment of the personality, to be seen I.C.C.J, Civil section, Decision no. 2196 of March 16, 2004, in *Dreptu*l no. 3(2005): 258.

[2] Published in the Official Gazette no. 652 of September 13, 2012. For the presentation of these protection measures, see O. Ungureanu and C. Munteanu. *Drept civil. Persoanele, în reglementarea noului Cod civil (Civil law. Persons in the regulation of the new Civil Code)*. (Bucharest: Hamangiu, 2015), 389-393.

[3] For interdiction and its effects, please see V. Bîcu, in *Drept civil. Persoanele (Civil law. Persons),* coordinator M. Nicolae. (Bucharest: Universul juridic, 2016), 239-251 and E. Chelaru. *Drept civil. Persoanele (Civil law. Persons),* 5th edition. (Bucharest: C.H. Beck, 2020), 178-184.

[4] Law no. 4/1953, itself repealed by the current Civil Code.

mental weakness, shall be placed under judicial interdiction.". According to paragraph 2 of the law text cited, minors with restricted capacity may also be placed under interdiction.

The expressions "mental insanity" and "mental weakness" are explained by the provisions of Article 211 of Law no. 71/2011, according to which they designate a mental illness or a mental disability that determines the mental incompetence of the person to act critically and predictively regarding the social and legal consequences that may arise from the exercise of civil rights and obligations.

The substantive rules of the judicial interdiction are contained in the new Civil Code at Title III Chapter III Book I (Articles 164-177).

If necessary, pending the resolution of the application for interdiction, the court of guardianship may appoint a special trustee for the care and representation of the person whose interdiction has been requested, as well as for the administration of his/her property (Article 167 of the Civil Code).

The effects of the interdiction are the deprivation of the person protected of his/her capacity to exercise (Article 43 paragraph 1 letter (b) of the Civil Code and the opening of guardianship).

Depriving the person under judicial interdiction of his/her capacity to exercise is not total so that (s)he, just like the minor who has not reached the age of 14, will be able to conclude on his/her own the specific deeds provided by law, the conservation deed, as well as minor deeds of disposition, with a current character and which are executed at the time of their conclusion (Article 172 of the Civil Code, in conjunction with Article 43 paragraph 3 of the same Code).

For the conclusion of any legal acts, the person under judicial interdiction will be represented by the guardian. The same rules apply to the guardianship of the person placed under judicial interdiction as those that regulate the guardianship of a minor who has not reached the age of 14 (Article 171 of the Civil Code).

The legal acts concluded by the person under judicial interdiction are annullable, even if at the date of their conclusion the person protected had discernment (Article 172 of the Civil Code). The legal acts that the protected person can conclude by oneself are exempted.

2. IMPLICATIONS OF THE DECISION NO. 601/2020[1] OF THE CONSTITUTIONAL COURT

By declaring the provisions of Article 164 paragraph 1 of the Civil Code unconstitutional, the Constitutional Court has shaken the traditional system of protection of the indiscriminate major.

What led to the adoption of this solution was the content of the Convention on the Rights of Persons with Disabilities adopted by the UN General Assembly on December 13, 2006, which, through Article 12 paragraph 1 provided, inter alia, that "1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law."

The Convention requires Member States to make their legislation more flexible by diversifying the measures that can be taken in the case of people with disabilities, a broader category that also includes those who suffer from mental illness. In applying these measures, account must be taken of the particularities of each person concerned, taking into account the extent to which his/her discretion is affected and respecting his/her legal autonomy as far as possible.

The Convention was signed by Romania on September 26, 2007 and ratified by Law no. 221/2010. The European Union also ratified this Convention by Council Decision no. 2010/48/EC of 26 November 2009 (hereinafter referred to as "the Convention").

However, the current Civil Code has maintained the same rigid conception, considering that all persons suffering from insanity or mental weakness are completely lacking discernment and instituting interdiction as the only measure to protect them.

Curiously, the French Civil Code, the Canadian Civil Code and the Swiss Civil Code were among the sources of inspiration for the new Civil Code. However, all these laws have regulated a wide range of means of protection for the mentally handicapped, which can be adapted to the degree of impairment of their discernment[2].

[1] Published in the Official Gazette of Romania, Part I, no. 88 of January 27, 2021.

[2] For example, according to the French Civil Code, the incapacity to exercise may be more or less profound. It can be general (the case of the adult lacking the capacity to exercise, who is placed under guardianship), special (the incapacity is not total, and the protected person concludes the acts by himself/herself, but with the appointment of a curator who has the task of watching over him/her, assisting or advising him/her) and conditional (an *a posteriori* controlled incapacity, instituted for the person under the

There are reasons why the Constitutional Court held that "the regulation under review establishes a substitute regime, so that the rights and obligations of a person placed under judicial interdiction will be exercised by a legal representative, regardless of the degree of impairment of the person's discretion, to the detriment of a support regime characterized by a support mechanism that the state should provide depending on the degree of impairment of discernment."

Such a regulation contradicts the provisions of Article 50 of the Constitution, which "enshrines the right of persons with disabilities to enjoy special protection, meaning that the state must ensure the implementation of a national policy of equal opportunities, prevention and treatment of disability, in order to ensure the effective participation of persons with disabilities in the life of the community" and "thus imposes on the state the obligation to regulate adequate measures so that persons with disabilities can exercise their fundamental rights, freedoms and duties."

At the same time, the Court held that the regulation contained in Article 164 paragraph 1 of the Civil Code is in conflict with the provisions of the Convention by establishing a single protection measure, which does not take into account the degree of impairment of the discretion of the data subject (violates the principle of proportionality of the measure) and leads to loss of capacity and limitation of civilian capability, without the possibility for such a situation to be avoided through necessary support measures, does not provide the guarantees that must accompany the protection measures (i.e. respect for inalienable dignity, including the freedom to make one's own choices and the person's independence), it does not set a duration of the measure and does not regulate the possibility of a regular review of it.

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protection of justice, respectively the adult who has suffered an impairment, temporary or limited, of mental faculties; (s)he is capable, but his/her harmful or excessive acts may be subject to termination or may be reduced). Please see Malaurie and Aynès, *Droit civil. Les persones. Les incapacités*, 240-244. In turn, the Swiss Civil Code regulates several forms of guardianship, of which only general guardianship covers all areas of personal assistance, wealth management and legal relations with third parties and deprives the protected person of the right to exercise his/hers right to exercise. Please see Ph.Meier and E. de Luze. *Droit civil suisse. Droit des persones. Articles 11-89a CC*. (Genève: Schulthess, 2014), 71-74.

It was also stated that "the effects of restricting, to a more than necessary extent, a person's ability to exercise can place that person, in terms of freedom of action in areas where it manifests a conscious will, in a situation of inequality with others who are not under a measure of protection, being free to exercise their rights and to exercise their freedoms, with consequences on the principle of equality."

Pursuant to Article 147 paragraph 1 of the Constitution, within 45 days from the date of publication of the decision of the Constitutional Court in the Official Gazette, the provisions of Article 164 paragraph 1 of the Civil Code have ceased to have legal effects. Since then, despite the fact that the other legal rules governing the ban, as well as those enshrined in the prohibition procedure, have remained in force, this protection measure can no longer be instituted in the case of adults.

Although paragraph 2 of Article 164 of the Civil Code, which allows the placing under interdiction of minors with restricted capacity, has not been declared unconstitutional, we consider that its provisions have become inapplicable since the rule governing the substantive conditions of detention ban ceased to have legal effects.

Because its effects occur only for the future, however, the decision of the Constitutional Court has no effect on persons who have been previously banned.

3. THE LEGISLATOR'S REACTION

The decision of the Constitutional Court has the merit of pulling the Romanian legislator out of lethargy and of forcing it to modernize the relevant legislation, which should be brought in line with the provisions of the Convention.

As noted in the doctrine, the Convention uses a new concept, namely "equality under the law", which refers to "the right to use the law for personal gain through the effective exercise of subjective civil rights."[1]

[1] M. Avram, "Impactul Convenției O.N.U. privind drepturile persoanelor cu dizabilități asupra căsătoriei (în perspectiva modificării Codului civil) (The impact of the UN Convention on the rights of persons with disabilities on marriage (with a view to amending the Civil Code)", in *R.R.D.P*. no. 3-4 (2021): 240.

The reaction was to draft a law on some protection measures for people with intellectual and psychosocial disabilities (hereinafter "the Draft").

This Draft aims to establish a system of protection for all adults whose discernment is affected. It is not only the permanently indiscriminate that are taken into consideration, but the scope of those targeted is widened so that it includes all adults with psychosocial or intellectual disabilities. At the same time, the planned protection measures are diversified so that they can be adapted to the requirements of those protected, the measure which attracts the lack of capacity to exercise, respectively special guardianship, being ordered only exceptionally, in cases where the other measures designed by the legislator could not be applied.

In all cases, the protection measures taken shall be revised periodically under judicial review.

It increases the degree of autonomy of people who are not completely indiscriminate, who are even allowed to appoint a trustee, under the control of the court (thus regulating a new legal institution - the mandate of protection).

To this end, some provisions of the Civil Code are amended[1], as well as the procedural rules devoted to this matter.

However, the reform proposed is much broader, targeting the marriage of persons with disabilities, including those under special guardianship[2], divorce, parental authority, adoption.

Finally, a new support measure is set p which does not involve restricting the beneficiary's capacity to exercise, namely assistance in concluding legal acts.

In terms of substantive law, the main sources of inspiration used by the authors of the Draft were the Civil Code of the Province of Quebec, the French Civil Code, the Spanish Civil Code, the Italian Civil Code, the Convention on the Rights of Persons with Disabilities and Recommendation no. 99 of 23 February 1999 of the Committee of Ministers of the Council of Europe on the principles of legal protection of incapacitated adults.

[1] In what follows we will quote the provisions of the Civil Code in the form they would receive after the amendment.

[2] For this topic, please see Avram, "Impactul Convenției O.N.U. privind drepturile persoanelor cu dizabilități asupra căsătoriei", 244-260.

4. PROTECTION MEASURES PROPOSED BY THE DRAFT

As mentioned in the preamble to the Draft, the system of protection of adults expected to be subject to the new regulation is based on three pillars: necessity, subsidiarity and proportionality.

Necessity takes into account the fact that the protection regime is established in order to adequately protect the vulnerable person.

Subsidiarity refers to the fact that protection measures are established only if the court considers that another measure provided by law, the application of the rules of common law established for the protection of a general or particular interest, those of assistance or representation, those relating to rights and the obligations of the spouses or the approval of a protection order concluded by the person concerned are not sufficient to protect the interests of the protected person.

Proportionality consists in choosing the protection regime that corresponds to the degree of incapacity and is individualized according to the needs of the person placed under protection and the circumstances in which (s)he finds himself/herself.

The current title of Chapter III of Book I of the Civil Code – "Protection of the person under judicial interdiction" - is replaced by "Protection of the Adult by means of Judicial Counselling and Special Guardianship".

The protective measures are represented by legal counselling and special guardianship.

Article 164 of the Civil Code, as amended, stipulates that these protection measures concern the adult who cannot take care of his/her own interests due to a temporary or permanent damage, partial or total, established following a medical and psychosocial assessment of his/her mental faculties, and who needs support in the formation or expression of his/her will. Such measures shall be instituted only if they are necessary for the exercise of the civil capacity of the protected person, on an equal footing with other persons.

Judicial counselling is established if the impaired person's mental faculties are partially impaired and the respective person needs to be continuously assisted or counselled in the exercise of his/her rights and freedoms.

It follows from the content of the provisions of Article 168 paragraphs 4 and 5 of the Civil Code that, as a rule, judicial counselling

does not affect the capacity of the protected person to exercise. Exceptionally, it limits this capacity.

On the contrary, special guardianship has the effect of depriving the person of the capacity to exercise and only in exceptional cases does it limit this capacity.

5. SPECIAL GUARDIANSHIP

Special guardianship is a measure of protection of the natural person that is established if three cumulative conditions are met: the deterioration of the mental faculties of the person is total; the respective person must be represented continuously in the exercise of his/her rights and freedoms, and adequate protection of the protected person could not be ensured by the establishment of curatorship or legal counselling (Article 164 paragraphs 4 and 5 Civil Code)

Given that, according to Article 164 paragraph 1 of the Civil Code, the protection measure applies to persons who need support in the formation or expression of their will, we consider that special guardianship can be established not only if the person's discretion is abolished, but also when it exists, but is so badly affected that judicial counselling would be insufficient. Our claims are also based on the content of Article 168 paragraph 4 of the Civil Code, according to which, depending on the circumstances, the court of guardianship may allow the protected person to conclude certain legal acts by himself/herself.

It can be stated that not in all cases there is an identity between the total deterioration of the mental faculties of the protected person and the total lack of discernment, which is one of the essential differences from the current measure of protection of judicial interdiction.

Minors with limited capacity may also enjoy special guardianship.

The implementation of the measure is carried out by a guardian, who can be appointed either by the person to be protected, if at the time of appointment (s)he has full capacity to exercise, or by the court of guardianship. In the first case, the designation is made by an authentic unilateral or bilateral act. The guardianship court shall appoint a guardian only if the person protected has not appointed one itself.

According to Article 168 paragraph 3 sentence I of the Civil Code, special guardianship shall be established for a period not exceeding 5 years.

The second sentence of the same text of the law has a peculiar wording, stating that "... if the deterioration of the mental faculties of the protected person is permanent and total, the court may order the extension of the special guardianship measure for a longer duration, which may not exceed 10 years." This provision suggests that special guardianship may also be instituted in the case of persons whose mental faculties are not permanently and completely impaired, which is contrary to the conditions for the establishment of guardianship provided for in Article 164 paragraph 4 of the Civil Code, quoted above. Thus, according to the latter law text, only persons who have suffered a total deterioration of mental faculties can be protected by special guardianship.

Therefore, we believe that it would have been more appropriate to provide that special guardianship is to be reviewed periodically, and that the court may maintain it when the conditions provided by law for its establishment continue to exist or may revoke it if those conditions have ceased.

The law text under analysis is also deficient because it does not stipulate what happens in cases when the conditions provided by law for the establishment of this measure continue to exist even after the 10-year term with which the guardianship was extended.

The guardian is obliged to notify the court of guardianship whenever (s)he finds that there are data and circumstances that justify the re-evaluation of the measure, as well as 6 months before the expiration of the period for which it was ordered.

In principle, special guardianship deprives the person protected of the capacity to exercise, which means that the guardian will conclude civil legal acts for this, unless the law provides otherwise.

However, it follows from the provisions of Article 168 paragraph 4 of the Civil Code that there may also be exceptional cases in which special guardianship has only the effect of restricting the ability of the protected person to exercise his/her capacity. The law text provides as follows: "By the judgment instituting legal advice or special guardianship, the court of guardianship may determine, according to the degree of autonomy of the protected person and to his/her specific needs, the categories of acts for which approval of his/her deeds is required, or, as the case may be, his/her representation. The court may order that the protection measure cover even a single category of deeds. The court may

also order that the protection measure relate only to the protected person or only to his/her property."

Although the "degree of autonomy" of the protected person is the legal criterion according to which the court can customize the effects of special guardianship, the draft does not explain the meaning of this notion. Because it is a measure of protection of the person who needs support in the formation of the will or in its expression, we believe that it is about the degree to which the discernment of the protected person is affected.

However, the degree of autonomy is not the only criterion that must substantiate those ordered by the guardianship court, which must also take into account the specific needs of the person.

While we have no objection to the need to meet the specific needs of the protected person, we cannot fail to notice that the wording of the provision we are commenting on seems to erase the essential difference between the conditions for the establishment of judicial curatorship and special guardianship, especially as regards the degree of impairment of the protected person's discernment. This provision is thus in contradiction with that contained in Article 164 paragraph 4 of the Civil Code, according to which special guardianship is instituted in the case of persons who have suffered a total impairment of mental faculties and must be continuously represented in the exercise of their rights and freedoms.

From the provisions of Article 168 paragraph 4 of the Civil Code, as they are drafted for the time being, it results that the protected person will be able to conclude by oneself the categories of legal acts that are allowed by the guardianship court by means of the decision to establish special guardianship.

With the exceptions provided by law for special guardianship, the rules of guardianship shall apply to a minor who has not reached the age of 14 (Article 171 paragraph 2 of the Civil Code).

Legal acts concluded by the natural person benefiting from special guardianship are annulled or the obligations arising therefrom may be reduced, even without proof of damage and even if at the time of their conclusion the respective natural person had discernment. The legal acts which, according to Article 43 paragraph 3 of the Civil Code, the minor lacking the capacity to exercise may conclude on his/her own, respectively specific acts provided by law, conservation acts, as well as

minor dispositions, of current character and exercised at the time of their conclusion, are excepted.

Legal acts concluded before the establishment of special guardianship may be annulled or the obligations arising therefrom may be reduced if at the time they were concluded the lack of discernment was notorious or known to the other party.

Special guardianship ceases on the death of the protected person, at the expiration of the term for which it was instituted, in case of its replacement, as well as at its lifting (Article 177 paragraph 2 of the Civil Code).

The lifting of the special guardianship is ordered if the causes that led to the necessity of the measure have ceased or changed. Depending on the circumstances, the court of guardianship may order the replacement of special guardianship with another protection measure.

CONCLUSIONS

Undoubtedly, the reform of the protection system in the case of adults who cannot take care of their interests because of a deterioration of mental faculties is welcome. We particularly welcome the regulation of judicial counselling, which removes persons whose mental faculties have suffered only a temporary or partial deterioration from the scope of the extreme measure of judicial interdiction.

Lacking in nuances, the regulation of judicial interdiction did not take realities into account, failing to offer solutions for situations in which the degree of impairment of the discernment of those in need of protection was not so serious as to impose their lack of capacity to exercise, nor so insignificant as to leave them unprotected. At the same time, this protection measure almost completely deprived the protected person, who could conclude only the legal acts that were allowed to the minor who lacked the capacity to exercise, of legal autonomy.

Of course, the draft still needs improvement, which we hope will be made during the legislative procedure.

We consider it necessary to make a clearer distinction between the legal regime of judicial counselling and that of special guardianship.

In most cases, the issues specific to the two protection measures are dealt with in the same provision, which is likely to create confusion. In addition to the provision contained in Article 168 paragraph 4 of the

Civil Code, which we have already referred to, we also point out the one enshrined in Article 172 of the Civil Code, which is enshrined in the legal acts concluded by the one in respect of which legal counselling or special guardianship was established. And the examples can go on.

This approach can lead to difficulties in implementation, all the more so since these are legal provisions that deviate considerably from the traditional way in which the protection of the adult has been regulated.

At the same time, the new regulations should not completely abandon the old terminology when, in their content, the notions have the same meaning or produce the same consequences.

We consider the stinginess with which the notion of discernment is used, which is used only when regulating the legal acts that the beneficiary of special guardianship concludes by himself/herself, not when the conditions for establishing the protection measure are set, but also the absence of any explicit reference to the capacity of the protected person to exercise.

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CASTILE AND ITS EUROPEAN PROJECTION (13TH-15TH CENTURIES). TWO EXAMPLES OF JURIDICAL SUPERIORITY

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Abstract:

Between the 13th and 15th centuries, two major historical events took place in the kingdom of Castile (Spain) that could have changed the course of history. King Alfonso X harboured the intention of going to Rome to be crowned emperor by the Pope as heir to the Romano-Germanic empire, as Frederick II of Hohenstaufen had died in 1250, since on his mother's side, Beatrice of Suabia, he was the great-grandson of the said emperor, and it was then that the "Ghibelline inheritance in Spain" came to mind. This yearning of Alfonso X was called "el fecho de imperio", but in the end it did not achieve the desired result for the Castilian monarch. On the other hand, the prelate from Burgos, Alonso de Cartagena, was commissioned in 1434 to take part in the Council of Basel, delivering the Discourse on the pre-eminence of Spain over England, at the same time as he articulated the speech Allegations on the conquest of the Canary Islands, in such a way that he demonstrated that the Portuguese crown lacked arguments to refute the title of ownership of the Canary Islands over the Castilian monarchy.

Key words: *Castile; Alfonso X; emperor of Romans; Alonso de Cartagena; Council of Basel; England; Canary Islands.*

INTRODUCTION

In the middle of the 13th century Frederick II of Hohenstaufen died, and then the opportunity arose to talk about the "Ghibelline inheritance in Spain". The Castilian monarch Alfonso X had given enough signs to try to achieve a new sociopolitical ordering and harbored the possibility of the "dream of the Empire", although the disadvantage was that the crown of the German Empire was elective, although it

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counted on supports, among others, the republic of Pisa and its paternal grandmother, Beatriz of Swabia was granddaughter of the Emperor Frederick I.

When dealing with the conoration as emperor and king of Romans, Pope Alexander IV had in mind a double game and apparently approved the actions of state of the Castilian monarch as it was the crusade in the African continent, the marriage between his brother and the daughter of king of Norway, although for it he approved the obtaining of economic resources that harmed the Castilians.

Regarding the Castilian presence at the Council of Basel held in 1434, the differences between Castile and England deepened. The bishop of Burgos, Alonso de Cartagena, a man who was legally and culturally prepared, attended the Council as ambassador of the monarch of Castile John II and in that assembly he pronounced the Discourse on the preeminence of Spain over England, based on several theses, such as antiquity in time or dignity and also disserted on the Allegations on the conquest of the Canary Islands, in response to the expansionist attempts of John I, King Portugal, who had sent an expedition to conquer the Canary Islands. To demonstrate the ownership of the said Islands to the Crown of Castile, the bishop went back to the Visigothic period, when Suintila, the first Hispanic monarch, expelled from the Peninsula the powers that controlled some part of the Iberian Peninsula, and the Islands had been part of the ancient Tingitania, an African territory integrated into the kingdom originated by the Visigothic monarch Suintila and thanks to this the heir of that kingdom was the Castilian monarch.

1. ALFONSO X "EL SABIO"

Alfonso X was born in Toledo on November 23, 1221. He had a relationship with several concubines, among others with Mayor Guillén de Guzmán, with whom he had a daughter, Beatriz, born in 1238. He remarried Vilante, daughter of James I of Aragon in 1249. The marriage of Prince Edward, heir of England with the Infanta Leonor, sister of Alfonso X took place in Burgos (Castile) in 1254. The legislative work of Alfonso X began in 1254 when the *Fuero Real* was written, in 1255 the writing of the Espécúlo began and in 1256 the writing of the Partidas began. He died in Seville in 1284.

When the Castilian monarch Alfonso X the Wise developed the great work of law, called in the fourteenth century Libro del fuero de las leyes or *Las Siete Partidas* (1256-1265), the roadmap of the king tried to make a profound doctrinal renewal, since "he sought to modify the socio-political organization of the present with important innovations, such as the elimination of the free creation of law in Castile thanks to the Royal Charter (1255) and the establishment of the legislative monopoly and the judicial unification of his kingdoms, ultimately concentrated in the royal court, with the *Speculum* (1255) "[1].

In his *General Estoria*, he transmits to us "universal history as a process of translatio imperii or transmission of the rights of sovereignty over the earth, granted by God to the peoples who dominated each epoch. From the first depositary of this right of divine origin, the Hebrew people, the imperium passed successively to the kings of Babylon and Persia (East), Macedonia (North) and Alexandria in Egypt (South), to end up deposited in the emperors of Rome (West)[2]. This is the reason why the medieval emperors were the transmitters and holders of the Romano-Germanic empire and for this reason, the Castilian monarch put his efforts to achieve this title between 1257-1275 in his General Estoria alluded to the relationship that Alfonso himself had with this noble lineage "in charge of ruling the world since the beginning of time".

When Frederick II of Hohenstaufen died in 1250, it was time to speak of the "Ghibelline inheritance in Spain", since, as Professor L. Suárez affirms, "when Frederick II's son Conrad died in 1254, the long period of vacancy that has been called the Great Interregnum (1250-1273) began. The leadership of the Ghibelline House passed to the children of Beatrice of Suabia and Ferdinand III - seven sons and three daughters - especially the eldest, Alfonso X, elevated to the throne of Castile in 1252"[3]. The stumbling block was that the Empire was elective because "if the crown of Germany had been, like that of France, England or Spain, hereditary, the aspirations of the Castilian monarch would have been fully founded "[4]. The infant Peter, (future Peter III) heir of

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1 María Victoria Chico Plaza, "Los códices alfonsíes de la Real Bibliotreca del Monasterio de El Escorial, cien años de investigación (1290-2020), en *Códices del Rey Sabio. VII Centenario de Alfonso X* (Madrid: 2021), 26.

2 Chico Plaza, "Los códices alfonsíes...", 27.

3 Luis Súarez Fernández, *Historia de España. Edad Media* (Madrid: Gredos, 1978), 305.

4 Suárez Fernández, *Historia de España...*, 305.

Catalonia, showed a radical Ghibelline position, fed by his hatred of Charles of Anjou, so that his alliance with Manfredo of Sicily, illegitimate son of Frederick II, was beneficial to him. On the other hand, the kingdom of Castile, with Alfonso X at its head, harbored hopes of obtaining the crown of the German empire, due to the economic strength of Castile because of the flow of gold from Africa[1]. It is true that both Castile and Aragon held similar views regarding European conflicts. For his part, Professor González Giménez systematically analyzes the question of Alfonso X' "fecho del Imperio" as king of the Romans.

On the other hand, González Giménez contributes new data: In March 1256, the "anti-emperor" William II of Holland had died and while Alfonso was in Soria "waiting to meet with James I of Aragon, an embassy arrived from the republic of Pisa, headed by the trustee Bandino of Pisa, with the task of offering the Castilian king the dignity of emperor and king of Romans [...] the offer was very tempting and came at a time when Alfonso X had just obtained very favorable agreements for his pretensions of hegemony over the remaining peninsular kingdoms"[2]. The election and the desire of the monarch Alfonso X to be crowned emperor of the Romans has been called the *fecho del Imperio,* and this expression was generalized to concretize this pretension. The Pisan emabajada remarked that "Alfonso was the most exalted over all the kings that are or were worthy of memory, because he was born of the blood of the dukes of Swabia "[3].

Given the situation, it was natural that Alfonso himself wanted to know the pope's position on this issue. Especially when there was too much reticence among the subjects of Castile towards this "imperial project" and as C. J. Socarrás affirmed "the imperial title was the best instrument to justify his preeminence over the remaining kings of the

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1 " The Castilian dobla was among the most solid European currencies. Against France, on the side of the Guelphs, Castile was the only power worthy of consideration", en Suárez Fernández, *Historia de España...,* 306.

2 Manuel González Jiménez, *Alfonso X el Sabio. Historia de un reinado, 1252-1284* (Navarra: 1999), 73.

3 González Jimémez, *Alfonso X el Sabio...,* 74 (nota 25). This author reproduces what was published by Cayetano J. Socarrás, *Alfonso X eof Castille: A Study on Imperialistyc Frustration* (Barcelona: 1976), apéndices IX y X; Antonio Ballesteros Beretta, *Alfonso X, emperador (electo) de Alemania* (Madrid: 1918).

Iberian Peninsula and to act as emperor-king of all Spain "[1], so that if he achieved the coronation as emperor and king of Romans, he would cease to recognize any political power over him, however legitimate it might be. The consequences of the pretension of the king of Castile were multiple and profound. But it is necessary to keep in mind the double game of the Pope of Rome, because King Alfonso of Castile wished to obtain the support of Pope Alexander IV, and he thought he had it, why? Essentially for two reasons: because Alfonso ideal of "crusade" was supported unconditionally by the pope, and because when the duchy of Swabia became vacant after the death of Conrad IV, the pope supported the pretensions of Alfonso X of Castile. Now, the pope practiced a "double game", since he wanted to finish with the scions of the Staufen dynasty, and according to professor C. Ayala "an absolutely Machiavellian move" in this matter, namely: "what the pope intended was to face the threat of the radical ghibellinism of Manfredo using for it the ambitions of a Staufen of second rank, inclined to France and eager to obtain the pontifical support, as was the case of Alfonso X "[2], for that reason the pope made Alfonso X believe that he was in favor of recognizing him as King of Romans.

This implied an advantageous exit on the part of the pope, who was not in a hurry to solve the situation, but managed to divide the Ghibelline sector and to control the times due to the "naivety" or "ambition" of Alfonso X of Castile. For his part, the latter, in his race towards his "possible throne of Romans" also played his strategy, as it was to expand the international policy of the kingdom of Castile, through the obtaining of extraordinary subsidies in the Cortes, which bled economically the kingdom and the ideation of a Crusade in the African continent, which attests to the objectives of the king himself.

Not in vain "in December 1259, after meticulous diplomatic preparation, the king announced at a meeting of the Cortes his intention to go to Rome to be crowned emperor by the pope [...] he requested military aid from his father-in-law James I and in July 1260 he appointed his friend and former steward Don Juan García de Villamayor as major advance officer of the sea or admiral of the fleet, to carry out the crusade

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1 Socarrás, *Alfonso X of Castille*..., 126. Cit. González Jiménez, *Alfonso X el Sabio*..., .75.

2 Carlos de Ayala, *Dicrectrices fundamentales de la política peninsular de Alfonso X* (Madrid: 1986), 173-174. Cit. González Jiménez, *Alfonso X el Sabio...,* 79.

at sea"[1]. He even activated the marriage of his brother, the infante Felipe, -raised in the house of the Archbishop of Toledo Don Rodrigo Ximenez- with Cristina, daughter of King Haakon IV of Norway in 1258, but Cristina died around the year 1261[2]. He also sent ambassadors to Egypt to establish diplomatic relations. There were many attempts and projects of Alfonso X to be crowned "king of Romans", for which he used many economic resources of the Castilian crown, and this is attested, for example, the bull of Clement IV of June 16, 1265 addressed to the archbishop of Seville so that for three years he would pay Alfonso X a tenth of the ecclesiastical revenues to finance the campaign against the Muslims and the bull of June 26, 1265 addressed to the archbishop of Seville, ordering him to preach a crusade against the Saracens of Africa[3]. From 1275 the situation changed for Alfonso X, since, besides tragically losing his collaborators Manfredo and Conradino, "the Italian inheritance of the Staufen passed into the hands of Charles of Anjou, brother of Louis IX of France, and with the election of Rudolph of Habsburg as emperor, the Great Interregnum (1250-1273) was over and the pope managed to put an end to the demonic lineage of the Staufen"[4]. In the last years of the reign of Alfonso X of Castile there was no lack of problems due to financial weakness and fiscal abuse of his subjects because of the Castilian monarch's desire to "make the Empire work".

2. CASTILE AND ENGLAND: HOSTILITIES AT THE COUNCIL OF BASEL

The differences between Castile and England began in 1257, due to the election of two candidates to the possible crown of the Roman

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1 "[...] Por grand sabor que auemos de leuar adelant el ffecho de la Cruzada dallend mar e sruicio de Diso e exalmamiento de la Christiandad, e pro pro de nuestros regnos e de nuestro sennorío, ffazemos nuestro adelantado mayor de la mar a don Iohan García, nuestro mayordomo […]. Pub. Luciano Serrano, "El mayordomo mayor de doña Berenguela", en *B.R.A.H.*, nº 104 (1934), 197-198; Cit. González Jiménez, *Alfonso X el Sabio...*, 82-83.

2 Pedro Salazar de Mendoza, *Orígenes de las Dignidades seglares de Castilla y de León* (Madrid: 1794), 142-143.

3 Édouard Jordán, „Les registres de Clément IV (1265-1268): Récueil del Bulles de ce Pape, publiées ou analyséss d`après les manuscrits originaux dess Archives du Vatican" (París: 1900-1945), 29, nº 126 (1) y 4, nº 15 (2).

4 González Jiménez, *Alfonso X el Sabio...*, 88.

Empire: Alfonso X of Castile and Richard of Cornwall, brother of Henry III of England "thanks to the vote of King Ottokar of Bohemia, cast in favor of one and the other candidate"[1]. Then relations between England and Castile became tense and the Castilian monarch drew closer to France. It would take 177 years for a diplomatic conflict to arise again, this time in the sessions of the Council of Basel.

ALONSO OF CARTAGENA

Alonso de Cartagena was the legitimate son of the converted Jew Pablo de Cartagena (Selomó ha Leví)[2], and successor of the bishopric, "who governed twenty years in the time of Kings Juan II and Enrique IV"[3]. He was born in Burgos between the years 1384 and 1385 and "he was not yet 25 years old to be able to enjoy the requested benefit, he was granted a bull to occupy the scholastry in Murcia"[4]. At the University of Salamaca he acquired a solid legal and humanistic formation and in 1414 he obtained a doctorate in Law. As F. Castilla Urbano affirms, "their elitism is based on a knowledge that goes back centuries and that, without any complex, leads them to consider jurisprudence as the true philosophy and even as the vera theologia "[5]. Alonso de Cartagena's stay at the Conclilio of Basel helped him to write two important texts of great juridical relevance: The Discourse on the precedence of the Catholic King over the King of England, read on September 14, 1434[6] and the

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1 J.F. O`Callahaan , *El Rey Sabio. El reinado de Alfonso X de Castilla*. Trad. De M. González Jiménez (Sevilla: 1996), 243-260.

2 Francsico Cantera Burgos, "La conversión del célebre talmudista Salomón Leví (Pablo de Burgos)", en *Boletín de la Biblioteca Menéndez Pelayo*, XV (1933): 429-445.

3 Pedro Orcajo, *Historia de la catedral de Burgos*, Parte I (Burgos: Cariñena y Jiménez, 1856), 152.

4 Luis Fernández Gallardo, *Alonso de Cartagena (1385-1456). Una biografía política en la Castilla del siglo XV* (Valladolid: 2002), 42.

5 D.R. Kelley, "Vera Philosophia: The Philosophical Significance of Renaissance Jurispridence", en *Journal of the History of Philosophy*, 14, 3 (1976): 269. Cit. Francsico Castilla Urbano, "Patriotismo y legitimación monárquica en el pensamiento de Alonso de Cartagena: los escritos de Basilea", en *Revista Española de Filosofía Medieval*, 19 (2012): 140.

6 Alonso de Cartagena, "Discurso sobre la precedencia del rey católico sobre el de Inglaterra en el concilio de Basilea", en *Prosistas castellanos del siglo XV* [Vol. I], ed. y estudio preliminar de M. Penna (Madrid: Atlas, 1959), 205-233; Vicente Beltrán de Heredia, "La embajada de Castilla en el concilio de Basilea y su discusión con los ingleses acerca de la precedencia", en *Hispania Sacra*, X, 19 (1957): 5-31; Francisco

Allegations on the conquest of the Canary Islands, of the year 1436. Regarding the first speech, the bishop from Burgos defended above all the interests of Spain.

As indicated in the *Chronicle of Don Alvar,* Alonso de Cartagena traveled at the end of May 1434 to participate in the Council of Basel, attending as ambassador of the Castilian monarch John II and after a stay in Avignon, where the prelate disserted on a law difficult to understand - La Lex Gallus- [De postumis instituendis vel exheredandis], he arrived in Basel on August 23[1]. Subsequently, with the aim of defending Hispanic sovereignty and defending the Monarchy, he delivered at the Council of Basel the Discourse on the preeminence of Spain over England, which is based on four theses: a) the nobility of lineage, b) antiquity in time, c) the loftiness of dignity and d) memory of benefits[2].

Likewise, Alonso de Cartagena emphasized that England "received the Catholic faith long after Spain"[3], an affirmation that he used to support his treatise on the Allegations on the conquest of the Canary Islands. The Canary Islands were conquered between 1402-1496, with Portugal, Castile, the Kingdom of Aragon and the Genoese attempting to control them during the 14th century. In the 15th century this aspiration would be reduced between the kingdoms of Castile and Portugal. It turns out that in the year 1423 the king of Portugal, John I had sent a Portuguese expedition with the aim of conquering the Canary Islands. Then, the king of Castile, John II commissioned Alonso de Cartagena in 1525 to submit a letter of complaint to the monarch of Portugal for the audacity of the conquering expedition and the clergyman from Burgos drafted a letter to be presented to Pope Eugene IV, which was done by the ambassador Luis Alvarez de Paz, to defend the rights of

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Blanco, "Discurso pronunciado por D. Alfonso de Cartagena en el Concilio de Basilea acerca del Derecho de precedencia del Rey de Castilla sobre el Rey de Inglaterra", en la *Ciudad de Dios*, t. XXXV (1894): 122-129; 211-217; 337-353 y 523-542.

[1] Francisco Cantera Burgos, *Alvar García de Santa Maria y su familia de conversos. Historia de la judería de Burgos y de sus conversos más egreegio*s (Madrid: 1952), 421; Luciano Serrano, *Los conversos D. Pablo de Santa María y D. Alfonso de Cartagena. Obispos de Burgos, gobernantes, diplomáticos y escritores* (Madrid: 1942), 137 y ss; Rafael Sánchez Domingo, *El Derecho común en Castilla. Comentario a la Lex Gallus de Alonso de Cartagena* (Burgos: 2002), 221 ss.

[2] Blanco, "Discurso pronunciado..", 127; Castilla Urbano, "Patriotismo y legitimación monárquica...", 145-150.

[3] Blanco, "Discurso pronunciado...", 344.

Castile and try to revoke the bull *Romanux Pontifex* dated September 15, 1436, whose content collided with the dominical interests of Castile in the Canary Islands[1]. Shortly thereafter, the Pope granted the bull Romanux Pontifex, dated November 6, 1436, which invalidated the content of the previous bull, recognizing the right of King John II of Castile as lord and master over the Canary Islands, and thus he could continue to expand his Castilian power in the Atlantic Ocean. The clergyman boldly took advantage of his *Allegations* in order to link the nexus of union between the Visigoth monarchy and the Castilian kings, so that the factor of antiquity remained in the background, giving priority in Alonso de Cartagena's theory to the origin of the Castilian monarchy and its relationship with the Visigoth monarchy, and for this he asserted that "the Goths reigned for the first time in Hispania with Theodoric, which was only a part of the Iberian territory, and Suintila was the first monarch of the Hispanians and who expelled from the Peninsula the rest of the powers that controlled some part of it, managing to rule in its entirety"[2]. He insists that, in spite of the fact that in the third Council of Toledo the Arian heresy spread, "saints and illustrious prelates flourished in Spain so that the kings of Castile were always faithful to the Roman church"[3], and following this theory, the cleric from Burgos, with a propagandistic spirit, alleged that the regnum Hispanicism of Spain was a "regnum Hispanicism", alleged that the regnum Hispaniae had been inherited by the Castilian monarch John II and this king was legitimized to claim the rights of the Visigothic kingdom, because "it is rooted in the hearts of men that the kingdom of Hispania has its continuity in the kings of Castile"[4].

This meant that, according to Cartagena's thesis, "the Canary Islands had been part of the ancient Tingitania, an African territory

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1 "[…] E dise Iohan en el catholicon e todos quantos escriuieron de la diuision de las tierras que en España hay seys prouinçias, conuiene ssaber la de Tarragona, la de Cartajena, Lusitania, Gallisia, Betica. E la passada de la mar en el regno de Africa, de las quales las cuatro enteras sson el señorio de mi sseñor el rey", en Blanco, "Discurso pronunciado...", 384.

2 Alfonso de Cartagena, *Allegationes super conquesta Canariae*, 1496 (Pub. T. González Roldán F. Hernández González y P. Saquero Suárez-Somonte, *Diplomacia y humanismo en el siglo XV*, Madrid UNED, 1994), 101. Cit. Castilla Urbano, "Patriotismo y legitimación monárquica...", 152.

3 Blanco, "Discurso pronunciado...", 537.

4 De Cartagena, *Allegationes super conquesta Canariae...*, 121.

integrated into the kingdom originated from Suintila, and only his heir the Castilian king could legitimately possess them"[1]. With this epilogue, the Portuguese crown lacked arguments to refute the title of ownership of the Canary Islands over the Castilian monarchy.

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"SUSTAINABLE DEVELOPMENT" CLAUSES IN THE TRADE DEALS OF THE EUROPEAN UNION – A LEGAL INSTRUMENT FOR ENVIRONMENTAL PROTECTION

Andrei DUȚU-BUZURA[1]

Abstract:

By means of the European Green Deal, the European Union has set (for itself) the ambitious goal of reducing greenhouse gas (GHG) emissions by the 2050 deadline by adopting a "sustainable and inclusive growth model [...] dissociated from the use of resources". In this context, the European Commission also acknowledges the lack of an international consensus on the measures required to ensure environmental protection and the fight against climate change. Thus, in the absence of direct and mutually agreed efforts by the partner states, policies imposed by the European Union may therefore have no effect on global GHG emissions, mainly due to the transfer of polluting and highly carbon-generating industrial production towards states that offer more flexible legal regimes for environmental protection.

Consequently, in order to achieve the proposed objectives, the EU must take advantage of its position as the world's leading trading bloc, using its economic strength to develop international standards in line with its ambitions in the field of ecoclimate action. Trade policy has therefore become a key tool in enabling the European Union to achieve its environmental, sustainable development, and climate change goals.

Keywords: *European Union; greenhouse gases (GHG); sustainable development; ecoclimate policy; trade policy; climate change; European Green Deal.*

INTRODUCTION

As the world's largest trading bloc, the European Union can use trade leverage to promote environmental protection among its partners. Faced with blockages at the World Trade Organization (WTO), the

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European Union (EU) is integrating environmental issues into the bilateral trade agreements it negotiates. More flexible, unilateral measures allow the EU to influence the development of third countries by promoting the establishment of conditions for sustainable growth. But it is mainly through the regulation of its own market that the EU is able to encourage the adoption of more environmentally friendly regulations by its trading partners.[1]

I. A NEW GENERATION OF AGREEMENTS INTEGRATING ENVIRONMENTAL CONSTRAINTS

A - INTEGRATION OF THE ENVIRONMENT IN TRADE AGREEMENTS

The implementation of environmental provisions in free trade agreements (FTAs)[2] negotiated by EU mainly involves the integration of a chapter "Trade and Sustainable Development" (TSD)[3] in the treaties. Although Brussels has included measures to promote sustainable development in the FTAs that have been negotiated since the '90s, it was in 2011 with the free trade agreement between EU and South Korea that the first chapter specifically dedicated to these issues was put in place. The integration of TSD chapters in EU-negotiated FTAs subsequently became more widespread, and systematic from the Commission's communication "Trade for All" in 2015. TSD chapter varies very little from one agreement to another, and is mainly aimed at affirming the integration of sustainable development and environmental protection by

[1] For the present context & strategy for development at the EU level, please see: Mircea Duțu, *Pactul Verde pentru Europa - strategie de dezvoltare şi reper în afirmarea regimului juridic european al climei* (The European Green Deal – development strategy and landmark in the affirmation of the European legal regime of climate), in "Juridical Studies & Researches" issue 1 Vol. 66 (2021): 7-45.

[2] European Committee of Regions, Implementation of Free Trade Agreements (FTAs): the regional and local perspective (139th plenary session, 30 June – 1-2 July 2020, ECON-VII/001) https://cor.europa.eu/EN/our-work/Pages/OpinionTimeline.aspx?opId=CDR-4764-2019

[3] Please see also: Velut, JB. and D.Baeza-Breinbauer, De Bruijne, M., Garnizova, E., Jones, M., Kolben, K., Oules, L., Rouas, V., Tigere Pittet, F., Zamparutti, T., Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements (Trade Policy Hub, LSE Consulting, LSE Enterprise Ltd, London School of Economics and Political Science, February 2022, https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160043.pdf);

the parties in the actual implementation of the agreements. In particular, it reaffirms the commitment of the parties to the effective implementation of the United Nations Framework Convention on Climate Change, of the Kyoto Protocol, and of the Paris Agreement[1], as well as of other conventions relating to the preservation of biodiversity and marine biological resources, and the sustainable management of forests.

This standardization aims to promote the convergence of international social and environmental standards towards the rules similar to those established by EU. However, it conflicts with WTO principle of differentiation, according to which developing countries should be able to benefit from preferential trade treatment. On this point, it is interesting to compare the FTAs that EU concluded with Singapore and Vietnam, which entered into force in November 2019 and August 2020: FTA with Vietnam does indeed grant preferential treatment compared to the agreement with Singapore, notably through progressive transitional measures over 15 years for public tenders, and a reduction in customs duties over 10 years. However, it includes commitments similar to those in the EU-Singapore FTA regarding compliance with social and environmental standards, which theoretically implies a greater adaptation effort for a developing economy like Vietnam's.

EU's ability to promote standards consistent with the principle of sustainable development through the imposition of the TSD chapter in the FTAs it concludes must, however, be modified by the non-binding nature of the vast majority of provisions relating to environmental protection. The real protection and promotion of sustainable development depends largely on the integration of the concept through various dispute settlement mechanisms put in place by free trade agreements. Indeed, TSD chapter provided for in the FTAs negotiated by EU has a specific monitoring mechanism, and is not subject to the general dispute settlement mechanism. The latter provides for the establishment of a Trade and Sustainable Development Committee which includes senior officials representing the stakeholders. At the request of a party, this one will have a 120-day term to reach a mutual agreement on a matter falling within the scope of TSD chapter. After this term, a committee of independent experts is established to examine the issue raised in light of

[1] See also: Mircea Duțu, *Acordul de la Paris – etapă majoră a acțiunii globale privind schimbările climatice și a afirmării dreptului climei*, in *Revista "Dreptul"* nr. 3 (2018): 9-33

the provisions of the TSD chapter, and has 150 days to issue recommendations. TSD chapter does not provide for any binding mechanism to ensure its application, which limits its scope. This also makes it much easier for the EU to impose it during negotiations with its partners, since no sanction is provided for failure to apply the recommendations issued by the expert committee.

There are, however, measures relating to environmental protection outside the chapter specifically dedicated to it, which are therefore covered by the general dispute settlement mechanism provided for by the FTAs. The new generation agreements signed by EU refer to sanitary and phytosanitary measures (SPM) and technical barriers to trade (TBT) as defined by WTO. However, these provisions are largely taking over the multilateral agreements and are simply intended to facilitate their application and to simplify and harmonize the technical regulations and conformity assessment procedures. SPM and TBT measures may therefore be subject to dispute before the independent arbitration panel provided for under the general mechanism of EU-negotiated FTAs. In the absence of mutual agreement on the settlement of the dispute, this panel will meet for a 150-day term to render a binding decision, which the parties will comply with in good faith and within a reasonable time pour. In case of failure to comply, the respondent will enter into negotiations on compensatory measures with the complainant in order to reach a mutual agreement. In the absence of an agreement, the complainant is entitled to suspend the obligations under the provisions covered by the agreement, to the extent of the cancellation or reduction of the advantages caused by the inobservance. However, this binding framework does not provide the conditions for a more effective integration of the environment than that developed within the framework of WTO. Indeed, the scope of the general dispute settlement mechanism of the FTAs concluded by EU is largely based on multilateral trade agreements for SPM and TBT measures, and also takes into account the case law of WTO's Dispute Settlement Body on these issues.

In the context of investment protection agreements (IPAs) negotiated by EU with its partners, the establishment of investor-State dispute settlement (ISDS)[1] mechanisms has been strongly criticized by

[1] Alexandra Born, "Reforming investor-state dispute settlement (ISDS) European Union flexing its normative power?", Doctoral Thesis › JD (Juris Doctor), Queen's University Belfast, School of Law, December 2021, available at:

civil society, as ISDS is widely seen as opening the door to the undermining of EU regulation on environmental issues. In 2015, the mobilization of public opinion against the ISDS mechanism during the negotiation of the Comprehensive Economic and Trade Agreement (CETA) is pushing stakeholders to reform its operation, which was previously based on private arbitration tribunals. The mechanism is "jurisdictionalized", with the creation of a tribunal composed of 15 members appointed for five years by the parties, as well as an appeal mechanism. ISDS is considered by Brussels as a measure to protect European standards, as it improves the independence of judges and limits the inflation of the number of appeals filed by the investors. As of 2015, this mechanism is becoming more widespread in the IPAs negotiated by EU, especially for the agreements concluded with Singapore and Vietnam. However, the new ISDS mechanisms are still widely criticized by civil society: the affirmation of the right to regulate is often considered insufficiently guaranteed. Moreover, the independence of judges has been called into question, particularly for the agreement between EU and Singapore, which allows legal practitioners, so the non-magistrates, to sit within the ISDS.

B - INFLUENCE OF CIVIL SOCIETY ON THE NEGOTIATION AND IMPLEMENTATION OF AGREEMENTS

The integration of the environment in trade negotiations conducted by EU is nevertheless growing, and strongly influenced by the media coverage of environmental issues and the mobilization of civil society. This progressive awareness of climate issues and the economic and social consequences of globalization gave rise to alter-globalization, which was organized since 1999 on the sidelines of the WTO summit in Seattle. However, the mobilization of non-governmental organizations (NGOs) and interest groups varies significantly from one agreement to another, depending on EU's negotiating power, the competition from third countries, or the structure of the partner countries' economies. In the context of negotiations with Singapore, a city-state integrated into global value chains with a largely tertiary economy, the civil society

https://pureadmin.qub.ac.uk/ws/portalfiles/portal/242796249/Reforming_Investor_State_Dispute_Settlement_ISDS_European_Union_Flexing_its_Normative_Power_.pdf

pressure on the environmental issues remained modest. Some industrial lobbies promote the development of regulatory barriers and of environmental standards, such as the European leather industry. However, the lack of significant mobilization of the NGOs for environmental protection leads to the marginalization of these issues at the negotiating table.

On the other hand, a convergence of interests is taking place between NGOs, trade unions and industry groups during the EU-Vietnam negotiations. In particular, the interest groups obtained concessions in the agricultural sector, with the designation of a list of sensitive products subject to a fixed-rate tariff quota, such as rice, sweet corn, garlic, mushrooms, or even sugar. In this context of strong mobilization, the European Commission has organized in 2015 a roundtable on trade, sustainable development and human rights in EU-Vietnam relations. The negotiation process was widely criticized by participants, who denounced the lack of binding provisions in the field of sustainable development. However, the protest focused mainly on the absence of a human rights impact assessment and of a consultation with civil society by the Vietnamese government. Furthermore, the remarks made during the roundtable organized by the Commission did not lead to a real change in its position during the continuation of the negotiations.

EU includes civil society in the impact review of the sustainable development of FTAs as part of the implementation of the TSD chapter. Since 2015, FTAs concluded by EU have included internal consultative groups (ICGs), which allow for the integration of civil society through an institutionalized mechanism aiming at enabling a participatory process. The members of the ICGs meet once a year, in parallel with the meetings of the Trade and Sustainable Development Committee, composed of representatives of the parties, in order to make recommendations on the implementation of the TSD chapter. The opinions of the ICGs are advisory and do not entail an obligation to respond for the Committee on Trade and Sustainable Development or for the parties, which has led to strong criticism from civil society. ICGs are widely perceived as a façade allowing to maintain the legitimacy of European trade policy in the face of the environmental concerns expressed by public opinion.

FTAs negotiated by EU provide that ICGs ensure a balanced representation of economic, social and environmental actors (trade unions and employers' organizations, interest groups, environmental

protection organizations). In practice, this balance in the representation of actors varies according to the calls for applications. While the structure of the ICGs of EU partner countries remains very opaque, or even inaccessible, that of the European ICGs is relatively transparent. In the context of the EU-Singapore FTAs, the structure of the ICG is uneven: 5 representatives of employers' associations, against 4 trade union representatives and 2 members of NGOs. Moreover, only one of these NGOs presents environmental protection as one of its main missions, which accentuates this imbalance. For the EU-Vietnam FTAs, the structure is more balanced: 7 representatives of interest groups or employers' associations, compared to 5 for trade unions and 6 for NGOs (2 of which specialize in environmental issues).

Many factors weaken the influence and participation of ICGs in the implementation of FTAs. The NGOs for environmental protection have to face a lack of financial and logistical resources that sometimes undermines their ability to participate in the ICGs, particularly in developing country partners. The topics discussed in the forums tend to concern the situation in the partner countries, which are more often targeted by European representatives. Moreover, the ICGs remain largely dependent on their relations with the States. Indeed, in the absence of an obligation to share information between the Committee on Trade and Sustainable Development and the ICGs, communication with the governments of the parties is often perceived as insufficient by civil society representatives[1].

C - ASSESSING THE IMPACT OF THE EU'S FREE TRADE AGREEMENTS

The integration of the environmental issues into account in the EU's trade policy requires an a priori assessment of the agreements' impact on the sustainable development. This involves the preparation of sustainability impact assessments (SIAs), which were first introduced as part of the Millennium Round in Seattle in 1999. The practice became more systematic from 2006 onwards. The Commission calls on independent consultants to carry out these assessments, under which recommendations are made for the European negotiator based on an analysis of the economic, social and environmental impact of the trade

[1] Tom Salmon, „La prise en compte de l'environnement dans le politique commerciale de l'Union Européenne", in *Revue de l'Union Européenne*, no. 654 (2022): 38.

agreement within EU and the partner countries. SIAs are a source of information on which the Commission can rely during the negotiations. However, they are generally prepared in parallel with the negotiations, which does not encourage the negotiator to take into account the conclusions and recommendations issued by the consultants, as these may be published several years after the start of the negotiations. Because of these delays, the Commission opts in particular to reuse the SIA prepared in the framework of the draft inter-regional agreement between EU and the Association of Southeast Asian Nations (Asean), published in 2008, for bilateral negotiations with Singapore and Vietnam.

The comparative analysis of the SIAs conducted by the consulting firm Development Solutions published in 2019 for bilateral negotiations with Indonesia, Malaysia and the Philippines allows finding out overall trends in the consideration of the impact of the trade agreements under negotiation between EU and its partners. On the environmental front, the assessments highlight the carbon efficiency of FTAs, with the exception of the FTA project with Malaysia: the impact of trade liberalization on economic growth is estimated to be greater than the impact in terms of increased CO2 emissions. The implementation of such FTAs is therefore in contradiction with the European objective of reducing greenhouse gas emissions by 55% by 2030 compared to 1990 levels. In addition, SIAs anticipate a degradation of water and soil quality due to the expansion of the textile and footwear industry in the Philippines, Malaysia and Indonesia. The development of trade with EU, which increases the amount of non-biodegradable waste circulating in the partner countries, is also seen as a major environmental problem, especially in the Philippines, where there is no appropriate waste treatment system.

While the trade agreements are the subject of considerable media attention and mobilization of public opinion and political decision-makers during the negotiation phase, the *a posteriori* control of the implementation of the treaties within the European institutions remains relatively limited. The European Parliament can initiate an *a posteriori* assessment of FTAs, as was the case in 2018 with the publication by the European Parliament Research Service of a study on the implementation of the EU-Colombia-Peru free trade agreement. On the economic front, the study found a positive effect of the trade stabilization which counterbalanced the relative decline in Colombia's trade with the rest of the world. However, it also denounced the failure of the agreement to

provide a framework for improving social and environmental standards in Colombia and Peru, as well as the intensification of mining and the violation of the rights of indigenous peoples by European companies. In response, the Parliament had called for concrete means to ensure the implementation of the roadmap on sustainable development and human rights issues, demanding additional measures to be established from Peru and Colombia.

II. UNILATERAL MEASURES FOR THE ENVIRONMENT

A - EFFICIENCY OF UNILATERAL MEASURES FOR SUSTAINABLE GROWTH

EU trade policy is also based on an arsenal of unilateral measures, whose capacity to promote environmental protection should not be overlooked. Since 2006, the EU has included measures to promote environmental protection within its Generalized System of Preferences (GSP)[1], through the establishment of the special incentive arrangement for sustainable development and good governance (GSP+)[2]. Established in 1971, the standard GSP makes it possible to support the development of the EU's partner countries by granting the beneficiary countries partial or total reduction of customs duties for two-thirds of the tariff lines, on condition that there is no serious and systematic violation of the principles defined by the principal conventions of the United Nations (UN) and the International Labor Organization (ILO) relating to human rights and labor rights. It is automatically granted to countries classified by the World Bank as lower than upper middle-income countries, provided they do not already receive preferential treatment under an FTA.

Unlike the standard GSP, the GSP+ is not granted automatically, but at the request of partner countries, based on a "vulnerability" criterion (eligibility for the standard GSP, weak diversification and low volume of exports to EU). It grants the beneficiaries a total reduction of customs duties for the tariff lines covered by the GSP. However, the

[1] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, consolidated version 01/01/2022, http://data.europa.eu/eli/reg/2012/978/2022-01-01

[2] For more info on GPS+, please check: https://gsphub.eu/

partner country must agree to cooperate with EU under a specific monitoring mechanism and ratify a package of 27 international conventions relating to sustainable development, human rights, and good governance. In the field of environmental protection, these conventions cover a wide range of topics, from the protection of endangered species to the fight against pollution, depletion of the ozone layer and climate change. The GSP+ is therefore an instrument capable of promoting the adoption of regulations in favor of environmental protection in the partner countries, through cooperation and economic incentives. In the context of integrating environmental issues into European trade policy, this system has a definite advantage over trade agreements: once an agreement has been concluded, it is more difficult to go back on its provisions, whereas the conditions for granting the GSP can be modified unilaterally and at any time by EU, which allows greater flexibility.

However, the reduced use of the suspension mechanisms has had only a limited effect on the development of environmental and social standards in the concerned countries. The monitoring mechanism provided for by the GSP+ shows a mixed record in the area of sustainable development and human rights, particularly in the Philippines. While Manila has ratified the 27 international conventions under the GSP+, their effective implementation faces major difficulties. Socially, the Philippines remains a destination and transit country for forced labor and human trafficking, particularly of children, despite the establishment in 2019 of a national council against child labor. Trade unions are subject to discriminations and violence in the absence of the legislative changes needed to effectively implement the ILO conventions. On the environmental front, the GSP+ mechanism has nevertheless helped to implement a new regulation on biodiversity protection in 2018. However, the Philippines is regularly pointed out by the UN Human Rights Council, which in 2019 expressed its concerns about human rights violations in the context of the Duterte regime's war on drugs. The impact of the GSP+ mechanism on the development of environmental and social standards and on the protection of human rights, although positive, remains still limited.

The integration of environmental issues into European trade measures to support the development of EU partner countries also includes aid for trade. Its primary and stated objective is to promote increased trade: technical assistance to developing countries to facilitate

conceiving trade policies and trade-related regulations, support for developing economic infrastructures, and strengthening production capacities in export-oriented sectors. However, it also includes measures to protect the environment, which do not necessarily contradict its primary objective of stimulating economic development. In particular, Brussels released €20 million in 2017 for a project to improve the efficiency of irrigated agriculture in the central and dry region of Myanmar. The project, co-financed by the Asian Development Bank, the French Development Agency and the Government of Myanmar, promotes both improved water management and increased productivity on Burmese farms. Similarly, EU is funding the *Systematic Mechanism for Safer Trade* in Laos, a project implemented by the International Trade Centre to facilitate Lao agricultural exports by supporting the development of domestic regulations and product compliance procedures. It therefore aims to create favorable conditions for the development of new markets for Laotian exports, through the adoption of international regulatory standards, as well as the implementation of greater control of pesticide use and its impact on local flora.

B - EXPECTED ENVIRONMENTAL IMPACT OF EU TRADE REGULATIONS

As the world's largest trading bloc, EU is in a position to influence international trade towards greater integration of environmental issues primarily through its own market regulation. The imposition of restrictions on the imports of the European companies on the grounds of environmental protection has consequences for exporters in the partner countries, which must adapt or risk losing one of their main markets.

Through its 2001 action plan "Forest Law Enforcement, Governance and Trade" (FLEGT)[1], EU has implemented a policy to ensure the traceability of raw materials in order to fight against illegally harvested wood by-products from entering the European market. To do this, the EU is adopting a demand-driven strategy by obliging European operators to implement a due diligence system to ensure the origin and legality of wood products. To this end, EU adopted a demand-driven strategy by making European operators to put in place a due diligence system aiming

[1]https://www.euflegt.efi.int/documents/10180/23015/EFI+Policy+Brief+2+-+Forest+Law+Enforcement%2C%20Governance+and+Trade/ba48359a-9ae0-4db7-9fd6-18a728b43e0e

at controlling the origin and legality of wood products. The FLEGT regulation provides the establishment of voluntary partnership agreements (VPAs) to facilitate its implementation. These allow signatory countries to create favorable conditions for bringing their national productions into compliance with European regulatory requirements: under a VPA signed between EU and Indonesia, the Indonesian timber legality certification system (SVLK) was recognized as compliant with European FLEGT regulations[1] in 2016. Indonesia is therefore able to issue FLEGT licenses directly, which benefits its exporters as European operators are no longer required to carry out checks on Indonesian products, but simply check the validity of their FLEGT certificates. Indonesia is therefore able to issue FLEGT licenses directly, which benefits its exporters to the extent that European operators are no longer required to carry out checks on Indonesian products, but simply to verify the validity of their FLEGT certificates. Although the advantage obtained by Indonesian producers must be put into perspective, as it has not led to a significant increase in exports of wood products from Indonesia to EU, this context favors the development of new partnerships between EU and third countries, which are encouraged to integrate the mechanism to ensure their competitiveness on the European market. The FLEGT scheme therefore encourages the development of regulations that allow for greater environmental protection within EU's partner countries.

In the same way, since 2000, EU has put in place regulations to combat illegal, unreported and unregulated (IUU) fishing, setting out a mechanism of sanctions to encourage cooperation in the field of environmental protection. Indeed, beyond the economic impact of illegal fishing, whose annual cost for States is estimated at €19.2 billion in 2021, it endangers biodiversity because it leads to an unsustainable exploitation of marine resources (destruction of the seabed, non-respect of quotas ensuring the reproduction of species). In 2008, EU introduced an obligation to hold a catch certificate for all imports of fishery products or their derivatives from a third country in order to guarantee the

[1] Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52003DC0251

traceability of products[1]. The certificate is subject to validation by the flag state of the vessel from which the products originate, and by the competent authorities of the EU Member States. The IUU fishing regulation is intended to influence the global trade in fisheries products and their derivatives by imposing regulatory requirements on fishermen wishing to export their products to EU market. But EU is one of the main global markets for fisheries products and a net importer (€21 billion in 2019), which makes access to its market essential for many non-European exporters and encourages the compliance of global production with European regulatory requirements. EU is also setting up a system for classifying non-cooperating third countries, which could lead to sanctions. In case of suspected non-compliance with international standards in the fight against IUU fishing, Brussels notifies the countries concerned, which are then subject to increased surveillance by the European institutions. If there is no improvement in the cooperation on these issues, the partner country may be placed by the Council of the European Union on the list of non-cooperating third countries, leading to a complete ban on imports from that country into EU. Notification is therefore an incentive for third countries to intensify cooperation with EU. This was notably the case for the Philippines, whose government implemented a reform making IUU fishing a crime punishable by fines in 2014, following EU's notification of the implementation of the monitoring mechanism. The implementation of this reform allows the Philippines to get out of this mechanism, and therefore to secure its fisheries exports to EU (8 billion Philippine pesos in 2015, or about €156 million).

CONCLUSIONS

EU trade policy is based on an objective of increasing trade that is in apparent contradiction with the concept of sustainable development. Paradoxically, it is one of the main instruments for disseminating European standards to partner countries in terms of environmental

[1] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, consolidate version 09/03/2011, http://data.europa.eu/eli/reg/2008/1005/2011-03-09

protection. Faced with blockages at WTO on environmental issues, EU is implementing a pragmatic policy through bilateral negotiations. This makes it possible to maximize the defense of its economic interests, but also to get around the blockages at WTO and to make progress on issues related to environmental protection. EU is increasingly integrating environmental issues into the trade agreements it negotiates, notably through the inclusion of the standard "Trade and sustainable development" chapter in the FTAs. However, the latter lacks enforceable provisions, which also facilitate its acceptance by EU's trading partners.

The more flexible arsenal of unilateral measures available to EU therefore seems to be a better tool for integrating and promoting sustainable development. The special incentive arrangement for sustainable development and good governance (GSP+) allows EU to influence the development of its partners by putting in place incentive mechanisms in the environmental field. Similarly, the allocation of European aid for trade takes into account the environmental issues, while displaying as its goals the development through increased exports and the integration into international trade. But it is mainly through the regulation of its own market that EU is most effective in spreading its environmental standards.

There is room for improvement in integrating the sustainable development in EU's trade policy. It comes up against the international legal context and the need for EU to act as a pragmatic player by developing new economic partnerships. Although limited in scope, the provisions relating to environmental standards in European trade policy are nonetheless the most developed on the international scene, which nevertheless responds to economic issues. Indeed, the EU has high environmental norms and standards and therefore has an interest in exporting them to limit the risk of dumping. The dissemination of European standards nevertheless contributes to a global movement towards greater integration of environmental issues, by accompanying and promoting the implementation of more environmentally protective regulations in partner countries.

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THE PRINCIPLE OF ENSURING A HIGH LEVEL OF CLIMATE PROTECTION UNDER EUROPEAN UNION LAW

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Abstract:

The principle of integrating the requirement of a high level of environmental protection and improving its quality into all Union policies, as enshrined in Article 37 of the Charter of Fundamental Rights of the EU, is also increasingly reflected in the EU action on climate change. It expresses the importance of environmental and climate protection as one of the European Union's key objectives (Article 3(3) TEU and Article 191 TFEU) and specifies the level pursued. The proclamation of the Green Deal (December 2019), the assumption of the "Fit-for-55" package and in particular the adoption of the European Climate Law (Regulation (EU) No 1119/2021) have brought about important developments in the meaning of the principle and the affirmation of its specific dimension in order to ensure a high level of climate protection. As a principle of EU law, compliance with it is conditional on the validity of the derived law and thus subject to judicial review under the conditions laid down in Article 191 TFEU; it constitutes an element of the interpretation of the derived law, thereby influencing national policies and regulations in this area. Last but not least, the principle is an incentive and influence of the general movement of enshrining and guaranteeing a stable right to climate, which is part of the general human right to a protected environment.

Key words: *climate change; EU principle of a high level of environmental protection; Green Deal; European Climate Law; Article 37 EU Charter of Fundamental Rights; stable climate right; integration of environmental requirements into EU policies.*

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INTRODUCTION

Solemnly proclaimed on 7 December 2000 in Nice by the European Parliament, the Council and the Commission, the *Charter of Fundamental Rights of the European Union* (EU-CFR) was initially a mere political declaration, but quickly gained in consistency and credibility and, under the Treaty of Lisbon, which entered into force on 1 December 2009, acquired a (binding) legal value equivalent to that of the founding treaties. By virtue of its codifying dimension it "reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights"[1].

The Charter thus presents itself as an "intertext related to other past texts but also to what is to come. With regard to what has been, its official *Explanations* review the inspirations, the sources and link, for the future, the contents to the next developments in the ECHR case law dedicated to the equivalent provisions of the eponymous Convention". The originality of this tool is undeniable. It resides first and foremost, but among other things, in its strictly sectoral scope; the limits of its applicability are set by Article 6 TEU and Article 51 of the Charter itself. A second specificity relates to its integration in a "political" project - in the broadest sense of the term - which goes beyond the protection of human rights and promotes the primacy, unity, and effectiveness of EU law as a whole. Finally, the Charter brings news; in terms of approach, it goes beyond the classical division of human rights into generations and the deliberate establishment of original rights and freedoms, in their formulation and/or dimension. Last but not least, the texts of the document have already generated a relevant case law, which interprets and develops the related meanings, amplifying and clarifying its contents.

[1] For more details on this matter: F. Picod and C. Rizcalleh, S. Van Drooghenbroeck (dir.), *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article* (Bruxelles : Editions Bruylant, 2020), 7-9, 930 and the following; Delphine Misonne, "Droit européen de l'environnement et de la santé. L'ambition d'un niveau élevé de protection", *LGDJ* (Paris: Anthemis, 2011).

Having been initially conceived, par excellence, as a project of economic integration, the European construction has gradually assumed and assimilated other perspectives, among which the ecological one, which, however, remains at different stages of expression, being in the process of affirmation.

1. GENERAL CONSIDERATIONS

The European Union's objective of ensuring a high level of protection and quality of the environment needs to be approached, viewed, and analyzed in a global dimension. Standard, rule or principle, of all of them to a certain extent and in an evolutionary synthesis, a dominant interest which tends to become a right recognized and guaranteed as such, the necessity to integrate an ambition to be achieved permanently and progressively into Community policies, evokes a particular feature of European Union's environmental law which is fast growing. Although legally incorporated in the founding treaties three and a half decades ago, it has become no more than a principle still in search of its own firm and precise meaning. The reference to a high level of environmental protection in the founding treaties has legal effects. Some are already confirmed by case law, others could be highlighted in the near future. They concern the interpretation and review of the legality of secondary and tertiary legislation, and the way in which national approaches to environmental protection are likely to be received and assessed as such. The decision-makers, whether European or national legislators or executives, are bound to take into account the message and resonance of the rule (principle) of a high level - quantitative and qualitative - of protection. Its integration in the EU Charter of Fundamental Rights consolidates, codifies and includes it within the legal institution of fundamental rights, opening up new horizons for the affirmation of its meanings and implications in European Union law.

From this general perspective, the provisions of Article 37 of the EU Charter of Fundamental Rights ("A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development") prescribe the principle of mandatory integration of environmental protection, thus aggregating various pre-existing provisions of primary law devoted to it [and

included among the objectives of the single market established by the Union under Art. 3(3) TEU] and set out the high level to be achieved (a high level of protection and improvement of its quality). Clearly, and in line with its simple role of codifying the existing law, the text of the document merely reiterates, in a somewhat more developed and articulated formulation, an integration requirement already present in the TFEU (in particular Art. 11 and 191) and establishes, as illustratively mentioned in the *Explanations* drafted by the authors of the Charter, a principle (and not a fundamental right), with the corresponding legal (enforcement) consequences [specified in Art. 52 (5)]. Accordingly, the provisions of Art. 37 may be implemented by legislative and implementation acts adopted by the Union institutions, bodies, offices and agencies in the exercise of their powers. The compliance thereof is a condition for the validity of the secondary legislation and may therefore be subject to judicial review under the conditions and within the limits laid down by the Treaties[1], in particular those deriving from Art. 191 TFEU[2]. Its invocation before the court is admissible only for the purposes of interpretation and review of the legality of secondary legislation and therefore appropriately resonates with the national environmental policies. Even if it is only recognized in this way at the more general level of protected values, the environment is in any case integrated in a movement aiming at recognizing its capacity as legally protected interest, as a priority in the contradictory relationship with ordinary social and economic interests.

2. SCOPE

The provisions of the Charter, like the other provisions of primary law, do not define what they mean by the term *environment* they use. A flexible and intrusive interpretation of the objectives pursued by EU environmental policy, as set out in Art. 191 TFEU, makes it possible to discover certain points of reference in this respect:

[1] CJEU, decision of 21 December 2016, Italia Nostra Onlus v Comune di Venezia, case C-444/15, ECLI:EU:C:2016:978, para. 61-64.

[2] CJEU, decision of 13 March 2019, Poland v European Parliament and Council of the European Union, case C-128/17, ECLI:EU:C:2019:194, para. 129-131.

– preserving, protecting and improving the quality of the environment;

– protecting human health;

– prudent and rational utilization of natural resources;

– promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Beyond the "chameleon notion" meanings and accounts of the term *environment*, which in a quasi-unanimous theoretical understanding and practical promotion also encompasses the climate factor, the determination of EU policies with relevant purposes in this field can take place through a fine distinction between, on the one hand, the concept as such and its necessary perceptions and, on the other hand, the objective pursued by the environmental policy. Thus, it has already been accepted, both under the doctrine and in case law, that environmental protection includes major aspects relating to the protection of public health, the essential criterion for determining them being the purpose of the measures laid down and the rules enacted, even if the two related spheres of competence are often entrusted to different institutional structures. This integrated dimension has become even more pronounced with the recognition and establishment at European Union's policies level of the *one health* approach (health of people, animals, and ecosystems) in the context of responding to the challenges of the Covid-19 pandemic crisis. Such finding also applies to climate protection, in the sense that, according to the same criterion of the pursued and established purpose, related to the relevant political and legal indications, it does or does not belong to the environmental protection action to which the high level of protection applies. Moreover, the wording of the objective established at Art. 191 TFEU of promoting measures at international level to deal with regional or worldwide environmental problems and "in particular combating climate change" includes three pertinent provisions: climate change is deemed to be an "environmental problem", EU action concerns, as a priority, the foreign, international (regional and worldwide) level, and the level of ambition seems lower in "to deal with", but in reality is much better than "a high level of protection", is about an obligation to achieve results, to meet undertaken targets.

As the doctrine has pointed out, the fact that the boundaries of this policy are not formally drawn more precisely allows thus the EU

legislator to extend its intervention to a multitude of matters, encompassing health, management of natural and energy resources and land use planning. The same relatively diffuse environment notions allow to attach to it new issues related to technological risks, stratospheric ozone, forest management, complex aspects of climate change and so on.

In terms of *ratione personae*, unlike other provisions of the Charter, but not by chance, the text of Article 37 refrains from identifying and specifying the possible beneficiaries of environmental policies. Indeed, omitting to use wording such as "everyone has the right" is explained by the refusal (for the time being) to recognize a subjective right of this nature at the level of primary law, and this can be explained above all by the nature of the determining objectives of the establishment of the European project and the sinuousness of its developments. However, following the example of ECHR, "by ricochet", but also in line with the openings of the concerned provisions, the recent case-law of CJEU has established a link between the meanings of the principle and the interests of individuals, whose fundamental right to life and health is co-substantial with the notion of a high level of environmental protection provided at Article 37. Thus, for example, in its judgment of 20 June 2019 in *Craeynest* case, the Luxembourg court held that the rules concerning, in that case, the protection of ambient air "put into concrete terms the EU's obligations concerning environmental protection and arising from the fundamental right to life set forth at Article 2(1) of Charter of Fundamental Rights, and a high level of protection required by Article 3(3) TEU, Article 37 of the Charter, and Article 191(2) TFEU. The measures likely to lead to the effective application of Directive 2008/50 are therefore, in terms of their weight, comparable to that of *a serious interference in fundamental rights*". To conclude, the text of Article 37 concerns Union policies, and its legal force lies in the possibility of reviewing the legality of secondary legislation (directives, regulations). It also binds Member States, not autonomously, directly but as an element of interpretation, when applying European Union law; because national environmental policy is essentially based on secondary legislation and some 75-80% of domestic regulations are of European origin, these provisions are likely to affect Member States' domestic environmental laws to a large and diverse extent.

3. EUROPEAN CLIMATE AND HUMAN RIGHTS LAW

Human rights, by recognizing, establishing and guaranteeing their enjoyment, are increasingly an essential lever to push States, especially through litigation, to act and comply with their international ecoclimatic commitments. In an increasing number of countries, as well as at regional and international level, the invocation of the rights to environment, including in their dimension regarding the right to a stable and sustainable climate in the context of an increasingly consistent and widespread climate litigation, has generated significant case law, on one hand, with judicial decisions encouraging States to act, to respect their responsibilities, and, on the other hand, with the related conclusions contributing to the development of the doctrine[1]. The considerations and provisions of Regulation (EU) 2021/1119 circumscribe the new climate action framework, with at its core "the irreversible and progressive reduction of anthropogenic greenhouse gas emissions" and the ongoing adaptation of the general issue of human rights, highlighting the interactions of climate change with their status, the meanings produced in terms of their content and influence on their exercise, and suggesting, implicitly or explicitly, necessary developments[2]. By invoking "the existential threat posed by climate change" as an essential, imperative

[1] Mircea Duțu and Mircea M. Duțu-Buzura, "Noul cadru de acțiune juridico-instituțională europeană privind schimbarea climatică. Fundamentele dreptului UE al climei instituite prin Regulamentul (UE) 2021/1119 (Legea europeană pentru climă)", in *Studii și Cercetări Juridice*, no. 4 (2021): 422 and following.

[2] The process of "climate control" of human rights in general and of the right to environment in particular which became the right to "a safe, clean, healthy and sustainable environment" is also reflected in the context of the works of the UN Human Rights Council to draft a document on such right. Conseil des droits de l'homme, Quarante-huitième session, para. 48. Droit à un environnement sûr, propre, sain et durable, A/HRC/48/L.23/Rev.1, 5 October 2021. Moreover, on the same occasion and by a resolution of the same date, a Special Rapporteur was established to study and determine "how the adverse effects of climate change, including sudden-onset and slow-onset disasters, affect the full and effective enjoyment of human rights" and to make recommendations on the subject. It should review the current issues, including the financial ones, faced by the States concerned with combating climate change and raise awareness among the public and all actors involved in human rights issues in this context.

reason for "an enhanced ambition and an increased climate action by the Union" legally undertaken [Preamble point (1)], *European Climate Law* is also a legal instrument to promote the demands of preserving the climate system as a prerequisite for the full and effective existence and exercise of fundamental human rights and freedoms and a contribution to enriching their meanings. In the same sense, the resonances are indicated also by placing the adoption of the new regulatory deed in the continuation and clarification of the European Union's ecoclimatic concerns, led by the declaration of *climate and environmental urgency* by the European Parliament, the adoption of *Green Deal* as the new strategy for enhanced growth (2019) and the establishment of *Climate Deal* (2021) as mechanism for public information, consultation and participation in the establishment of the regulatory and institutional mechanism to promote climate neutrality and the new type of energetic, social and economic development. Evoking the vocation of the documents adopted in this context to "protect the health and well-being of citizens from environmental-related risks and impacts" [Preamble, point (2)], to reduce "the likelihood of extreme weather events and of reaching tipping points" [Preamble, point (3)], preventing and managing "the growing climate-related risks to health, including more frequent and intense heatwaves, wildfires and floods, food and water safety and security threats, and the emergence and spread of infectious diseases" [Preamble, point (5)], as well as revealing the interdependence with the crisis of biodiversity decline (climate change being the third most important cause) converge towards the same goal of highlighting the close reciprocal links between the human rights situation and the general state of ecoclimatic balances, which are increasingly threatened by anthropogenic action, including through GHG emissions and thus climate warming. Last but not least, paragraph 6 of *Preamble*, one of the few express and integral texts of EU climate law, states that "*This Regulation respects the fundamental rights and observes the principles recognized by the Charter of Fundamental Rights of the European Union, in particular Article 37 thereof which seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development*". Such reporting of *European Climate Law*, even in terms of recitals, but with a direct, express reference and in a wording with firm and precise emphases denotes an

important step in the "climate control" of the field. According to the constant and relevant case-law of the Court of Justice of the European Union (CJEU), if "the preamble to a European Union act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting them in a manner clearly contrary to their wording", it is nevertheless "capable of specifying the content of that act"[1]. In addition, as noted in the doctrine, "Drafting a preamble is a serious matter, and its authors give it due attention. It is therefore appropriate for the CJEU and the jurisdictions of the Member States to have regard to its letter and spirit in the exercise of their role"[2].

3.1. The legal value of Article 37 of the Charter of Fundamental Rights of the EU and its significance in climate matters. As noted in some of the works devoted to it, despite a coherent doctrinal movement in favor of establishing the environment quality as individual right, the provisions of this article do not explicitly enshrine such a fundamental right, in its substantive or procedural aspects, either objective or subjective, but merely repeat an integration requirement already present in the TFEU. Compliance with the provisions of Article 37 of the Charter is a condition for the validity of secondary legislation and is thus subject to a judge's review, which is exercised under the conditions and within the limits laid down by the Treaties and in particular those resulting from Article 191 TFEU. That article is also considered an element of interpretation of secondary legislation and thus influences national environmental policies. Last but not least, the EU text in question is helping to fuel a background movement to increase the importance to be attached to the environment as a protected interest, which does not need to be given precedence over social and economic interests in its establishment and application. By a text in a preamble of a regulation referring to another one with the value of a principle in the Charter, it is not possible, of course, to change the legal nature of the provisions in

[1] CJEU, 28 June 2012, Carrona, case C-7/11, ECLI : EU-C2012-396, para. 40 and references quoted; Adde: TFPUE, 2 March 2016, Freberger et Vallin v Commission, case F-3/15, ECLI : EU : F2016, 26, para. 60.

[2] Antoine Baillux, "Préambule", in F. Picod, C. Rizcallah, S. Van Drooghenbroeck, *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article*, 2e édition (Bruxelles : Editions Bruylant, 2020), 39.

question, but a creates a relationship which induces the idea of connection and integration in the same regulatory set. Moreover, as this is the (first) *European Climate Law*, this leads to the express 'climate control' of the notion of environment in EU environmental law. Indeed, as the term in question is not defined, a flexible and inclusive interpretation one of the objectives pursued by environmental policy, as set out in Article 191 TFEU, has been accepted and is being promoted. The fact that the boundaries of this policy are not more clearly set allows the EU legislator to extend its intervention to a wide range of matters, to easily assimilate into the environmental sphere the full implications of ecoclimatic issues, such as health, management of natural and energy resources or spatial planning. Other aspects may also be included, such as new risks and areas of interference, with association still to be defined. In conclusion, the legal force of the provisions of Article 37 of the Charter is expressed in and embodied in the possibility of a review of the legality of secondary legislation, in this case a regulation, and in relation to the national legislation of the Member States as an element of interpretation in the application of Union law represented by the relevant provisions of the *European Climate Law*.

3.2. The principle of non-regression and the rule of constant progression. The European Climate Law has taken over or developed, through specific provisions in EU law from general environmental law and the Paris Agreement, the non-regression principle and the rule of constant progression in mitigation, stipulating "the irreversible and gradual reduction of anthropogenic GHG emissions by sources and enhancement of removals" (Art. 1-1), and the rule of steady progress in mitigation, Art. 5 (1) requiring the relevant Union institutions and Member States to ensure "continued progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change". The reviews of national ambitions announced at COP-26 in Glasgow (November 2016), despite some progress, also fall short of expectations of getting on a sufficient trajectory[1].

[1] According to the annual stocktaking of climate action, only 140 countries (out of 191 Parties to the Paris Agreement, i.e., 190 countries and the EU) have reported their new nationally determined contributions to the UN. Of these, only half are more ambitious than before. Among the G-20 members, representing 80% of global GHG emissions, only 10 have increased their reduction pledges, two have even reported a lower volume

4. REGULATION ARTICLE 37 OF THE CHARTER IN THE GENERAL CONTEXT OF HUMAN RIGHTS LAW

Placed in the general context of domestic and international regulations in the human rights field, the text of Article 37 of the Charter appears to us to be clearly in an obvious regressive lag compared to the relevant provisions of domestic law, including those relating to the constitutions of the Member States and international human rights law. This is despite the fact that, at least in terms of the procedural rights to the environment (to information, participation in decision-making and access to justice, which are essential in this field), EU became a party to the Aarhus Convention (1988) indeed in 2005, that is after the Charter text was decreed, and some legislative acts (directives) on the environment have developed relevant provisions in this respect (such as Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information).

Also, on a more general level, from a more developed perspective in the field, Article 47 of the Charter sets forth the right to an effective remedy and access to an impartial tribunal, and generates jurisprudential developments concerning interactions with the provisions of the Aarhus Convention[1]. In addition, an inseparable link has been established in the same way between a high level of environmental protection and the protection of health and, ultimately, of human life (case *Craeynest*, judgment of 26 June 2019, quoted before).

The reference to common constitutional traditions and the observation of the existing gap in this respect also gives rise to surprise, if the provisions in question are not seen in the light of the fact that the adoption of the Charter was justified, first and foremost, in order to reassure the Member States, which were concerned about finding

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of reductions than before (Brazil and Mexico), 2 show no progress (Australia, Indonesia), and the rest have reported no new plans. China announced on 28 October 2021, in the spirit of the same "baby steps" policy, revised new nationally determined contributions, reconfirming targets of peaking emissions before 2030 and carbon neutrality before 2060, but without clarifying the overall mitigation trajectory for the decade.

[1] CJEU, decision of 8 November 2016, Lesoochranárske, case C-243/15, ECLI:EU:C:2016:838; CJEU, decision of 20 December 2017, Protect Natur-, Arten- und Landschaftschutz Umweltorganisation, case C-664/15, ECLI:EU:C:2017:987.

themselves in a situation where European Union law would impose rules on them which would not provide them with a satisfactory level of protection compared with national constitutional guarantees and thus generate an insoluble and disintegrating legal conflict. The question then arises as to whether the content of the article really corresponds to common values and the way in which national constitutions provide for and regulate environmental protection. An analysis of the provisions of the relevant fundamental laws of the EU Member States shows a substantially different "geography". Currently only 10 of these expressly establish the right to environment, often intimately linked to the right to life or to the protection of health. If, from this point of view, it is not possible to speak of the existence of firm common constitutional traditions, it should be deemed however that this would consist in giving the States the responsibility for an environmental policy which is not reduced to a simple administrative action, but requires the achievement of an objective of protection, even improvement of the quality of the environment. The common constitutional tradition does not consist, therefore, in the affirmation of a right to environmental protection, recognized as such for the benefit of any person, but rather in the assignment to the State of a mission to guard this environment, in the sense that it is responsible for establishing relevant, balanced and effective policies and legislation. Such a role is expressed in two ways: on one hand, the public authorities must create the conditions for the exercise of a right recognized for the citizens, to a greater or lesser extent, and on the other hand, it is their duty to adopt appropriate measures to guarantee the protection of this environment, independently of the recognition of such right. It should be noted that, in this respect, the provisions of Article 37 of the Charter, as well as the other provisions of EU primary law establishing a high level of environment protection and quality, bear these characteristics, namely those conferring on the public decision-maker a positive obligation to adopt environmental protection measures, in a dynamic time perspective, in the sense of a progressive improvement of such an approach. Climate protection issues have gradually but firmly been added, initially to the EU's external action in particular, which played a major role in the adoption of the 2015 Paris Climate Agreement and has consistently assumed leadership status in global climate negotiations and governance. It has been rightly argued that it has opened a new stage in the "humanization" of the climate

change issue, being the first time that a treaty on this subject, and one of the first international legal instruments on the environment, explicitly mentions human rights obligations of States. If the new climate regime was essentially built on environmental and economic issues, it has now also become clear that social and cultural interests must be understood and integrated, particularly in the light of an approach based on human rights[1]. In an equation that is about to be clarified and established, the effects of climate change have and will have adverse consequences for the enjoyment of human rights, and international human rights obligations contribute to the development of a climate law that puts people (humanity) at the center of ecoclimate concerns[2].

In a similar approach, the *Glasgow Climate Pact* (2021) confined itself to setting out the issue in its *Preamble* in the form of two recitals. First, as a consequence of the recognition of climate change as a "common concern of humankind", the Parties, EU included, must, when taking action to address climate change "respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development... intergenerational equity". Then, with reference to climate justice, it is considered that it entails "ensuring that the efforts to combat climate change take into account human rights and social inequality". Moreover, in the context of this new legal framework for the global response to climate change, the European legal framework related to *Green Deal* (2019) and European Climate Law [Regulation EU 2021/1119] brings important particularities.

5. A RIGHT TO ENVIRONMENTAL PROTECTION IN THE SYSTEM OF FUNDAMENTAL RIGHTS

The acceptance of the right to a protected environment within the EU takes place according to the terms of its particular fulfillment at a

[1] Camila Perruso, « Perspectives d'humanisation des changements climatique : réflexion autonome de l'Accord de Paris », in on line magazine *Droits fondamentaux* no. 14 (2016).

[2] Mircea Duțu, *Dreptul climei. Regimul juridic al combaterii și atenuării încălzirii globale și adaptării la efectele schimbărilor climatice* (Bucharest: Universul Juridic, 2021), 280 and the following.

general, including European, level. The general regulatory and case law context of human rights, through the mutual interferences and resonances of their related meanings, has led to the implicit recognition of different aspects of a right to environmental protection. It is mainly about related contributions of other provisions of the Charter, in the circumstances of the protections already provided, of ECHR case law and national constitutions, through the right to respect for private and family life and the protection of the home, the right to life, the right to health, the right to freedom of expression, the right to a fair trial, as well as through the "mirror effect" of the right to the protection of property. As has sometimes been pointed out, the "context of fundamental rights" is likely to weigh, even to the point of being decisive, in the judge's assessment when faced with the question of the legality of environmental protection measures; "The Charter of Fundamental Rights of the European Union includes in Article 7 the fundamental right to private and family life and home, whilst Article 37 expressly recognizes the right to environmental protection. The latter right is expressed as a principle and, moreover, does not arise in a vacuum but instead responds to a recent process of constitutional recognition in respect of protection of the environment, in which the constitutional traditions of the Member States have played a part"[1]. This view, which is present in the Opinion of the Advocate General of the Court of Justice in Luxembourg in a case concerning aircraft noise over Brussels, has been reiterated in other documents of the same nature, and such dynamic reading was accepted by the CJEU which, in a judgment of 21 December 2016, confirmed in 2019, considers that the provisions of Article 52(2) of the Charter, which concern "Rights recognized by this Charter" refer also to how to interpret the article 37 and, therefore "In this regard, it should be noted that Article 52(2) of the Charter provides that rights recognized by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined here. Such is the case with Article 37 of the Charter."[2]

[1] Av. Gen. P. Cruz Villalon, conclusions; CJEU, 17 February 2011, European Air Transport v Collège d'environnement, case C-120/10, ECLI:EU:C:2011:556, recitals 82.

[2] CJEU, decision of 13 March 2019, Poland v Parliament and Council, case C-128/17; ECLI:EU:C:2019:194, para. 129.

6. REAFFIRMATION AND ACCREDITATION OF THE REQUIREMENT TO INTEGRATE A HIGH LEVEL OF ENVIRONMENTAL PROTECTION

The text of Article 37 merely reaffirms an integration requirement already present in the TFEU, while emphasizing more prominently the requirement, also pre-existing but placed in other articles, for a "high level of environmental protection and improvement". In the positions and work of the Advocates General of the CJEU, the principle of a high level of protection laid down in Article 3(3) TUE and in Article 37 of the Charter has become one of the guiding objectives of EU law since the entry into force of the Lisbon Treaty (1 December 2009), the scope of Article 37 of the Charter being, however, not identical to that of Article 11 TFEU, from which it obviously draws its inspiration ("Environmental protection requirements must be integrated into the definition and implementation of the Community policies, in particular with a view to promoting sustainable development"). As noted in the relevant doctrine, instead of focusing on the integration of "requirements", as in Article 11 TFEU, requirements which have proved particularly difficult to determine in practice, the Charter is about the integration of an ambition, but directly expressed, which thus becomes explicitly synonymous.

As an expression of the growing trend towards a cross-cutting approach to Community action and the increasing role of the environment, Article 37 calls for the integration of an ambition for a high level of environmental protection and improvement of the quality of the environment. Giving useful effect to this provision involves taking into account considerations relating to the actual protection of this environment. Stopping the erosion of biodiversity, the spread of endocrine disrupters, the deterioration of air quality, the destruction of the ozone layer, the disruption of the climate system are explicit dimensions to be considered when integrating a high level of environmental protection. The use of products, the recycling of waste and the development of new energy processes, which inspire a unique dynamic, are all part of the same perspective. From another point of view, Article 37 of the Charter constitutes a new integration clause, in addition to quite a number of others belonging to primary law. Thus, in the relevant texts of the TFEU these qualitative aspects must be "taken into account" or "taken into consideration"; these provisions are working

together to promote a common project of a balanced, and also qualitative development. The integration clause is the vehicle, the means of action that allows environmental interests to be accepted and expressed and, at the same time, to be given priority over other social and economic aspects. In this context, it is worth noting the difference between the provisions of Article 11 TFEU, which emphasize the integration of requirements, the determination of which is particularly approximate, and those of Article 37, which imply the integration of an ambition, a higher benchmark, which means an evolution, a progress, not a mere mechanical, indifferent operation.

7. A HIGH LEVEL OF PROTECTION AND IMPROVEMENT OF ENVIRONMENTAL QUALITY

The establishment of an "ambition" requirement at the heart of EU environmental policies and regulations has its formal origins in the dates of the European integration process. The issue arose on the occasion of the elimination of a veto right, as a condition for moving to qualified majority voting quorum for the adoption of maximum harmonization measures, likely to affect qualitative dimensions, such as those of environmental protection. Member States thus no longer had the possibility of properly blocking the adoption of legislation which they felt was too weak to achieve certain defining objectives in this area, and it was agreed that this would prevent the risk of alignment with the lowest common denominator. At present, the invocation of a "high level of protection" is not uniformly reflected in the treaties, with the way in which it is framed and the extent of its meanings varying from article to article, according to their own history and evolution. But the categories are not impermeable and in the case law of the CJEU there has been no hesitation in resorting to one interpretation or another, in a dynamic generally favorable to a "smoothing" of the approaches. Often in this regard, especially in the conclusions of the Advocates General, it has been considered that the multiple inclusion in EU law of the objective of a high level of environmental protection induces a special significance, that of a uniform principle of a high level of environmental protection by virtue of which the various provisions concerned cannot be interpreted separately. Article 37 of the Charter and the review of the validity of the secondary legislation which follows from this is not, however, subject to

a separate review, the Court ruling in this respect that its review, as a "right" and on the basis of Article 52 of the Charter, must be carried out under the conditions and within the limits laid down by the Treaties, the finding of validity in relation to the Treaties (laid down in Article 191 TFEU) easily imposing also that in relation to the provisions of Article 37 of the Charter.

8. THE DEGREE OF JUDICIAL REVIEW OF THE REQUIREMENT OF A HIGH LEVEL OF PROTECTION

According to the constant case-law of the CJEU, it is for the jurisdiction of the Court in Luxembourg to verify compliance with the requirement of a high level of protection, apart from the question of manifest error of assessment (on account of technical and scientific complexity) or from the verification of the interpretation given to a legislative act in implementing or transposing measures. The Court has never rejected the applications for review of legality on the basis of a high level of protection and on the ground that it is merely a general guideline which is not subject to its review, or because it does not fall within the competence of the European Union judge to rule on an element which is a matter for political considerations alone. The existence of a discretion conferred by an act of secondary legislation does not in any way mean that decisions made by national authorities within that framework are exempt from judicial review. Its intensity would be all the greater when the European legislative act concerns fundamental rights or concerns the fight against health-damaging pollutions. The fact that the obligation to pursue a high level of protection and improvement of the quality of the environment is of an indeterminate nature does not mean that the EU institutions enjoy absolute discretion in this regard. It is, of course, indisputable that the non-existence or weak level of protection is tantamount to its non-compliance. Beyond the null ambition, the judge's review will be conditional on the existence of manifest error of assessment. If it is obvious, in the light of objective scientific or technical data, that the act used does not properly reflect the echo of the concerns of achieving a high level of protection, when these are necessary in real terms, the Court seized must annul it. The high level of protection must not, however, be associated with a complete understanding of the problem; secondary legislation which only concerns

certain aspects of an issue remains valid in this respect as long as and insofar as the measures contribute to preserving, protecting and improving the quality of the environment. And this is all the less so for those based on Article 191 TFEU, even those with environmental protection as their primary objective, the level of protection must not "necessarily be technically the highest possible" because Article 193 TFEU allows Member States to maintain or establish enhanced protection measures. On the contrary, for measures based on Article 114 TFEU which do not benefit from the same presumption of automatic consolidation for the benefit of the Member States, a stricter position on the requirement of the level of protection to be observed can be foreseen, without prejudice to possible safeguard clauses. An EU harmonization based on Article 114 TFEU could be vitiated by a manifest error of assessment if it is based on the lowest level that exists within the Member States, but also if it imposes a generalization of low ambition when the Member States themselves do not have the possibility, in principle, to strengthen the requirements. In health matters, the CJEU has already confirmed that maximum harmonization is not admissible unless it complies with the requirement to ensure a high level of protection, as required by the integration requirement laid down in Article 168 TFEU. Finally, it should be noted that, at present, the existence of a high level of protection has an effect especially against attacks from the EU legislator. The principle of proportionality requires that the acts of the Union institutions must be suitable for attaining the legitimate objectives pursued by the regulation in question and must not exceed the limits necessary to attain those objectives, it being understood that when a choice is offered between several appropriate measures the least restrictive should be used, and that the inconvenience caused must not be disproportionate to the goals pursued. In the context of a marginal control, concerned only with the grossest errors, it is manifestly unreasonable to consider that a demanding measure is in line with the ambition pursued, which is a high level of protection.

With regard to the review of the validity of Article 37 of the Charter and the articles on which this is based, it finds a favorable ground in administrative litigation, whether it concerns legislative measures, which are at the origin of administrative constraints, or, on the contrary, certain regulatory acts or secondary legislation to which it refers.

In the regulatory field, the margin of appreciation of the decision-maker called upon to apply the policy options established by the legislator is generally smaller. The review carried out by the judge is not limited to a marginal review relating to manifest error of assessment. Failure to comply with the prescribed ambition may lead to annulment of the act, even to conviction for refraining from taking expected action.

The text of Article 37 of the Charter establishes sustainable development as a principle which makes the integration obligation conditional; its invocation here, inspired by Article 11 TFEU raises the question of the impact of such a reference on the level of protection. At the szme time, Article 3(3) of TEU expresses the "threefold nature of "sustainable development in Europe", which is based successively on economic ("balanced economic growth"), social ("a social market economy … aiming at full employment and social progress") and environmental ("a high level of protection and improvement of the quality of the environment"). Carrying a social and economic dimension, environmental policy, in turn, is amplified by new concerns. The reference to sustainable development is mainly concerned with a requirement to balance economic and social interests. The sustainability argument, the mitigation of the severity of certain environmental or other requirements, has had some case law resonance, but without being able to become rule.

9. STATUS OF PROVISIONS OF ARTICLE 37

Establishing the status of Article 37 of the Charter requires, first of all, revealing the relationship between Article 37 and Article 52 of the Charter. Thus, Article 52(5) provides that "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality". Despite some more or less contradictory aspects, mainly due to imperfections in the drafting of the text, the objective of a high level of protection combined with the mission of sustainable development, which is clearly laid down in the TEU, today reveals a priority orientation horizon for EU policies and regulation.

With regard to the relationship between the provisions of Article 37 and those of Article 53 of the Charter, it should be noted that the particular feature of European Union policy under Article 193 TFEU is that it calls, in principle, for the maintenance or adoption of enhanced protective measures by the Member States when the legal basis for the legislation in question is Article 192 TFEU. This faculty is not subject to the existence of a provision of secondary legislation expressly authorizing it. Essentially, the European legislation adopted on this base does not prefigure a complete harmonization. The more so as a national measure pursues the same objectives as a directive, the exceeding of the minimum requirements laid down therein is provided for and authorized by Article 193 TFEU under the conditions set forth therein. Thus, by adopting more stringent measures Member States always exercise a competence as regulated by EU law, so they must in any case be compatible with the Treaty. However, the Member States have the obligation to define the extent of protection to be achieved.

SOME CONCLUSIONS

From the perspective of general developments, both in EU law in general and in environmental law in particular, some developments are emerging in relation to the meanings of the principle established at Article 37 of the Charter. By giving the idea of a permanent progress in the action of the European Union institutions with a view to constantly ensuring a high level of protection, it has already been invoked the crystallization in this field too of the principle of non-regression. From the rule of *standstill* it follows *a contrario* that the positive obligation to guarantee fundamental rights is inherent in these positive duties. There is also the evolution according to which the determining element of this recognition resides in the objective that incorporates the rights of claim and the temporality required to achieve them progressively or, more or less, tends towards this achievement.

Also, the analysis of the findings of the relevant case law suggests that the promotion of a high level of protection is sometimes confused with the need to give a "useful effect" to the measure in question. Where a provision of EU law is susceptible to more than one interpretation, priority must be given to the one which is likely to save its useful effect. In interpreting the secondary legislation texts that are referred to, CJEU

promotes an interpretation which guarantees both the effectiveness and the efficiency of the arrangements established. This search for useful effect remains, however, dependent on the content of secondary legislation and its context of application. If, as such, it is aimed only at a particularly weak objective, it may even lead to a regression of protection from the pre-existing right. Therefore, its combination with the demand for a high level of protection must be tempered and balanced in line with the prospects for sustainable development.

Finally, while the requirement contained in Article 37 is sometimes combined with the invocation of compliance with the precautionary principle, these aspects should not be confused. As provided at Article 191 TFEU, precaution is one of the principles contributing to achieving the objective of a high level of environmental protection. Undoubtedly, the prescribed ambition is not limited to the assumptions covered by the precautionary principle, namely situations of uncertain risk.

As aspects of a general conclusion, the text of Article 37 of the Charter gives added weight to the interest it establishes, namely that of environmental protection, and contributes to sustaining substantive developments in opening new prospects for affirming the environmental priority, in particular through administrative practices and case law.

Also, it certainly does not explicitly establish any subjective right such as "everyone has the right to the protection of a healthy environment", but reinforces the degree of ambition required from EU institutions and Member States applying the Community acquis. This responsibility belongs to an obligation and does not constitute a mere faculty, and is subject to limited judicial review on a manner similar to what is already provided for in the Treaties. However, case law tends to elevate it to the category of rights and less to that of principles, from which it follows that its interpretation is not distinct from that given to environmental protection in the Treaties and in particular in Article 191 TFEU. Unquestionably, Article 37 helps to prevent a decline in the level of ambition of EU environmental law, promoting, on the contrary, the strengthening of its ambition, irrespective of its presence in the texts or in the effects sought (improvement of its quality) and thus complying with the principle of non-regression.

While playing the role of disseminator of pre-existing aspirations, its relevance can however only really be assessed through the more

precise rules invited to be applied, in compliance with various provisions on which it is inspired, arbitral or not, in the explanations of the Charter and the data of the emerging case law of the CJEU.

With regard to the climate dimension of the principle, the movement to "humanize" the matter initiated by the Paris Agreement and made more specific at EU level by the European Climate Act places the protection of human rights at the center of strategies for responding/retaliating to climate change and the human being at the center of this global issue. Indeed, the acceptance of human rights in these two legal documents remains insufficient, but this paves the way, firstly, for climate matters to enter more vigorously into the horizons of Article 37 of the Charter, and secondly, for favors the developments relating to environmental and climate protection in EU law.

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ENVIRONMENTAL PROTECTION DURING ARMED CONFLICTS

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Abstract:

In the context of the outbreak of the armed conflict in Ukraine, the analysis of legal instruments for environmental protection, guaranteeing national and cross-border environmental security are topical issues.

Given that the negative effects of pollution caused by an armed conflict do not only occur at the state level but can spread rapidly, causing damage to states neighboring the war zone, this article proposes a debate on international regulations on environmental protection during an armed conflict.

Undoubtedly, history has shown that wars of all times have caused serious and long-lasting damage to the environment. If in the past military tactics such as arson, water poisoning, deforestation was used, today new types of weapons, such as nuclear, biological, chemical, artificial weathering, can have a devastating effect on human health and life on earth.

Consequently, this study is built around the idea that environmental protection is and must remain a major public interest objective, both at the national level but also at the international level, especially in times of crisis, generated by the existence of different armed conflicts.

Key words: *armed conflict; environmental protection; States' obligations; ecological security; forbidden weapons.*

INTRODUCTION

Military conflicts have always led to the loss of human lives, the damage to the environment.

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Armed conflicts continue to wreak havoc on the environment today, endangering the well-being, health and lives of people. The situation is even worse as the effects of this damage persist for long periods after the end of the wars.

Even if the natural environment in itself is not a military objective, in war, it acquires a special importance for the organization and conduct of combat actions. Military objectives are located in the environment, and the actions of the belligerents automatically produce ecological consequences, often the most serious.

1. RISKS AND THREATS TO ENVIRONMENT DURING ARMED CONFLICTS

Today's society, which has just emerged from the difficult confrontation with the COVID-19 pandemic, is facing a challenge: the outbreak of a military conflict in Ukraine.

In common with many conflicts, from the first days of the fight, there were serious incidents of pollution[1].

The targeting of military infrastructure, ammunition depots, aerodromes and their fuel storage tanks, naval facilities generate fires that emit clouds of smoke composed of toxic gases with harmful effects on air quality and human health. At the same time, there is substantial contamination of the soil, subsoil and water. Burned tanks, various vehicles, downed planes and any other wreckage are undeniably sources of pollution. To all this is added the impact of the use of explosive weapons into cities.

The consequences of armed conflict can also lead to climate change by destroying large areas of forest, damaging oil or large industrial plants, and releasing large amounts of greenhouse gases into the atmosphere.

In principle, it has been shown in the literature that military risks and threats to the environment are considered "a matter of warfare, because some weapons harm environmental conditions when used in a certain way, such as be the bombings made in the "carpet" type method. Conventional weapons remain a threat to the environment even after the end of armed conflict, through so-called "material remnants of war";

[1] https://ceobs.org/environmental-trends-in-the-ukraine-conflict-10-days-in/, accessed on 22 April 2022.

mine and traps not raised, not destroyed or not neutralized; unexploded ordnance for various reasons, etc. Compared to the effects of conventional weapons, the effects of unconventional weapons are more serious, more widespread and more lasting"[1].

To all these direct effects are added the indirect effects that occur on the environment. For example, the collapse of the government, the deterioration of the infrastructure service, the displacement of the population, the illicit and harmful exploitation of natural resources to support war savings or personal gain, the reduction of institutional capacity for environmental management also contribute to sustainable environmental degradation conflict and more[2].

As a result of the first damage to the environment caused by the conflict in Ukraine and the growing concern about the magnification of the consequences of this war, international political and civil society has not remained immune.

At the UN Environment Assembly (UNEA-5), held from 28 February to 2 March 2022 in Nairobi, Kenya, 108 NGOs endorsed a statement condemning Russia's actions and calling for support for monitoring and addressing the damage caused to the environment. Subsequently, the General Assembly of the United Nations (UN General Assembly), convened in a special emergency session on March 24, 2022, adopted a resolution entitled "Humanitarian Consequences of the Aggression Against Ukraine" by a large majority[3].

This resolution contains strong messages on the global consequences of Russia's aggression, especially on the impact of the conflict on increasing food and energy insecurity. In response to Russia's

[1] Elisabeta-Emilia Halmaghi, **"**Aspecte privind efectele conflictelor militare asupra mediului înconjurător"*, Revista Academiei Forțelor Terestre*, no 3 (35)2004, *https://www.armyacademy.ro/reviste/3_2004/r19.pdf;* Amelia Diaconescu, "Dreptul umanitar al mediului", in *Universul Juridic Magazine* no 1(2018): 54-64.

[2] International Committee of the Red Cross (ICRC), *Guidelines on the protection of the natural environment in armed conflict. Rules and recommendations relating to the protection of the natural environment under international humanitarian law, with commentary*, 2020, 11, available at https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating, accessed on 22 April 2022.

[3] Resolution adopted by the General Assembly on 24 March 2022 - ES-11/2 Humanitarian consequences of the aggression against Ukraine (A/RES/ES-11/2) [EN/AR/RU/ZH],https://reliefweb.int/report/ukraine/resolution-adopted-general-assembly-24-march-2022-es-112-humanitarian-consequences.

threats regarding the use of nuclear weapons, as well as armed action against Ukrainian nuclear power plants, the resolution also expresses concern about the serious humanitarian and environmental consequences of accidents that could result from the bombing of Ukraine's nuclear infrastructure. Last but not least, the document emphasizes the obligation to ensure the safety and security of the entire nuclear infrastructure.

2. LEGAL INSTRUMENTS TO GUARANTEE ROMANIA'S ECOLOGICAL SECURITY

In the current context, given our geographical location, the issue of our security, including from an ecological perspective, is a hot topic.

The damage to the quality of the environment in one state does not only remain at the level of that state, but often pollution has consequences in other states. Therefore, environmental security must be thought of in terms of cross-border security, for which it is necessary to have mechanisms, strategies, institutions for the prevention and management of crises, disasters, armed conflicts that can affect the environment[1].

Environmental protection obligations in the context of armed conflict are set out directly or indirectly in international conventions and protocols in the field of international humanitarian law.

Among the treaties and protocols in this field to which our state is a party are: Additional Protocol (Protocol I) to the 1949 Geneva Conventions for the protection of victims of international armed conflicts, June 8, 1977 [art. 35 (3) and art. 55 (1-2)]; Convention (IV) on the laws and habits of land warfare and its annex: Regulations on the laws and habits of land warfare, The Hague, 18 October 1907 (art 23); The 1949 Geneva Convention (IV) on the protection of civilian persons in time of war (art 147); Convention on the prohibition or restriction of the use of certain conventional weapons which may be considered to be excessively harmful or to have non-discriminatory effects, Geneva, 10 October 1980; Convention on the prohibition of the use of military or any other hostile use of environmental modification techniques / ENMOD (Geneva, 18 May 1977, art I-II) etc.

[1] Mădălina Virginia Antonescu, "Protecția mediului în cazul conflictelor armate", in *Gândirea Militară Românească Magazine* no 3 (2020): 170.

At the same time, the agreements on the status of the forces to which Romania is a party include provisions regarding environmental protection. For example, art. VIII (2) of the Agreement between Romania and the USA on the location of the United States ballistic missile defense system in Romania (Washington, 2011) states the following: "The parties will have a preventive approach to environmental protection. To this end, any problems that may arise will be dealt with promptly in order to prevent any lasting damage to the environment or to endanger human safety and health. The United States will provide Romania with information on the impact of electromagnetic spectrum on human safety".

In addition to the rules of international humanitarian law, the rules stated by the international treaties and customary law protecting the natural environment (including the rules of international environmental law, international human rights law, the law of the sea and international criminal law) may continue to apply during armed conflict. The main argument is that the outbreak of an international or non-international armed conflict does not cease or suspend in itself the application of rules of international law (whether conventional or customary) that protect the natural environment in peacetime, either between States Parties to the conflict or between a state party to the conflict and one that is not[1].

Separately, obligations concerning the protection of the environment that are binding on States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict[2].

Although national legislation does not contain special provisions on environmental protection during armed conflict, several environmental legislations, including specific legislation on environmental damage[3], could be invoked in situations that have a negative impact on the environment and public health.

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[1] International Committee of the Red Cross (ICRC), *Guidelines on the protection of the natural environment in armed conflict*, 20.

[2] International Committee of the Red Cross (ICRC), *Guidelines on the protection of the natural environment in armed conflict*, 21.

[3] Government Emergency Ordinance No 195/2005 on environmental protection, with subsequent modifications and amendments; Water Law No 197/1996; Forestry Code; Law No 59/2016 concerning the control of major accident risks implying dangerous

International environmental law also has two principles that outline the obligations of states in the field of environmental protection that must be respected even in times of conflict.

In the literature, it has been shown that the first principle refers to the obligations of each state not to cause damage to the environment beyond its territorial competence. The belligerents are not exempt from this obligation, as they are liable for transboundary damage caused to the natural environment. The second principle concerns the obligation of states to respect the environment in general, not to damage it outside their jurisdictions, for example in the open sea areas, on the bottom of the seas and oceans, in areas of common interest of humanity, such as the Moon, the Cosmos, the high seas, Antarctica or the celestial bodies[1].

At the same time, the Statute of the International Criminal Court by art. 8.2.b IV qualifies as a war crime "*the act of intentionally launching an attack knowing that it will incidentally cause loss of life among the civilian population, injuries to civilians, damage to civilian property or extensive, long-term damage and serious to the environment which would have been manifestly excessive in relation to the overall concrete and directly expected military advantage*".

Unfortunately, this regulation is insufficient, which can be deduced from international jurisprudence, for example the UN Tribunal for Rwanda does not identify any reference to the environment, despite the considerable damage caused by this conflict to the environment[2].

The provisions of art. 8.2.b IV of the Statute of the International Criminal Court are in line with the 1996 Advisory Opinion of the International Court of Justice on nuclear weapons, which established that, under applicable international law, no definitive conclusion can be drawn as to the legality or illegality of a state's use of nuclear weapons in extreme circumstances of self-defense"[3]. However, states are required to consider environmental protection and to assess whether the damage to

substances; Law No 211/2011on the regime of waste; Law No 360/2003 on the regime of dangerous chemical substances and preparations etc.

[1] Daniela Marinescu, T*ratat de dreptul mediului*, 4th Edition (Bucharest: Universul Juridic, 2010), 601; Antonescu, "Protecția mediului în cazul conflictelor armate", 183.

[2] Mircea Duțu and Andrei Duțu, *Răspunderea în dreptul mediului* (Bucharest: Romanian Academy, 2015), 314.

[3] ICJ, *Legality of the threat or use of nuclear weapons*, Advisory Opinion, 8 July 1996, para. 33.

the environment is proportionate and necessary to achieve a legitimate military objective[1].

3. PROHIBITED WEAPONS: NUCLEAR WEAPONS, BIOLOGICAL WEAPONS, CHEMICAL WEAPONS, ECOLOGICAL WEAPONS

Over time, states, taking into account a number of criteria such as whether nuclear weapons cause unnecessary suffering or genocide or are poisonous weapons, have adopted a number of rules imposing only partial and limited bans on such weapons. without completely and definitively prohibiting any manufacture and use of nuclear weapons and any nuclear experience[2].

Among the relevant international documents are: The Declaration on the prohibition of the use of nuclear and thermonuclear weapons (November 6, 1961) by the UN General Assembly; Nuclear Non-Proliferation Treaty of 1968, June 12 (entered into force in 1970); United Nations General Assembly adopted a total ban on nuclear testing (September 10, 1996)[3].

Also, in the category of banned weapons, we find biological weapons. The first international document to outlaw these weapons is the Geneva Protocol of 17 July 1925, which prohibits the use of asphyxiating, poisonous and other gases in warfare, as well as bacteriological means of warfare.

For its part, the Convention on the prohibition of the processing, production and stockpiling of bacteriological, biological and toxic weapons (July 10, 1972)[4] is based on the determination of States Parties to act towards effective progress towards general and total disarmament, including and the elimination of all forms of weapons of mass destruction.

With regard to chemical weapons, defined as means of mass destruction whose effect is based on the use of harmful properties of

[1] ICJ, *Legality of the threat or use of nuclear weapons*, para. 33.
[2] Anca Ileana Dușcă, *Dreptul mediului*, 3rd Edition revised and amended (Bucharest: Universul Juridic, 2021): 222-226.
[3] Ratified by Romania by Law No 152/1999, published in the Official Gazette No 478/4 October 1999.
[4] Ratified by Romania by the State Council's Decree No 253/1979, published in the Official Bulletin No 57/7 July 1979.

toxic substances[1], relevant is the Convention on the prohibition of the production, development, stockpiling and use of chemical weapons and their destruction (Geneva 1993)[2]. The signatory parties undertake not to: a) develop, produce, otherwise acquire, store or conserve chemical weapons or transfer, directly or indirectly, chemical weapons to others; b) use chemical weapons; c) to engage in any military training for the use of chemical weapons; d) assists, encourages or otherwise causes any other person to engage in any activity prohibited by a State Party under the Convention. At the same time, the states undertake to destroy the chemical weapons, which they own or have abandoned on the territory of another state and any chemical weapons production facilities.

Last but not least, given that science and technology today have reached extremely high levels, the so-called geophysical (ecological) war has been called into question.

Ecological warfare involves a form of total warfare in which the means and methods of altering the natural environment are used, considering that they can cause so much damage that it would force the adversary to cease fighting[3].

These destructive techniques include climate change, causing and directing storms, tornadoes and hurricanes, producing high tidal waves, causing earthquakes, deflecting ground and groundwater, using various types of radiation as a weapon[4].

Such techniques have been prohibited by the Convention on the prohibition of the use of environmental modification techniques for military or other hostile purposes (United Nations General Assembly, December 10, 1976).

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[1] I. Cloşcă and I. Suceavă, *Dreptul internaţional umanitar* (Bucharest: "Şansa" Publishing and Press House SRL, 1992), 110.

[2] Ratified by Romania by Law no 125/9 December 1994, published in the Official Gazette No 356/22 December 1997.

[3] Larisa Plop, Tudor Cozari, Elena Gherasim and Cătălina Pînzari, "Aspecte ale protecției mediului în desfășurarea acțiunilor militare", in vol. *Învăţământ superior: tradiţii, valori, perspective Științe Exacte și ale Naturii și Didactica Științelor Exacte și ale Naturii*, Chișinău, Vol. 1(2021): 165-168.

[4] Plop, Cozari, Gherasim and Pînzari, "Aspecte ale protecției mediului în desfășurarea acțiunilor militare", 165-168.

CONCLUSIONS

In conclusion, although there are legal regulations, we cannot deny that as long as there are armed conflicts, there will be situations in which military needs will be more important than environmental protection. Regardless of the international rules in force, it is not possible to fully protect the environment.

On the other hand, we categorically state that the environment is not and should not become a military objective but has a civilian character. It represents the key element for the survival of the human species, "represents a complex system of interconnections where the factors involved (such as humans and the natural environment) interact with each other in different ways that do not permit them to be treated as discrete"[1]. Environment protection is a vital component of civilian protection.

As we have shown, international environmental law establishes environmental protection obligations and regulates liability and potential liability for environmental damage. Its sources consist of treaties, general principles and customs of international law, as well as the case law of the International Court of Justice which states that international rules on environmental protection must be taken into account in situations of armed conflict. However, the extent to which international environmental law applies in parallel with international humanitarian law remains a complex issue.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
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THE EUROPEAN UNION: THE EVOLUTION TOWARDS A POLITICAL UNION

Carmen DIMA[1]

Abstract:

Ever since its foundation, the European Union has always had treaties in place, which regulate a wide variety of topics: from economics and free trade to European Citizenship or individual rights. Throughout the years, these treaties have evolved and have adapted based upon the needs and demands of the member states, but ultimately, of the European citizens. What used to be a common market for steel and coal in between France and West Germany has evolved into a political union counting 27 states. This spectacular transformation is the result of over 70 years of European cooperation. Resulting from this cooperation are the numerous treaties enacted throughout the years, which have been the very essence of the European Union, shaping its law, institutions, and policies. Without any hesitation, it can be said that the backbone of the whole European Union are the treaties which shape it.

Key words: *Treaties; European Union; European Economic Community; EU Principles; Integration; Legal Personality.*

INTRODUCTION

The European Union is an economical-political union made up of 27 member states, having a population of 447.7 million people, while covering over 4 million km^2 of land[2]. After multiple waves of expansion, the European Union (hereby referred to as EU) at one point consisted of 28 member states, but with the withdrawal of The United Kingdom, the number has gone back down to 27. While Brexit was certainly a blow to the European project, as the UK was the country with the second highest

[1] **Public notary, Bucharest (Romania), email: bnpdimacarmen@yahoo.com.**

[2] The European Union. "Facts and figures on life in the European Union." Europa.eu. Accessed April 16, 2022. https://europeanunion.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en.

nominal GDP[1] and the third highest population[2] in the EU, the EU stands strong and has withstood the shock. At a geopolitical level, the EU is considered one of the most important actors in the world, as it encompasses many of Europe's most powerful nations, in terms of economy and living standards. Without any exaggeration, the EU can be considered one of the most influential entities in the world and certainly in Europe. Whether it is the right to travel freely in the EU or the "Euro" currency, there many ways that the EU directly impacts the everyday life of European citizens. All these mechanisms and rights are incorporated into treaties, which essentially shape the EU and its institutions. It goes without saying that this spectacular evolution that the EU and its citizens have witnessed is directly corelated to the evolution of the treaties, which have drastically changed as the years have gone by. This is of course a materialization of the principle of legality, which is one of the EU Principles that shapes EU law.

1. EUROPEAN STEEL AND COAL COMMUNITY

The European Steel and Coal Community (hereby referred to as the ECSC), known also as The Treaty of Paris, was established signed on the 18th of April 1951 and came into force on the 23rd of July 1952, lasting for exactly 50 years, when it expired[3]. The treaty was signed by France, Italy, West Germany, Netherlands, Belgium and Luxembourg[4]. After World War II, Western Europe was seeking, prosperity, stability and economic cooperation. As such, the 6 countries which signed this treaty agreed to create a common market for steel and coal, hence eliminating tariffs and leading to a free movement for these two

[1] Statista. "Gross domestic product at current market prices of selected European countries in 2021." Statista.com. Accessed April 16, 2022. https://www.statista.com/statistics/685925/gdp-of-european-countries/.
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[4]The European Union, "Treaty establishing the European Coal and Steel Community, ECSC Treaty," EUR-Lex, accessed April 16, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0022.

commodities in between the respective countries. Looking at this treaty 70 years onwards, it can definitely be considered a precursor to European Economic Community, as it laid the groundwork for what was to come, enhancing the economic collaboration to a level that had not been seen before in Europe.

2. EUROPEAN ECONOMIC COMMUNITY

In 1957, the same 6 countries which formed the ECSC signed The Treaty of Rome, hence creating the European Economic Community[1] (hereby referred to as the EEC). The common market was no longer limited to just steel and coal, as the aim of this treaty was to create an economic integration of the member states. Furthermore, to achieve economic integration, this treaty led to the formation of a customs union, also known as a trade bloc. Such was the success of EEC, that the number of member states started to expand, with other European countries being keen on enjoying the benefits of the EEC. In 1973, Denmark, Ireland and the UK adhered, while Greece in 1981, Spain in 1986 and Portugal also in 1986 became EEC member states[2]. Through this treaty, several institutions were created, which are to this day key to the functionality of the EU. These institutions are: The Commission (which represents the interests of the EEC, or the EU nowadays), The Parliament (which represents the interests of the citizens) and The Council (which represents the interests of the member states)[3]. In addition, there was also a European Court of Justice that was created as a result of The Treaty of Rome. The role of this court was to settle any disputes in between member states or institutions, enforcing the Community law[4]. Hence, it can be considered the watchdog of

[1] Encyclopædia Britannica, "European Community," Britannica, accessed April 16, 2022, https://www.britannica.com/topic/European-Community-European-economic-association.
[2] Encyclopædia Britannica, "European Community," Britannica, accessed April 16, 2022, https://www.britannica.com/topic/European-Community-European-economic-association.
[3] Encyclopædia Britannica, "European Community," Britannica, accessed April 16, 2022, https://www.britannica.com/topic/European-Community-European-economic-association.
[4] Mihalea Augustina Dumitrascu, *Dreptul Uniunii Europene 1* (Bucharest: Universul Juridic, 2021), 138.

Community law. In 1975, The European Court of Auditors was set up, to ensure that the taxpayer's money was properly spent[1].

3. EUROPEAN ATOMIC ENERGY COMMUNITY

The Euratom Treaty, which led to the creation of The European Atomic Energy Community (hereby referred to as EAEC), was also signed in 1957. This treaty is still in place till this day and legally, it is a separate entity to the EU, even though all EU member states are members of the EAEC[2]. The EAEC was created in order to develop nuclear energy and distribute it to the member states, with any surplus being sold to non-member states. Currently, Switzerland and the UK are associated member states of the EAEC, as they are not EU members.

4. MERGER TREATY

With the objective to further unify and to bring cohesion to the member states, the Treaty of Brussels, also known as the Merger Treaty, was signed in 1967. What this treaty accomplished was to homogenize the executive branch of the ESCS, Euratom and the EEC[3]. As such, any bureaucratic impediments that came from the previous fragmentation of the executive branch would be drastically reduced, as the decision-making process became swifter and more straight-forward. The reason why the Treaty of Brussels was known as the Merger Treaty is because multiple European institutions merged and formed and a unit. For example, what were once the High Authority of the ECSC, the Commission of the EEC and the Commission of the Euratom would all merge into the Commission of the European Communities[4]. Also, the Special Council of Ministers of the ESCS, the Council of the EEC and

[1] Encyclopædia Britannica, "European Community," Britannica.
[2] The European Union, "Tratatul privind Comunitatea Europeană a Energiei Atomice (Euratom)," EUR-Lex, accessed April 17, 2022, https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=LEGISSUM:4301853.
[3] The European Union, "Treaty of Brussels (Merger Treaty)," Eur-Lex, accessed April 17, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532405560467&uri=LEGISSUM:4301863&print=true.
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the Council of the Euratom would all be unified in the Council of the European Communities[1]. Technically, each of the previous communities remained a self-standing legal entity, however, de facto, they now shared common institutions and most importantly, a common decision-making process. Regarding the Parliament and Court of Justice, these were institutions that were already shared before the Treaty of Brussels came into place. The role of these two institutions continued to function go the same lines as before the Merger Treaty, being essential to the functionality of the European Project. It is considered by many that from this moment onward, the steppingstone for the EU was set and that the blueprint was laid for the upcoming developments.

5. TREATY OF MAASTRICHT

In 1992, the future of the European Project and the continent of Europe would change forever, when the 12 member states at that time signed the Treaty of Maastricht, also known as the Treaty on European Union and would therefore lead to the creation of the European Union as we know it today[2]. The treaty itself would be effective starting with the 1st of November 1993 and would usher in a new era of European unity and collaboration. Major changes would occur with the implementation of this treaty, such as the creation of "European Citizenship". Basically, all citizens of member states automatically became EU citizens. There were also other ambitious goals and changes that were brought about as a result of the Treaty of Maastricht, most notably creating a common currency, the "Euro". As part of the process of a single currency, economic integration went even further than it previously was. In 2002, the "Euro" officially became the currency of 12 EU member states, with the number currently expanded to 19 member states[3]. What distinguishes the Eurozone (the countries which have adopted the "Euro" as the official currency) is that there is a common monetary policy. In essence, the monetary policy is controlled by the "Eurosystem", being comprised of

[1] The European Union, "Treaty of Brussels (Merger Treaty)," Eur-Lex, accessed April 17, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532405560467&uri=LEGISSUM:4301863&print=true.
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the European Central Bank (hereby referred to as the ECB), headquartered in Frankfurt, Germany, and the national central banks of each Eurozone member state. The ECB controls the monetary policy through its Governing Council, setting the interest rate for the Eurozone. It is this single monetary authority that is responsible for key objectives, such as price stability[1]. The Eurozone member states do have some flexibility in managing economic policy, but the member states must collaborate and coordinate in such manner to achieve, growth, employment and stability. Such coordination is achieved through the Stability and Growth Pact (hereby referred to as the SGP), which sets rules for fiscal discipline, limiting national debt and government deficits[2]. The economic governing of the EU is done through the European Semester[3]. Furthermore, the Treaty of Maastricht contained provisions regarding common foreign and security policies[4].

With the implementation of this treaty, the juridical structure of the EU changed. Three pillars were created, with each regulating a specific domain[5]. The first pillar was, called "European Communities" and it regulated policies related to economics, environment and society[6]. The three previous communities made up the first pillar, with the Economic Community (which is the former EEC that had changed its to Economic Community in 1993 with the Treaty of Maastricht) regulating the customs union and the single market, Common Agricultural Policy, Common Fisheries Policy, EU competition law, economic and monetary union, EU citizenship, education and culture, Trans-European Networks, consumer protection, healthcare, research (7th Framework Program), environmental law, Social policy, asylum policy, Schengen Area and immigration policy[7]. Euratom regulated nuclear power in the first pillar,

[1] The European Union, "What is the euro area?," Europa.eu, accessed April 17, 2022, https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en.
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[3] The European Union, "What is the euro area?," Europa.eu, accessed April 17, 2022, https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en.
[4] Encyclopædia Britannica, "The Maastricht," Britannica.
[5] Wikimedia, "Three pillars of the European Union," Wikipedia, accessed April 17, 2022, https://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.
[6]Wikimedia, "Three pillars of the European Union," Wikipedia, accessed April 17, 2022, https://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.
[7]Wikimedia, "Three pillars of the European Union," Wikipedia, accessed April 17, 2022, https://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.

while the ESCS regulated the coal steel industry until its cessation in 2002. The second pillar was called "Common Foreign Policy and Security Policy" (hereby referred to as CFSP). Firstly, in the foreign policy domain, there were regulations regarding human rights, democracy and foreign aid, meanwhile, in the security policy domain, aspects such as Common Security and Defense Policy, EU battle groups and peacekeeping were regulated[1]. Lastly, the third pillar was named "Police and Judicial Co-operation in Criminal Matters" (hereby referred to as PJCCM), after it was originally named "Justice and Home Affairs". This last pillar regulated contained rules on tackling issues such drug trafficking and weapons smuggling, terrorism, human trafficking, organized crime and corruption[2]. Following their implementation in 1993, the three pillars suffered minor modifications after the ratification of the Treaty of Amsterdam (1999) and the Treaty of Nice (2001), this also being the moment when the third pillar was renamed[3].

6. TREATY OF LISBON

After several decades of expansion and consolidation of the European Project, the two-thousands brought along the Treaty of Lisbon, initially known as the Treaty of Reform. As mentioned in the previous name, there was a vision of reforming and enhancing the European Union, which served as an inspiration for this treaty. The treaty was signed in 2007 and came into force in 2009[4]. Initially being drafted in 2001 as a project for an "European Constitution", the project failed to obtain the majority of support in the French and Dutch referendums organized in 2005, with the EU having to reorient itself. The main problem was that many citizens disagreed with the European Constitution as they perceived it as a threat to national law being undermined by EU law. While the Constitutional Treaty did contain an article which stated the superiority of EU law over national law, the Treaty of Lisbon does

[1] Wikimedia, "Three pillars of the European Union," Wikipedia, accessed April 17, 2022, https://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.
[2] Wikimedia, "Three pillars of the European Union," Wikipedia, accessed April 17, 2022, https://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.
[3] Wikimedia, "Three pillars of the European Union," Wikipedia, accessed April 17, 2022, https://en.wikipedia.org/wiki/Three_pillars_of_the_European_Union.
[4] Eeva Pavy, "The Treaty of Lisbon," European Parliament, accessed April 17, 2022, https://www.europarl.europa·eu/factsheets/en/sheet/5/the-treaty-of-lisbon.

not contain such an article, however the Treaty of Lisbon does have an annexed declaration which indirectly implies this fact[1]. While the Treaty of Lisbon is no longer a constitutional treaty, it does still contain a lot of the values and ideas that were envisioned in the 2001 draft. With the enactment of this treaty, the pillar structure that was enforced by the Treaty of Maastricht was abandoned, as the EU obtained a consolidated legal personality in 2009, when the Treaty of Lisbon went in force[2]. In consequence, the EU can now sign international treaties in the areas of its competence, with member states being able to sign international treaties that are compatible with EU law. One of the main ways that this treaty reformed the EU was by amending previous treaties. As such, the Treaty of Maastricht was amended and was renamed the Treaty on European Union (hereby referred to as TEU). It is important to note that while the Charter of Fundamental Right of the European Union (hereby referred to as CFR) was not incorporated into the Treaty of Lisbon, Article 6 (1) of the TEU recognizes the importance of the values and principles enumerated in CFR and states that they have an equal legal value to the treaties[3]. One other very important treaty that was amended was the Treaty of Rome (1957), which created the EEC. With the treaty of Maastricht, the EEC had become the EC (European Community), however the amendment from 2007 renamed the treaty from 1957 into the "Treaty on the Functioning of European Union" (hereby referred to as TFEU). For every instance in the treaty where the term "European Community" was used, it was replaced with "European Union", in the TFEU[4]. One other important aspect of the Treaty of Lisbon is that it lists the powers of the EU, this being the first time where the powers are clearly traced out through a treaty. Regarding the powers, there are 3 types of competences. There is the exclusive competence, where only the EU can write laws, with the EU states only implementing those laws, or being able to legislate in these areas of exclusive competence when the EU specifically designates the member states to do so, or when the EU declines its competence to legislate in the areas of exclusive competence. There are also shared competences, in areas where the member states can

[1] Eeva Pavy, "The Treaty of Lisbon," European Parliament, accessed April 17, 2022, https://www.europarl.europa·eu/factsheets/en/sheet/5/the-treaty-of-lisbon
[2] Wikimedia, "Three pillars," Wikipedia.
[3] Pavy, "The Treaty," European Parliament.
[4] Pavy, "The Treaty," European Parliament.

adopt laws if the EU has not done so and there are also areas of supporting competence, where the EU only adopts laws to support or complement the policy of the member states[1] .

A very important aspect that has been consolidated through the treaty of Lisbon is the idea of European Citizenship. This idea is fundamental when it comes to individual rights that each citizen of any EU member states benefits from in its relationship with European institutions. The TFEU does specify a series of rights which each European Citizen is entitled to. These rights are to not be discriminated on the basis of nationality, to be able to move freely and reside within the EU, to vote and stand as a candidate in the European Parliament and municipal elections, to ask for consular protection from any EU country in a situation of distress where the citizen's own country does not have an embassy or consulate in the country where the citizen is located in, to petition the European Parliament and complain to the European Ombudsman, to launch or support a European citizens' initiative which asks the European Commission to propose legislation in a certain domain, to contact or receive a response from any EU institution in one of the official languages of the EU and to access document of the EU Parliament, EU Commission and Council under certain circumstances[2]. Also, all EU citizens have the right to equal access to the EU Civil Service[3].

CONCLUSIONS

All in all, it is a privilege and an honor to be a citizen of the EU. The European Project has developed astoundingly throughout the decades and will certainly continue to develop based upon the wants and needs of the EU citizens. In this analysis, it can be seen how as the years have gone by, the project has changed and has become the economical-political union that it currently is. The advantages that the EU provides to both its

[1] Pavy, "The Treaty," European Parliament.
[2] The European Union, "Rights of EU citizens," Europa.eu, accessed April 17, 2022, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/eu-citizenship/eu-citizenship_en.
[3] The European Union, "Rights of EU citizens," Europa.eu, accessed April 17, 2022, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/eu-citizenship/eu-citizenship_en.

member states and its citizens noticeable in every day's life. Perhaps, all these benefits have been taken for granted by many and are not appreciated to their truest of value. However, if reflected upon, a Europe without the treaties and institutions that have been discussed in this paper, would be weaker, poorer and more hostile. There would not be such a concept as European Citizenship, leaving many exposed to arbitrary power of their own states. In conclusion, in its decades of existence, the European Project has solidified EU Principles, individual rights and fundamental values, which have brought prosperity, a collaboration that has not been seen before in the history of the old continent and numerous opportunities of growth and development.

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THE „EUROPEAN" MODEL – REGIONAL PROJECTS AND CONSTRUCTIONS IN THE EURASIAN SPACE

Cătălina-Laura PAȘCU[1]

Abstract:

In the global context of geopolitical transformations, of the gap between regional and global as a reaction-counter-reaction approach, new powers and centers of power imprint their presence in a world that tends towards structural changes of a multipolar type.

A „strategic identity" in a multipolar context is what the Russian Federation also wants, promoting cooperation in regional projects and constructions, in order to give it and sustain a questionable identity of great power both in the Eurasian space and globally.

This paper aims to present an analytical panorama of the regional visions of the Russian Federation, starting from the limits of a regional concept - the Eurasian space, necessary for maintaining the sphere of traditional influence and as a support of regional projects and constructions, achieved through the „Europeanization" of integration models.

Key words: *European Union; Russian Federation; Regional Projects; Geopolitics; Eurasian Identity.*

INTRODUCTION

At the end of the last millennium, post-Soviet Russia lost its status as a great power, the adventure of the greatness of the „Russian Idea" and messianic traditions declined in the „Great Russian Question", which later manifested itself in the attempts at identity-national retrieval. This finality of historical level was materialized at the level of the international system by the disappearance of bipolarity and the resizing

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of the Russian Federation in the context of the annulment of the global vocation and its closure in the borders of a regional power.

The European Union is an area for a common perspective of development, an existential condition. Conceived as an economic, political and legal structure, original and innovative, the regional area of the Community is created by the will and sovereign consent of the Member States and has a unique institutional system through its complexity, becoming a model of regional integration.

Thus, the phenomenon of „Europeanization", understood as the impact of the regional integration process, has surpassed the borders of the European Union by translating the mechanisms that generate and deepen the normative obligations as a support of the changes objectives that intervene in the economic structures and strategic interests as a result of integration and of the changes or subjective at the level of socio-political beliefs and identity.

This analysis framework presents comparatively the nature and exercise of the relations in the Russian Federation and the European Union, starting from the identity dilemmas to the pragmatic governmental relationship, but also the geostrategic aspects revealed in the Eurasian space where we will also evaluate the „geostrategic triad", USA – China – Russia, but also the emerging impulse of the BRICS structure.

Also, the case study ensured the vector research of the geopolitics of the Russian Federation in the space of regional influence and the connection to the new geostrategic game of the great world powers in the Eurasian area and their impact on international security, by identifying the general features and highlighting the specific peculiarities.

The analytical aspects of geopolitics and geostrategy combine with the aspects of geoeconomics, through regional consolidations of governance in the space of political discourse and action of the Russian Federation, in relation to regional and global challenges.

CONSTRUCTION OF THE EUROPEAN UNION – MODEL OF REGIONAL INTEGRATION

The idea of European unity has manifested itself throughout history as a community of civilization, but also as a possible political project that would lead to overcoming state rivalries, becoming a

multidimensional space in which economic integration, political deepening, and common development perspective, represent an essential condition of identity European.

The founding fathers, Jean Monnet, Robert Schuman, Konrad Adenauer, Alcide de Gasperi, Paul Henry Spaak, promoted a harmonious development of the community based on a progressive institutionalization characterized by an evolutionary dynamism of economic integration, followed by that of political integration, to which was later added the social and identity dimension.

The European Union is highlighted by the complementary nature of its methods of operation based on supranationalism and intergovernmentalism[1]. An economic, political, legal, and social construction, which is in a permanent evolutionary process, the European Union has at its core a certain conception of governance, in which the democratic system and human rights, humanism, tolerance and dialogue, solidarity and social cohesion are important common values[2].

Thanks to economic integration, the overall efficiency of the Community system and the combined efforts of the Member States, the Community area has become an area of economic prosperity, and through political deepening, the European Union is the only political project that allows European states to play a major role in the international arena.

In an international system, in which political and economic problems are dealt with between the great powers, the united Europe must become a great power, in this competition the chances of the European states, individually analyzed, can be considered low[3].

The difficulties that European unity had to overcome were overall European diversity, the large disparities in economic and social development, the complex nature of the European construction, but especially the difficulty of reconciling national and European identity.

The European construction process is constantly progressing, with the cumulation of the territorial enlargement dimension, with the deepening of the dimension of economic, political, and social-cultural

[1] John McCormick, *Să înţelegem Uniunea Europeană* (Bucharest: Codecs, 2006), 23.
[2] Anamaria Groza, *Emergenţa unei identităţi europene. Comunităţile Europene şi colaborarea politică europeană* (Bucharest: C. H. Beck, 2008), 2.
[3] Joshua Goldstein and Jon C., Pevenhouse *Relaţii Internaţionale* (Iaşi: Polirom, 2008), 512.

integration and with the dimension of an important international actor, we can identify the current European community institutional perspectives[1].

Distinguished from international cooperation organizations, in which the representation of Member States is essential or even exclusive, the Community institutional system has been designed to represent the interests of citizens as well, including at regional level, in fact the European Union providing a double legitimacy, of the states and of the citizens.

Accession and subsequently integration into the European Union meant at national level an amendment of the institutions in order to harmonize with the European ones, a process of adaptation without a strict orientation, from top to bottom, from the Union to the Member States, there being the reverse process, from the bottom up, through the possibility of influencing and controlling European institutions and policies at state level: national governments, parliaments, justice, political parties, citizens opinions and interests[2].

EURASIAN SPACE – THE LIMITS OF A REGIONAL CONCEPT

The term *Eurasia* has also been used in geopolitics since the beginning of the twentieth century, and the interpretative tendency has varied depending on the theoretical context, generally limited to a specific, special identity in the context of Russian geohistorical and geopolitics.

After the Cold War, the new geographical borders of the international system also led to a political and social-economic change of the models of interaction, through the expansion of the structures of the European Union and NATO, but also of the emergence of new structures, the Commonwealth of Independent States and the Eurasian Union[3].

The complex strategic confrontations, especially between the USA and Russia, but also the geoeconomics partnerships and constructions,

[1] Liliana Popescu-Bîrlan, *Construcţia Uniunii Europene* (Bucharest: C. H. Beck, 2009), 92.
[2] Flore Pop and Sergiu Gherghina, George Jiglău, *Uniunea Europeană: Drept, Instituţii şi Politici Comunitare* (Bucharest: Argonaut, 2009), 91-92.
[3] Nikolas V. Riasanovsky, „The Emergence of Eurasianism", *California Slavic Studies*, vol. 4 (1997): 39-40.

between the EU, Russia and China, the increase of interests for oil and gas resources in the Eurasian region, keep the attention sustained in the political, economic, social and cultural-identity studies and analyses[1].

The limits of Eurasia's epistemic explanation, as a time space of complex geopolitical analysis, remain to be redefined. Eurasianism and neo-Eurasianism as a support for identification and parallel as an identity construct, in systemic and functional context, was supported by the "Russian Idea" to demonstrate belonging to a particular political and socio-economic system[2].

In addition, the theorizing of the democratization process in the context of globalization, consider it increasingly difficult to find a coherent and more generalized explanation for the transition processes in the former socialist countries and in the post-Soviet states, and the "double transition" could be a response to the difficulty of generalizing the conclusions of Eurasian studies, imposing barriers in the theoretical-applicative and/or comparative approach in the context of problematization of the Eurasian station and the ideology of Eurasianism[3].

Immediately after the collapse of the Soviet Union, there was a tendency to consider the delimitative restrictive region of the former empire, by which the Russian Federation defied - „*The Near Abroad*".

Regarding the ideology of the regional concept of Eurasia, the paradigm of Eurasianism involves not only objective factors, such as geographical space, but also subjective factors, such as identity and political, socio-economic aspects and historical meanings.

The regional concept of Eurasia, as a projection of political practice, was defined by Nikolas Ryasanovsky in terms of an „economically self-sufficient space", „led by Moscow" and which at the ideological level is an interface of political strategies[4].

However, for Andrei Tsygankov, strategic political thinking evolves geohistorical differently in Russia, with Eurasian regional variations such as the vision of the current neo-Eurasianism that supports

[1] Riasanovsky, „The Emergence of Eurasianism", 40.
[2] Milan Hauner, *The Rise of Eurasianism* (Washington D.C.: Brookings Institution Press, 1997), 32.
[3] Douglas W. Blum, *National Identity and Globalization: Youth, State, and Society in Post-Soviet Eurasia* (Cambridge: Cambridge University Press, 2007), 17.
[4] Riasanovsky,"The Emergence of Eurasianism", 57-58.

the importance of the religious tradition, in the context of the present political and socio-economic changes at the global level[1].

Graham Smith emphasizes that *the Eurasian regional identity* implies an accentuation of inter-relations in the regional processes and in the environment of the international system and is closely linked to the concerns of the world hegemonic dichotomy, but also to the geopolitical, geostrategic and geoeconomics challenges and perspectives, the translation of various creeds, beliefs and myths of the ,,Greatness of the Russian Idea"[2].

Thus, the Eurasian space, as a *regional conceptual limit*, remains to be a challenging research agenda, in the context in which geopolitical studies must develop an interdisciplinary framework to find significant variables and establish a new relationship from a causal point of view in the Eurasian regional context.

GEOPOLITICAL STRATEGIES IN THE REGIONAL CONTEXT

At present, the political world and economic space is constantly changing, and the balance of forces between the great economic powers of the world tends to redefine itself, acquiring new valences. In this context, we try to highlight the reconfiguration of the geopolitical strategy of the Russian Federation in the current international context.

Vladimir Baranovsky considers that the Russian Federation has pursued two great geopolitical imperatives: to preserve its national unity and to impose itself as a regional power, to become a global power again. In the post-Cold War period, he was continuously preoccupied with institutional consolidation and support for the Russian national specificity and began to develop various strategies in order to relaunch himself as a Eurasian regional power, using natural resources as an active force of the balance of power in relation to the great powers in the vicinity of the Eurasian space[3].

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[1] Andrei P. Tsygankov, ,,Mastering Space in Eurasia: Russia's Geopolitical Thinking after the Soviet Break-Up", *The Communist and Post-The Communist Studies*, vol. 36, No.1 (2003): 101-102.

[2] Graham Smith, ,,The Masks of Proteus: Russia, Geopolitics Shift and the New Eurasianism", *Transactions of the Institute of British Geographers*, Vol 24, No. 4 (1999): 485-486.

[3] Vladimir Baranovsky, ,,Russia: A Part of Europe or Apart from Europe?", *International Affairs*, vol.76, No. 3 (2000): 443.

Igor Okunev believes that this geopolitical strategy aims for the Russian Federation to recapture its position as a regional leader, lost following the dissolution of the Soviet Union in 1991, a process that was identified by Vladimir Putin as ,,the greatest geopolitical catastrophe of the twentieth century", a situation that he is currently trying to remedy by reintegrating all of them, ,,the former Soviet republics within the framework of a new union structure", the Eurasian Union[1].

At present, the new foreign policy strategy of the Russian Federation considers the changes in the balance of forces in the world, the financial crisis and the instability in the Middle East and North Africa. An important component of this strategy is the promotion of close relations with India and China in the Eurasian area.

In the regional context, the Russian Federation re-orientation of foreign policy strategy towards China and India is since these states have similar ideological approaches to the place and role of the new power centers in the international system, centered on supporting multipolar, constituting one of the guarantees of stability of partnership networks.

The Russian Federation, in terms of geopolitical strategies, intends to maintain close cooperation with China, including to find solutions to solve new challenges and threats at regional and global level. At the level of political discourse of the Russian authorities, it is desired that the two states develop their cooperative relations within the international organizations in which both have the quality of members: the UN Security Council, the G-20, the BRICS, the Shanghai Cooperation Organization[2].

In the context of the Russian Federation's reimposition in the Eurasian space, it is estimated that in the perspective of "a world looking to Asia", the intention of this Eurasian regional power is to position itself as a "bridge" between the Asia-Pacific region and the European-Atlantic region, a major strategic imperative, from a geopolitical, geostrategic but also geoeconomics point of view[3]. Annually, during the meetings of the Valdai Club Forum, it is reaffirmed that for the Russian Federation, one of its priority government objectives regarding the Eurasian integration is

[1] Igor Okunev, „ A Foreign Policy to Suit the Majority?", *Global Affairs*, no. 2 (2013): 43.
[2] Baranovsky, "Russia: A Part of Europe or Apart from Europe?", 458.
3 Fyodr Loukyanov,, ,,Central Asia: An Indicator of Russia's Imperial Aspirations", *Global Affairs*, no.2 (2011): 26.

the consolidation of relations with the Asian states, in order to identify a new ,,super-region" of the world[1].

In the space of the ,,near abroad" the Russian Federation seeks to maintain its influence and does not support the projects of accession to the European Union, making efforts to force their entry into the Eurasian Union, thus limiting in the future any attempt to ,,escape" from its sphere of geopolitical and geostrategic influence.

Regarding this imposition of the Russian Federation to discourage accession to the European Union, forcing at the level of discourse and political action for an integration into the Eurasian Union, Stanislav Secrieru considers that the Eurasian integration is ,,a harmful illusion" for the government from the Kremlin that could end up not being able to support the costs of this regional integration project[2].

THE „EUROPENIZATION" MODEL - REGIONAL CONSTRUCTIONS IN THE EURASIAN SPACE

The Russian Federation is in convergent power relations at regional level with multiple international actors, the European Union representing such an actor able to exert an influence on the process of state building in the post-Soviet space, a process that has in its identity matrix the dynamic European model.

Regarding the reconstruction of the Eurasian regional space, we can identify specific characteristic valences through the dynamic process of state construction in the external dimension, and in the internal dimension of policies and actions, a formative process influenced by several actors - political parties, the vertical of the Prussian power, the oligarchic system and the institutions of the state.

This dimension determines a divergence between the state and society, consequence of the communist legacy, the process of state construction imprints a rapid pace of change, characterized by the existence of formal institutions and informal parallel structures[3].

[1] http://valdaiclub.com/projects/east/, 14.02.2022.

[2] Stanislav Secrieru, *The illusion of Eurasian integration*, Policy Brief CRPE (September 2013): 6-7.

[3] Anna Grzymalla-Busse and Pauline Jones Luong, ,,Reconceptualizing the States: lesons from Post-The Communism", *Politics &society*, vol. 30, no. 4 (2002): 530-536.

The construction of regional integration began with the edification of the Commonwealth of Independent States (CIS) that interrupted the process of decomposition of the USSR. This new form of organization of the post-Soviet space promoted the coordination of the actions of all member states.

At the same time with the creation of the CIS began to clearly manifest the identity and identification features of the post-Soviet states with the structures of the European Union, specifically the bidirectional perspective, towards the East and/or west contributed to the choice of its own model of political evolution, socio-economic reforms.

The dissolution of the USSR conditioned the emergence of future relations between the 15 states, which resulted and which by force of circumstances remained linked by mutual interests. All the ,,new states" ,,inherited" from the former Union the single energy system, the single system of transport and telecommunication links, the unique system of oil and gas pipelines, as well as the freedom of the population to move in the post-Soviet space.

The sum of these factors as a whole gave the possibility of a more intensive unification and collaboration in the ex-Soviet area, unlike the European one, and the specialization of some republics in the production of a certain production made to feel the necessity of an economic reintegration in the conditions of the formation of the markets and the political dependence on the former center. [1]

After the 1990s, the Russian Federation started a series of geopolitical projects regarding regional integration, such as the Commonwealth of Independent States, which appeared in 1991, the Treaty Organization Collective Security, appeared in 1992, and the Russia-Belarus-Kazakhstan Customs Union, appeared in 2010.

The Customs Union is the pillar of another Eurasian regional integration project, namely the Eurasian Economic Union (EEU), which has functioned as an expression of the Eurasian geoeconomics *soft power* strategies. The EEU entered into force on 1 January 2015 and is,, built" on the model of the European Union, both at institutional and principled level economic[2].

[1] Zbigniew Brzezinski and Paige Sullivan, (Eds.), *Russia and the Commonwealth of Independent States* (Wagshinton DC : CSIS, 1997), 15.

[2] Ulrich Sedelmeier, ,,Europenization flax New member and candidates States", *Reviews in European Governance*, vol. 6, no.1 (2011): 14-15.

This regional construction has the following current members: the Russian Federation, Belarus, Kazakhstan, Tajikistan, Armenia, Kirgizstan in 2016 and Serbia in 2019[1]. The Kremlin govern also used *its hard power* tools such as maintaining geopolitical constructions at all costs, in terms of the regional integration model, which must be adopted to support the construction of the Eurasian Union project.

CONCLUSIONS

The age of globalization is characterized by the concentration of the effect of interdependencies. Thus, there is a tendency for geopolitics and geostrategies to be resized as a support of the action of power, a concentration of effects in terms of connections of the policies of states and international institutions.

From a regional perspective, it can be said that the Russian space represents a relevant space-time framework from the point of view of the exercise of power, thus, significant reflections we have identified regarding the vision of neo-Eurasians and to the geopolitical projects carried out in the Eurasian space, a space in which we find complex geostrategies and a sum of geoeconomics interests.

As a model of regional integration, the European Union must face the challenge of permanently adapting to the changes generated by several factors, through a process of identity reconnection with its own citizens. The European institutional architecture demonstrates the direct and functional link between the Community institutions, European identity, and European space, to decide and coordinate European processes and policies, so that the European Union remains an important player in the system of international relations.

From my point of view, this explains the fact that each international actor needs a geopolitical project, regional and global, through which to become aware of his interests, to define his options, to formulate his value system, to relates his position in the international system.

Thus, I consider, about the behavior of the Russian Federation, that we can extrapolate predictions in view of the near, medium and long future. In the near term, we can count on Russia's expansionist trend, on the strategy of ,,frozen conflicts" and on the creation of a reality on the

[1] Frank Schimmerlfennig, ,,Europenization beyond Europe", *Reviews in European Governance*, vol. 7, no.1 (2012): 8.

ground that will give it negotiating power in international institutional structures.

Also, the Russian Federation is strongly influenced by the perception of the West and European Union, as an ,,imperialist entity" that forced NATO borders into territory that not long ago belonged to Soviet Russia. From this geopolitical situation we will be able to predict an aggressive attitude of the current Russia, ,,fully justified" by an existential *raison d'état*, like the radical and tragic actions that are taking place now in Ukraine and not long ago in Georgia.

Therefore, we can say that the assumed strategic identity of the Russian Federation is that of an influential power in the Eurasian space, through which it wants to recover the greatness of its power, its role and its place in the global plan, with a line of pragmatic foreign policy in the regional structures and with a special internal specificity represented by the sovereign democracy, constituted in opposition to the European model and liberal principles.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 06 May 2022

COOPERATION OF THE EUROPEAN PARLIAMENT WITH THE NATIONAL PARLIAMENTS OF THE MEMBER STATES

Ioana-Nely MILITARU[1]

Abstract:

Cooperation relations have been established between the European Parliament and national parliaments, initially through systematic meetings between the Speakers of National Parliaments and later through meetings of parliamentary factions and committees. Cooperation between the European Parliament and national parliaments has been enshrined in Protocol no. 1 on the role of national parliaments in the European Union in organizing and promoting interparliamentary cooperation. COSAC - Inter-Parliamentary Conference of European Business Bodies, was established in Madrid in 1989. Members of the national parliaments of the Member States of the European Union have committed themselves to strengthening the role of the national parliaments of the Member States in relation to Community issues, today of the Union

Key words: *European Parliament; national parliament; protocol; parliamentary committee; cooperation; interparliamentary cooperatio.*

1. PRELIMINARY CLARIFICATIONS

European integration has, over time, changed the role of national parliaments. In the context of changing the role of Member States' national parliaments, the European Parliament's cooperation with them has gained the European legislator's concern by strengthening it through the provisions of the Treaty of Lisbon[2].

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[2] Vâlcu Elise Nicoleta and Iulia Boghirnea, *"Jurisprudence and the juridical precedent of the European Court of law as source of law"* Lex et Scintia International Journal, LESIJ No.XVI, vol 2(2009) indexata EBSCO HOST, proquest, HeinOnline etc.www. lexetscientia.univnt.ro

Thus art. 12 of the TEU and protocol no. 1 on the role of national parliaments in the European Union is the legal basis for this cooperation.

European integration means a transfer of responsibilities from the national authorities of the Member States to the institutions, initially the Community, now the Union. This has diminished the role of national parliaments as legislative, budgetary and executive control bodies. If this transfer of responsibilities initially fell to the Council, with each subsequent treaty, the institutional treaties (TCECO, TCEE, TEuratom) the European Parliament acquires new, strengthened powers. Initially, these powers of Parliament were consultative and supervisory, until the Single European Act on the AUE[1], then the functions of this institution were exercised in the framework of the institutional cooperation procedure, through the AUE, to introduce the Maastricht Treaty[2] (TEU). the co-decision procedure in certain matters, according to which the European Parliament is on an equal footing with the Council in adopting European Union legislation. The co-decision procedure was later extended by the Treaty of Amsterdam[3] and generalized by the Treaty of Lisbon[4].

As a result, some responsibilities transferred from the national level to the EU level initially fell to the Council, and the European Parliament gradually acquired a full parliamentary role[5].

As the role of the European Parliament is strengthened, the role of national parliaments as legislative, budgetary and executive control bodies diminishes accordingly.

2. REASONS FOR COOPERATION

European integration through the transfer of powers from national institutions to those of the European Union has led, in our case, to a change in the role of national parliaments. Thus, various instruments of cooperation have been set up between the European Parliament and

[1] Signed in 1986 (in Luxembourg and The Hague) and entered into force in 1987
[2] The Maastricht Treaty or the Treaty on European Union was signed in Maastricht in 1992 and entered into force in 1993.
[3] Signed in 1997 in Amsterdam, entered into force in 1999
[4] Signed in 2007 in Lisbon, entered into force in 2009
[5]Eeva Pavy, 10, 2021, https://www.europarl.europa.eu/factsheets/en/sheet/22/European-parliament-relationships-with-national-parliaments , 1

national parliaments to ensure demographic control of European law at all levels[1].

Formal cooperation links have been established between the European Parliament and national parliaments, through systematic meetings between the Speakers of National Parliaments and subsequently through systematic meetings of parliamentary factions and committees[2].

More effective control over the EU-related activities of their governments and closer relations with Parliament would be a way for national parliaments to hope to influence European Union policies in order to ensure that the European Union is built on a democratic basis.

The European Parliament's strong relations[3] with national parliaments also contribute to strengthening its legitimacy and bringing the Union closer to its citizens.

3. THE CONTEXT OF COOPERATION

Until 1979, the links between Parliament and national parliaments were organic, as Members of the European Parliament were appointed from among the members of national parliaments. The introduction of direct universal suffrage for the election of members of Parliament has severed these ties for 10 years. Restoration of ties began in 1989, with the establishment of contacts that replaced the original organic links mentioned. To this end, the Maastricht Treaty, in a Declaration (No 14, attached to the EC Treaty[4]), provided that, when necessary; The European Parliament and national parliaments should meet in the form of a "Conference of Parliaments" and this forum should be consulted on the main EU guidelines, without prejudice to the powers of the European

[1] Pavy, https://www.europarl.europa.eu/factsheets/en/sheet/22/European-parliament-relationships-with-national-parliaments , 1

[2] Ioana-Nely Militaru, *European Union Law. Chronology. Springs. Principles. Institutions. The internal market of the European Union. Fundamental Freedoms*, 3rd Edition, revised and added (Bucharest: Universul Juridic, 2017), 214

[3] Elise Nicoleta Vâlcu, „Theoretical aspects on the *"Legislative initiative" - right of the European citizens", Jurnal of Legal Studies*, nr.3-4 (2013): 43-52, ISSN: 1841-6195, Index Copernicus, Ideas RePeC, Econpapers, Socionet, CEEOL (Central and Eastern European Online Library), www.lumenpublishing.com

[4] Treaty establishing the European Community

Parliament and national parliaments[1].In this sense, based on art. 9 of the Protocol on the Role of National Parliaments, annexed to the Treaty of Amsterdam, organizes and promotes concrete and ongoing interparliamentary cooperation, which is negotiated on the basis of a mandate given to the Conference of Presidents after consulting the Conference of Committee Chairs[2].The Protocol on the role of national parliaments, annexed to the Treaty of Amsterdam, encouraged their involvement in the activities of the Union, in the sense that the Commission's consultation documents and legislative proposals were forwarded to make a decision in the Council.

"Political dialogue" between national parliaments and the European Parliament has become a legal obligation through the Treaty of Lisbon. The Lisbon Treaty has further strengthened the role of national parliaments by involving them in the procedures for revising the Treaties, including in the evaluation mechanisms for the implementation of EU policies in the areas of freedom, security and justice.

The Treaty of Lisbon also introduced an early warning system for the SAT, which allows national parliaments to ensure that legislative proposals respect the principle of subsidiarity, namely: Protocol no. 1 on the role of national parliaments in the European Union and Protocol no. 2 on the application of the principles of subsidiarity and proportionality.

4. COOPERATION TOOLS

The instruments of cooperation between the European Parliament and national parliaments are represented by[3]:

a. Conferences of Speakers of Parliamentary Assemblies of the European Union

b. European Center for Parliamentary Research and Documentation (CECDP).

c. Conference of Community Parliamentary Bodies of the Parliaments of the European Union - COSAC

[1] G. Fabian, *European Court of Justice. Supranational court* (Bucharest: Rosetti, 2002), 180

[2] Art. 130 of the Rules of Procedure of the European Parliament

[3] Pavy, 10, 2021, https://www.europarl.europa.eu/factsheets/en/sheet/22/European-parliament-relationships-with-national-parliaments, 2

d. Conference of Community Parliaments
e. Joint Parliamentary Meetings

A. Conferences of Speakers of Parliamentary Assemblies of the European Union These conferences have been officially established since 1981. Since 1995, Parliament has maintained close relations with the parliaments of the associated and candidate countries. Accession strategies and other topical issues are addressed at regular meetings.

B. European Center for Parliamentary Research and Documentation (CECDP). The establishment of this center was decided by the "Great Conference" in Vienna in 1977.

The Center involves a network of documentation and research services that cooperate to facilitate access to information (including national and European databases) and to coordinate research activities, in particular to avoid duplication of effort. The Center brings together the parliaments of the Member States of the European Union and the Council of Europe. Its services may also be used by the parliaments of observer states in the Parliamentary Assembly of the Council of Europe.

C. Conference of Community Parliaments. The conference was originally organized under the name "European Assembly", with the theme "the future of the Community". On this occasion, the role of the national parliaments and the Parliament were also taken into account ".

D. Conference on Community Affairs Bodies of the Parliaments of the European Union - COSAC[1].

Originally proposed by the President of the French National Assembly, the Conference meets every six months, starting in 1989 The Conference meets every six months, the European Business Committees of the PN and Members of the European Parliament. In its meetings, each parliament shall be represented by six Members. COSAC was formally recognized in a Protocol to the Treaty of Amsterdam, which was concluded by the Heads of State and Government in June 1997. The Protocol on the Role of National Parliaments in the EU entered into force on 1 May 1999. Among other things, COSAC may address to the EU

[1] Guide to EU interparliamentary cooperation (Official Journal of the EU, 31 January 2008)

institutions any contribution it deems appropriate with regard to EU legislative activities. The objectives of COSAC are[1]:

- allow for a constant exchange of information, including best practices and opinions on Union issues, in business, between national parliaments and the European Parliament;
- ensure the effective exercise of the powers of national parliaments in the EU, in particular in the area of monitoring the principles of subsidiarity and proportionality;
- promote cooperation with the parliaments of third countries.

E. Joint parliamentary meetings Members of national parliaments, as well as Members of Parliament, considered it useful to set up a permanent instrument of political cooperation to deal with specific issues[2]. Since 2005, MEPs and nationals have held joint parliamentary meetings, in which issues concerning parliaments in the decision-making process were debated.

F. Other instruments of cooperation[3]

Parliament's standing committees shall consult with national committees at bilateral level during bilateral or multilateral meetings and on visits by chairs and rapporteurs. These contacts have developed to varying degrees, depending on the Member States involved or the political parties. In this context, the European Parliament's Directorate for Relations with National Parliaments is distinguished. In the context of these concerns, the exchange of information on parliamentary proceedings has developed, in particular legislative activity, data and communications exchanges, namely the EU Interparliamentary Exchange Platform[4].

CONCLUSIONS

Formal links between national parliaments are expressly enshrined in the TFEU (Treaty on the Functioning of the European

[1] Guide to Interparliamentary Cooperation in the EU (EU Official Gazette, 31 January 2008); Militaru, *European Union Law. Chronology. Springs. Principles. Institutions...*,215

[2] Pavy, https://www.europarl.europa.eu/factsheets/en/sheet/22/European-parliament-relationships-with-national-parliaments 10, 2021,2

[3] Pavy, https://www.europarl.europa.eu/factsheets/en/sheet/22/European-parliament-relationships-with-national-parliaments 10, 2021,2

[4] https://ipexl.europarl.europa.eu/IPEXL-WEB/

Union). Thus, according to art. 12 TEU, the Treaty on European Union, and the Maastricht Treaty (reformed by the Treaty of Lisbon) provides that national parliaments shall contribute actively to the proper functioning of the Union, as follows:

- by participating in interparliamentary cooperation between national parliaments and the EP in accordance with the aforementioned Protocol;

- by participating, within the area of freedom of security and justice, in the mechanisms for evaluating the implementation of the Union's policies in this area, according to art. 12 TEU and by involvement in the political control of Europol and in the evaluation of the activities of Eurojust, according to art. 88 and art. 85 TUE.

It should be noted that on 19 April 2018, the European Parliament adopted a resolution on the application of the Treaty provisions on national parliaments[1], which states that national parliaments improve and actively contribute to the proper functioning of the European Union's constitution. The resolution emphasized that the SAT, since the entry into force of the Lisbon Treaty, has been used less frequently, proposing to reform it, according to the treaty. The resolution also comes with a number of suggestions in order to strengthen the current instruments of cooperation between Parliament and national parliaments[2]

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[1] European Parliament resolution of 19 April 2018 on the implementation of the Treaty provisions on national parliaments (OJ C 390, 18.11.2019, 121.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
Pitesti, 06 May 2022

THE IMPACT OF COVID-19 CRISIS ON CULTURE AND THE EU SOLUTIONS

Sorina IONESCU[1]

Abstract:

The impact that the present Covid-19 crisis had on culture has shown the precarity that this sector manifested for a very long time. This crisis just emphasized a situation that was a reality for many years and the fact that no real efforts were made to recognize the real value of culture especially on social cohesion and also on international relations.

The present paper aims to emphasize the efforts that are made and also the necessary actions at EU level to improve this situation in order to safeguard this important sector.

Ke y words: *Covid-19; crisis; culture; EU; solutions.*

INTRODUCTION

The crisis generated by Covid-19 pandemic affected the cultural and creative sectors[2] and by this occasion was highlighted the importance of this sector and also the fact that the authorities were not prepared to handle this kind of crisis so that the impact can be reduced.

The importance of this sector can be identified also as an economic and employment vector that brings an important contribution to a positive social impact in education, well-being and health, inclusion and others. This sector was seriously affected by the recent crisis, a large number of jobs being at risk and the need for policies that can support

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[2] Cultural and creative sectors are comprised of all sectors whose activities are based on cultural values, or other artistic individual or collective creative expressions and are defined in the legal basis of the Creative Europe Programme.

this sector and also to help artists and firms from public and private sector is a reality that needs to have a legal framework.

The European Commission has identified some solutions for this situation and has adopted a Temporary Framework[1], based on Article 107(3)(b) of the Treaty on the Functioning of the European Union, that enable Member States to use the full flexibility foreseen under State aid rules in order to obtain the necessary support in the context of the COVID-19 crisis.

This Temporary Framework is a tool that enables Member States to help the economic activity continue in this period of crisis and also after this period is over. Also, the Temporary Framework admits that the entire economy at EU level is facing an important challenge and that the cultural and creative sectors make no exemption. Along with this important legal tool are developed other important instruments containing solutions for the cultural and creative sectors.

1. **WHY IS IT IMPORTANT TO KEEP THE CULTURAL AND CREATIVE SECTORS FUNCTIONING DURING CRISIS?**

The cultural and creative sectors are very important economic sectors in the context that aroused from the COVID-19 crisis, that brought to light the importance that the culture has in the life of people from the mental health and well-being point of view. So, in this context, efforts were made to find the best solutions for all parties involved, because many activities were cancelled due to the closure of spaces[2].

This was a very difficult job for the national authorities and also for the European ones because these sectors are among the hardest hit by the COVID-19 pandemic, this having as result a large number of jobs at risk.

We can easily see this in a decrease of around 35% in royalties collected by collective management organizations for authors and performers, and this was still continuing to fall in 2021 and 2022. This was also reveled in the Eurostat data showing that in 2020, the arts,

[1] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01.

[2] The two sectors have experimented new forms of performing with their audiences through digital technologies, for example in the audio-visual field.

entertainment and recreation activities experienced the largest percentage drop compared to 2019[1].

The difficulty came from the fact that the economic policies that are supposed to function for other sectors were not always adapted to the specific of the cultural sector and this made it even harder for the institutions involved to manage this situation.

Everybody knows that this economic sector is a source of innovation that brings along competitive and societal challenges that can help the local development and also can help to make the necessary adjustments after the crises generated by the pandemic is over.

Going through the recent years crises and also through the measures taken by the authorities that included the lockdown and the social distancing represented a moment of acknowledgment regarding the importance of arts and culture for people's health, well-being and mental health[2].

This acknowledgment has to be followed by another one: the fact that the cultural sector is in need during these periods of time that can easily repeat themselves and that cultural institutions have to be supported to find the best solutions which will also have a social and economic impact on the communities.

Thus, this sector experienced a fast forward process of digitalisation that showed a series of possibilities for development but we can observe that many times lacked the methodologies for applying these measures. Also, according to the UN's International Telecommunications Union, for millions of people around the world access to culture through digital means remains out of reach. This situation can bring along the risk of exacerbating inequalities and that can represent a challenge for the authorities to take the necessary measures.

[1] EU guidelines for the safe resumption of activities in the cultural and creative sectors - COVID-19, Communication from the Commission, Brussels, 29.6.2021 C(2021) 4838 final.

[2] The 2021 Annual Single Market Report indicated that the cultural sector was among the hardest hit industrial ecosystems in the EU.

2. SOLLUTIONS FOR THE CULTURAL CRISIS GENERATED BY COVID-19 PANDEMIC

The European Commission has brought to the attention of the Member States institutions a series of possible solutions for the unprecedented crises the cultural sector was facing during the last 2 years[1].

These measures are taken in a moment when everyone was expecting solutions from national authorities and also when there were a lot of differences between the various measures taken at national level.

So, there was a very optimistic approach in considering that vaccination would help substantially reduce the spread of COVID-19 and that will eventually lead to re-opening of cultural venues, activities and events. Taking this into consideration, Member States have started to implement lifting of restrictions, including in the field of culture.

Alongside with the actions to support the sustainable recovery of the tourism ecosystem, are highlighted the measures that the Member States could follow during the post-pandemic period to help the recovery of the cultural sector by the EU guidelines for the safe resumption of activities in the cultural and creative sectors: a) EU tools to facilitate the re-opening; b) Rebuilding trust by engaging with lost audiences Member States should help design and facilitate new business models and innovative schemes addressing the need to increase the sectors' capacity to emerge from the crisis; c) Experiment with new ways of promoting cultural content and responding to changes in audience behavior; d) Adapt the cultural offer to specific targets and different settings and strengthen the link between culture and well-being; e) Facilitate investment in strategies that promote the sustainability and resilience of the sector; f) Invest into skills, digital training and digital capacity-building; g) Dissemination of data and follow-up on trial events; h) Increased resources under new EU programmes; i) VAT rates and other measures; j) Artists' working conditions[2].

[1] This also benefits of a great support from EU funding instruments, the most important one we believe it is the Multiannual Financial Framework and NextGeneration EU for the period 2021-2027, Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

[2] See EU guidelines for the safe resumption of activities in the cultural and creative sectors - COVID-19, Communication from the Commission, Brussels, 29.6.2021 C(2021) 4838 final.

We consider all these measures mentioned in the EU guidelines for the safe resumption of activities in the cultural and creative sectors - COVID-19 to be very important steps that can help the recovery and development of the cultural and creative sectors, but among them the most necessary in this period we believe are the measures concerning VAT rates and also the artists' working conditions.

In this regard, Member States received a recommendation to take into consideration the specificities of the cultural sectors' workers and also to protect those professionals whose jobs are extremely precarious.

The Member States were already given the possibility to access lower VAT rates on services supplied by the cultural sector, making possible for them to apply what they consider as the most appropriate VAT rates and also having the possibility to access state aid[1], according to the Temporary Framework to support the economy in response to the COVID crisis.

Also, artists' working conditions represents an important topic for EU cooperation on culture. In the autumn of 2021 a new group of Member States experts started its work, having as starting point the Voices of Culture dialogue with cultural and creative sector organizations from April 2021, when the Commission had this initiative. We can also observe that an innovative scheme to support the sustainable recovery of Europe's music sector was also made available from 2021 and hopefully will be developed.

CONCLUSIONS

The cultural and creative sectors can be considered important drivers for the economy, by being a source of innovation. They can also be important for other areas of local and regional development, playing an important role in contributing to the post-pandemic recovery.

At EU level several measures are being implemented in order to help the cultural sector recover from the post-pandemic shock and this highlights once again the vulnerability of this sector.

If at the beginning of 2020 nobody was expecting this crisis to last this long, we can now observe that it was a very difficult period for

[1] This framework has covered a range of sectors, being impossible to give the exact amount of aids granted to the CCSI under this framework.

all economic sectors and also for the cultural and creative ones and unfortunately this is not over yet[1].

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THE INTERNATIONAL CONFERENCE
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THE INFLUX OF REFUGEES FROM UKRAINE - UNIONAL AND NATIONAL MECHANISMS REGARDING TEMPORARY PROTECTION OR ASYLUM REQUEST

Elise-Nicoleta VÂLCU [1]

Abstract:

On February 24, 2022, the Russian Federation launched a military invasion of Ukraine, the conflict generating implications for the European Union, namely the pressure of immigration at its eastern borders, endangering European stability.
Faced with this reality, Member States have activated the temporary protection provided by Directive 2001/55 / EC, in order to allow temporary refuge in the European Union as well as the sharing of responsibility among Member States for managing the situation of refugees in Ukraine.

In accordance with the union legislative approach, the Romanian Government adopted the Government Emergency Ordinance no. 15/2022 on providing humanitarian support and assistance by the Romanian state to foreign citizens or stateless persons in special situations, from the area of armed conflict in Ukraine by Emergency Ordinance no. 20/2022.

Key words: *temporary protection; refugee; asylum; European Network; fund.*

INTRODUCTION

The European Council, in its conclusions of February 24, 2022, strongly condemned Russia's aggression against Ukraine, considering it a "serious violation of the territorial integrity, sovereignty" of an independent state, reaffirming the need for sanctions and contingency measures.

Thus, on 4 March 2022, the Council adopted Implementing Decision (EU) 2022/382 establishing a mass influx of displaced persons

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from Ukraine within the meaning of Article 5 of Directive 2001/55 / EC and having the effect of introducing a *temporary protection.*

I.1. WHAT IS THE PURPOSE OF "TEMPORARY PROTECTION"?

On the basis of temporary protection, aimed subjects may enjoy harmonized rights[1] throughout the Union. In addition, declaring this situation is to the benefit of the Member States, as temporary protection rights limit the need for displaced persons to seek international protection immediately and thus reduce the risk of their asylum systems being overwhelmed.

In view of the provisions of Regulation (EU) 2018/1806, Ukrainian extra-nationals as visa[2]-exempt travelers have the right to move freely within the territory of the Union after being admitted to that territory for a period of 90 days. On this basis, they can choose the Member State in which they wish to enjoy the rights of temporary protection and join family and friends through the extensive diaspora networks that currently exist throughout the Union. This will, in practice, facilitate a balance between Member States' efforts, thus reducing the pressure on national reception systems.

Council Implementing Decision (EU) 2022/382 finding a mass influx of refugees from Ukraine shall apply starting with or after 24 February 2022 to the following categories:

- Ukrainian citizens residing in Ukraine before February 24, 2022;

[1] Ioana Nely Militaru, *Protection of Fundamental Rights in the European Union,* International Conference, "Perspectives of Business law in the Third Millenium" 8 noiembrie 2019, Section III. European Union Law. International Law, Volume 8, Issue 2, ninth edition, Bucharest, 2019.

[2] Ukraine is listed in Annex II Regulation (EU) 2018/1806, and citizens of Ukraine are exempted from the visa requirement for crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period.,see Regulation(EU)2018/1806 of the European Parliament and of the Council of 14 November 2018 establishing the list of third countries whose nationals must be in possessin of visas for the crossing of external borders and the list of third countries whose nationals are exempt from this obligation (OJ L 303 28.11.2018. p.39)

- Stateless persons and third-country nationals other than Ukraine receiving international protection or equivalent national protection[1] in Ukraine before 24 February 2022;
- Family members of the above categories.

Within the meaning of this decision, a family member means:

a) the husband, the wife of a person mentioned above, but also the partner with whom he is in a stable relationship, where the law or practice in force in the Member State concerned applies to unmarried couples a treatment comparable to that applied to married couples, according to its national legislation on foreigners;

b) unmarried minor children of a person mentioned above or of his / her spouse, regardless of whether they are legitimate, born out of wedlock or adopted;

c) other close relatives who lived together, as part of the family, when the events that led to the massive influx of displaced persons took place.

I.2. DOES THE EUROPEAN UNION HAVE CRISIS MANAGEMENT MECHANISMS IN PLACE FOR THE INFLUX OF REFUGEES FROM UKRAINE?

The crisis of 2015 highlighted the shortcomings of both EU and national systems in the sense that in the face of an immigration process, the EU and its Member States did not have the necessary capabilities or tools to improve the sustainability of migration management at the *legislative, operational and financial level*.

In recent years, various platforms have been set up in order to achieve cooperation between Member States in order to prevent uncontrolled flows of immigrants.

Of these, the EU Crisis Preparedness and Migration Management Network[2] is considered to be the most appropriate for the current situation on the eastern border of the European Union. Thus, within the meaning of Article 27 of Directive 2001/55 / EC, Member States shall

[1] Who can prove that they were legally resident in Ukraine before February 24, 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law and who cannot return safely and stably to their country or region of origin.

[2] Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU Crisis Preparedness and Migration Mechanism (Action Plan for Crisis Preparedness and Migration).

use the EU Crisis Preparedness and Migration Management Network in accordance with Recommendation (EU) 2020/1366.

The European Commission also coordinates the cooperation mechanism and the exchange of information between Member States. To this end, the Commission, in cooperation with the Member States, the European Border Police and Coast Guard Agency (Frontex), the European Union Agency for Asylum (EUAA) [1] and the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for the Operational Management of Large-Scale Information Systems in the Area of Freedom, Security and Justice (eu-LISA) and the Agency for Fundamental Rights (FRA) are constantly monitoring and reviewing the situation, using the EU Network[2] to they must cooperate in the "*Action Plan for Preparing for and Managing Migration Crisis Situations*".

The principles underlying the operation of the Action Plan are:

• Permanent monitoring of the migration process in the European Union;

• Establishing a coordinated and comprehensive approach both at the Union institutional level and on the reaction of the Member States;

• Rapid reaction of all factors involved to prevent the degeneration of the situation;

• Flexible allocation of resources by the bodies involved, taking into account the different financing instruments;

• Solidarity and fair distribution of responsibility.

How does the European Union manage the influx of refugees from Ukraine, from a financial point of view?

The financial implications arising from this temporary protection are ensured by the Asylum, Migration and Integration Fund established by Regulation (EU) 2021/1147 of the European Parliament and of the Council[3].

[1] On 19 January 2022, the European Union Agency for Asylum (EUAA) replaced the European Asylum Support Office (EASO). The Agency operates under the Council Regulation adopted on 9 December 2021 on the EU Asylum Agency.

[2] See, to that effect, Article 3 (2) of Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of an influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55 / EC and having as effect the introduction of a temporary protection.

[3] Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund (OJ L 251, 15.7.2021, 1).

Moreover, the Union's civil protection mechanism has been activated. Through this mechanism, Member States may request essential funds to meet the needs of displaced persons from Ukraine present on their territory and may receive co-financing for the provision of such assistance[1].

II. THE BENEFITS OF "TEMPORARY PROTECTION" FOR UKRAINIAN REFUGEES – APPROPRIATE NATIONAL LEGISLATION

In view of *Decision (EU) 2022/382 establishing the existence of a massive influx of displaced persons from Ukraine*, the Romanian Government adopted Emergency Ordinance no. 15 of February 27, 2022 *on providing humanitarian support and assistance by the Romanian state to foreign citizens or stateless persons in special situations, coming from the area of the armed conflict in Ukraine*, which represents the framework measure for the implementation of the issue regarding the granting of facilities to the Ukrainian citizens on the territory of Romania[2] in "*temporary protection*" regime.

Thus, the beneficiaries of the provisions of this GEO are "foreign citizens and stateless persons in special situations who come from the area of armed conflict in Ukraine and enter Romania and who do not request a form of protection according to Law no. 122/2006 on asylum in Romania" in temporary accommodation camps and humanitarian assistance.

They benefit for the entire period of temporary protection on the Romanian territory:

- food, clothing, personal hygiene materials[3].

[1] Regulation (EU) 2021/836 of the European Parliament and of the Council of 20 May 2021 amending Decision No 1313/2013 / EU on a Union Civil Protection Mechanism (OJ L 185, 26.5.2021, 1).

[2] See in this sense art.1 paragraph (1) GEO no.15 / 2022 on the provision of support and humanitarian assistance by the Romanian state to foreign citizens or stateless persons in special situations, from the area of armed conflict in Ukraine.

[3] The purchase of food products, clothing, personal hygiene materials and accommodation services is carried out through the public procurement procedure in an emergency, according to the provisions of art. 68 para. (1) lit. f) in conjunction with art. 69 para. (4) and art. 104 para. (1) lit. c) of Law no. 98/2006 on public procurement, with

- primary health care and appropriate treatment, emergency health care, and free medical care and treatment in cases of acute or chronic life-threatening illness through the health care system. They also have the right to be included in national public health programs aimed at the prevention, surveillance and control of communicable diseases in situations of epidemiological risk.[1]
- Article 2 of the normative act regulates the specific situation of foreign minors unaccompanied by their parents or another legal representative, who come from the conflict zone, in the sense that they will benefit from the special protection provided by Law no. 272/2004 on protection and promoting the rights of the child, republished with subsequent amendments and completions. [2]
- By derogation from the provisions of Article 1 paragraph (1) of the Government Emergency Ordinance no. 129/2021 on the implementation of the digital entry form in Romania, with subsequent amendments and completions, applicants for temporary protection are not required to complete the form in order to enter the Romanian territory. [3]

The funds allocated by the Romanian Government for the application of the provisions regulated in this ordinance are part of the "Member States' Programs" as provided in Article 16 of Regulation (EU) 2021/1147 of the Parliament and of the Council establishing the Asylum, Migration and Integration Fund, according to which each Member State's priorities are in line with the Union's asylum and migration management priorities, according to the relevant Union acquis.

Considering the need to continue undertaking measures of support and humanitarian assistance for foreign citizens or stateless persons coming from Ukraine, affected by this conflict and who arrived in Romania, the Romanian Government adopted on March 7, 2022, GEO

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subsequent amendments and completions, by the General Inspectorate for Emergency Situations and / or subordinated units.

[1] The basic necessities provided in art. 1 para. (1) lit. a) -c) is ensured in the amount provided in art. 55 of the Methodological Norms for the application of Law no. 122/2006 regarding asylum in Romania, approved by Government Decision no. 1,251 / 2006, with subsequent amendments and completions.

[2] Law no. 272/2004 on the protection and promotion of children's rights.

[3] Government Emergency Ordinance no. 129/2021 on the implementation of the digital entry form in Romania, with subsequent amendments and completions, do not have the obligation to complete the form in order to enter Romania.

no. 20/2022 regarding the modification and completion of some normative acts as well as for the establishment of some measures of support and humanitarian assistance, of modification and completion of GEO no. 15/2022.

Thus, through this legal instrument, one considered situations such as:

- Identifying solutions to facilitate the access of Ukrainian citizens to the Romanian labor market, by creating the necessary framework for them to be able to ensure a source of income from the work performed, which will have the effect of better integration during the period. who are forced to remain in Romania, with the consequence that the state budget is relieved, which, in the context in which Ukrainian citizens do not have their own sources of income, must bear the cost of their maintenance.
- In order to ensure the granting of the right to education in this special situation for preschool minors, preschoolers, pupils and students from Ukraine, legislative changes are required as the right to education is ensured by compulsory general education, through high school and vocational education, through higher education and represents a fundamental right established by the provisions of art. 32 of the Romanian Constitution, republished
- Creating the specific legal framework for situations in which legal and natural persons intend to donate amounts to persons affected by the conflict in Ukraine, provided that, until the entry into force of the ordinance, according to the tax rules on humanitarian donation they were not considered deductible expense.
- Public procurement for products in the categories of food, clothing, personal hygiene materials and accommodation services is carried out through the emergency public procurement procedure.

Thus, the provisions of GEO no. 15/2022 are completed in the sense that its provisions also apply to "*beneficiaries*" as identified in Decision (EU) 2022/382, respectively

(a) the husband, the wife of a person referred to above, but also the partner with whom he is in a stable relationship, where the law or practice in force in the Member State concerned applies to unmarried couples a treatment comparable to that applied to married couples under its national legislation on foreigners;

b) unmarried minor children of a person mentioned above or of his / her spouse, regardless of whether they are legitimate, born out of wedlock or adopted;

c) other close relatives who lived together, as part of the family, when the events that led to the massive influx of displaced persons took place.

Also, Article 1 of the O.U.G. no. 15/2022 is completed, so it is introduced in paragraph 1 "

- letter e) with the following text "all categories of beneficiaries have the right to be included in the national public health programs"
- letter f) according to which "all beneficiaries have the right to free transport on the Romanian territory".
- paragraphs (3) and (4) are amended and will have the following content - Public procurement for products in the categories of food, clothing, personal hygiene and accommodation services is carried out through the emergency public procurement procedure according to article 68 (paragraph 1) letter f) in conjunction with article 69 paragraph (4) and article 104 paragraph (1) letter c) of Law no. 98/2016 on public procurement with subsequent amendments and completions, by the General Inspectorate for Emergency Situations and after case, by the County Inspectorates for Emergency Situations / Bucharest-Ilfov Emergency Situations Inspectorate. By O.U.G. No. 20/2022, Article 2 of the O.U.G. no. 15/2022 is completed in the sense that by derogation from the provisions of article 554 of the O.U.G. no. 57/2019 on the Administrative Code with subsequent amendments and completions, to ensure the protection of minors who come from the conflict zone and enter the territory of Romania, unaccompanied by parents or another legal representative, the general directions of social assistance and child protection, may hire contract staff through competition in social services for unaccompanied minors, depending on their needs, for a specified period, which may not exceed 3 years.

The concept of "unaccompanied minor" not defined in GEO no. 15/2022 is clarified in the current ordinance which in article 7 (newly introduced) stipulates that "unaccompanied minor" means a foreign citizen or stateless person under the age of 18, who arrived in the territory. Romania not accompanied by any of its parents or by another legal representative or who is not under the legal supervision of another person ".

Also regarding the status of the temporarily protected minor on the Romanian territory, article 10 is introduced in the O.U.G. no. 20/2022, according to which in order to transpose the Council Decision (EU) 2022/382, a series of rights in the educational field are introduced, as follows:

- The right to education in schools under the same conditions and with funding from the same budgets as early preschoolers, preschoolers, and Romanian pupils
- The right to free accommodation in boarding schools, food allowance, the right to school supplies, clothing, footwear, textbooks
- The quality of "audience" is regulated as the student enrolled in an education system from another country, who continues his studies at the request of his parent or legal representative in an educational unit in Romania until the equivalence of studies and the support of eventual differences as a result of which they can acquire the quality of student in Romania

After Article 2, six new Articles 2 ^ 1-2 ^ 6 are introduced with reference to:

a) "*persons with disabilities, accompanied or unaccompanied, coming from the conflict zone*" benefit on the Romanian territory, free of charge, from the social services from the centers provided in article 51 paragraph (3) of Law no. 448/2006 on protection and promotion the rights of the disabled persons, republished with the subsequent modifications and completions[1], being taken over in the records of the general directions of social assistance and child protection of the respective county of the sectors of the Bucharest municipality.

[1] Republished pursuant to art. III of the Government Emergency Ordinance no. 14/2007 for the amendment and completion of Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, published in the Official Gazette of Romania, Part I, no. 187 of March 19, 2007, approved with amendments and completions by Law no. 275/2007, published in the Official Gazette of Romania, Part I, no. 700 of October 17, 2007, giving the texts a new numbering. Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities was published in the Official Gazette of Romania, Part I, no. 1,006 of December 18, 2006 and was further amended by Law no. 241/2007 for the abrogation of some regulations by which exemptions or exemptions from the payment of customs duties of certain goods are granted, published in the Official Gazette of Romania, Part I, no. 496 of July 24, 2007 / Amended by GEO no. 84 of September 20, 2010 published in the Official Gazette no. 654 of September 22, 2010.

b) "*companions of persons with disabilities*" benefit under the same conditions of social services together with them

c) "*elderly persons with reduced mobility or in a situation of dependency*" who come from the conflict zone and are on the territory of Romania benefit, upon request, free of charge from social services in accordance with the provisions of Law no. 17/2000 on assistance social security of the elderly, republished[1].

For the above-mentioned categories, the local public administration authorities may hire without competition, social workers or other specialized personnel as the case may be, within the public social assistance services at local and county level, for a maximum duration of 3 years.

The provisions of section 6 of the O.U.G. no.15 / 2022 are mentioned in the sense that by derogation from the provisions of article 1 paragraph (1) of O.U.G. no / 129/2021 on the implementation of the digital entry form in Romania with subsequent amendments and completions[2], persons arriving from Ukraine do not have the obligation to fill in the digital entry form in Romania.

Applicants for temporary protection[3], from the conflict zone and located in Romania may be employed without the employment permit[4], provided for in Article 3 paragraph (1) [5], and Article 17 paragraph (1) of O.G. no.25 / 2014 regarding the employment and secondment of

[1] Law no. 17/2000 on social assistance for the elderly republished pursuant to the provisions of art. II of Law no. 281/2006 for the amendment and completion of Law no. 17/2000 on social assistance for the elderly, published in the Official Gazette of Romania, Part I, no. 600 of July 11, 2006; Chapter II was amended by Point 1, sole article of Law no. 19 of January 12, 2018, published in the Official Gazette no. 44. from January 17, 2018.

[2] GEO no. 129/2021 regarding the implementation of the digital entry form in Romania was amended by GEO no. 5 of February 3, 2022 published in the Official Gazette no. 117 of February 4, 2022.

[3] Ukrainian citizens legally entered on the territory of Romania and who do not request a form of protection according to Law no. 122/2006 on asylum in Romania with subsequent amendments and completions are considered.

[4] In accordance with art.2 paragraph (1) of O.G. no.25 / 2014, the employment notice means "the official document issued by the General Inspectorate for Immigration, which certifies the right of an employer to employ a foreigner on a certain position.

[5] According to art. 3 paragraph (1) of O.G. no. 25/2014, "Foreigners legally residing in Romania may be employed on the basis of the employment permit obtained by employers under the conditions of this ordinance".

foreigners on the Romanian territory and for the modification and completion of some normative acts regarding the regime of foreigners in Romania[1], approved by Law no.14 / 2016 with the subsequent modifications and completions. Moreover, the above-mentioned persons are extended the right to stay for work purposes according to the O.U.G. no. 194/2002 regarding the regime of foreigners in Romania, republished, with the subsequent modifications and completions, without the obligation to obtain a long-stay visa for employment.

What happens to temporary protection applicants who do not have documents proving their professional qualification or experience in the activity necessary for employment?

Article VI para. (3) of the O.U.G. no. 20/2022 brings the legal solution to such a reality. Specifically, the beneficiaries requesting temporary protection in the above-mentioned situation may be employed for a period of 12 months with the possibility of extension for periods of 6 months, for a maximum of one year, based on their declaration on their own responsibility in the sense that they meet the conditions of professional qualification and experience in the activity necessary for the employment on which they are to be employed.

The employment of temporary protection applicants is done in compliance with the conditions inserted in Article 29[2], and Article 31[3] f Law no. 53/2003 - Labor Code republished with subsequent amendments and completions, regarding the prior verification of the professional and personal skills of the person requesting employment.

[1] On the date of entry into force of O.G. no.25 / 2014, the O.U.G. no. 56/2007 regarding the employment and secondment of foreigners on the Romanian territory.

[2] The individual employment contract is concluded after the prior verification of the professional and personal skills of the person requesting employment.(2) The modalities in which the verification is to be carried out are set out in the applicable collective bargaining agreement, in the staff status - professional or disciplinary - and in the internal regulations, unless the law provides otherwise.

[3] For the verification of the employee's aptitudes, at the conclusion of the individual employment contract, a probationary period of no more than 90 calendar days for the executive functions and a maximum of 120 calendar days for the management positions may be established. (3) During or at the end of the probationary period, the individual employment contract may be terminated exclusively by written notice, without notice, at the initiative of any of the disabled persons. (4) During the probationary period, the employee shall enjoy all the rights and have all the obligations provided for in the labor law, in the applicable collective bargaining agreement, in the internal regulations, as well as in the individual employment contract.

We note, however, that the derogating provisions regarding the temporary classification mentioned in Article VI paragraph (3) do not apply to the beneficiaries of Ordinance no. 22/2022, who wish to exercise on the territory of Romania independently or as employees the professions of doctor, dentist, pharmacist, general nurse, midwife, veterinarian and architect.

Last but not least, temporary protection applicants arriving from the conflict zone have access to the unemployment insurance system, to unemployment prevention measures and to employment stimulation measures, following their registration with the territorial and employment agencies. Bucharest for employment, under the conditions established for Romanian citizens by the provisions of Law no. 76/2002 on the unemployment insurance system and the stimulation of employment with subsequent amendments and completions.

CONCLUSIONS

Romania has the obligation, as an EU member state, to fully apply the unique legislation. [1]

Starting from this approach, this scientific paper aims to bring to light in the analysis innovative concepts "temporary protection" and "beneficiary of temporary protection" regulated in the context of the realities of the armed conflict in Ukraine, derogating from the terms "asylum" and " asylum seeker ".

Thus, through the analyzed legislation, respectively *Decision (EU) 2022/382 establishing the existence of a massive influx of displaced persons from Ukraine to allow temporary refuge in the European Union as well as sharing the responsibility between Member States for managing the situation of refugees in Ukraine* and its transposition norms, respectively *Government Emergency Ordinance no. 15/2022 on providing humanitarian support and assistance by the Romanian state to foreign citizens or stateless persons in special situations, from the area of armed conflict in Ukraine completed and amended by the Emergency No.*

[1] Ioana Nely Militaru, *Dreptul Uniunii Europene, Cronologie. Izvoare. Principii.Institutii. Piata interna a Uninuii Europene*. *Libertatile fundamentale*, Editia a-III-a, revăzută si adăugită (Bucharest: Universul Juridic, 2017), 25 -30.

20/2022 was considered to ensure adequate conditions for foreign citizens and stateless persons in special conditions, who come from the conflict zone of Ukraine and who request a form of special-temporary protection derogating from the classic form of asylum.

In conclusion, both the Union legislation and the transposition legislation, presented above, are part of the "challenge" of a coordinated approach between the European Union and the Member States.

This is the need for a coherent and clear common policy to restore confidence in the Union's ability to bring together European and national efforts to tackle migration and work together in an effective way, based on the flexible and coordinated use of all available instruments. at Union and Member State level, respectively legislative, financial and institutional, in accordance with the principle of solidarity and fair distribution of responsibilities between Member States, as provided for in Article 80 TFEU.

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HISTORICAL APPROACH TO THE BREACH OF HUMAN RIGHTS IN THE FORMER SOVIET SPACE

Alina Gabriela MARINESCU [1]

Abstract:

Russia's expansionist policy in the northern Black Sea, namely Crimea, the city of Sevastopol and now in Ukraine, has a significant negative impact on the economic and social life of all European citizens and beyond, while also posing a significant threat to regional, European and world security.

The illegal annexation of these areas and the current war declared to Ukraine by the Russian Federation violate international law, including the UN Charter, the Helsinki Final Act, the 1994 Budapest Memorandum and the 1997 Treaty of Friendship, Cooperation and Partnership between Ukraine and the Russian Federation.

The European Union strongly condemns the actions considered to be genocide committed in the territory of Ukraine after the present invasion, firmly upholding the sovereignty and territorial integrity of Ukraine within its historical borders.

Key words : *human rights; totalitarianism; geopolitical space; expansionism.*

1. INTRODUCTORY ASPECTS REGARDING THE HISTORICAL COURSE OF THE RELATIONSHIP RUSSIAN FEDERATION-UKRAINE-CRIMEA

From a historical perspective, the relationship between the two states, now independent, is a special one based on the fact that their roots are common and are found in the so-called "Kiev Russia". In reality, the two states have evolved differently so that they have developed distinctly but with two cultures and two related languages.

Thus, while Russia became an empire, Ukraine did not have a "happy" historical evolution, so in the 17th century, a significant part of present-day Ukraine became part of the Tsarist Empire. This "unfortunate

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existence" ceased in 1917 when, after the disintegration of the Tsarist Empire, Ukraine gained independence until Soviet Russia regained it.

Ukraine regained its independence in 1991, when, along with Russia and Belarus, "sealed" the disintegration of the Soviet Union, only this time Russia manifested its dominant position of power, establishing the Commonwealth of Independent States as a tool of control. It's just that while Belarus is constantly showing a servile attitude towards the Kremlin, Kiev is showing its affinity for Western Europe.

In the context of the war in Chechnya, and amid economic weakness Russia concluded in 1997 the "Agreement of Friendship between Ukraine and the Russian Federation", an agreement by which the Russian Federation recognizes the borders of today's Ukraine, including the Crimea.

The first diplomatic problems between the two countries, and implicitly the first cracks in the friendly relationship, arose under Putin's presidency in 2003, when Russia began construction of a dam from the Russian Taman Peninsula to the Russian island of Tuzla in the Kerch Strait, Kiev considering that Russia is thus showing interest in restoring the borders of the old Tarist Empire. The conflict was settled due to the fact that the construction was stopped as a result of the official approach made by the presidents of the two countries.

Since then, Ukraine has consistently been leaning towards Western Europe and NATO. Thus, in 2008, the then US President, George W. Bush, proposed the integration of Ukraine and Georgia into NATO, proposing a formal program of preparation for accession. Putin has clearly disagreed with this integration, making it clear that he does not fully accept Ukraine's independence. Europe through the voice of Germany and France did not accept the will of the USA, as its dependence on Russian gas is known. Thus, Ukraine received only the promise of a future accession at the NATO Summit in Bucharest.

Following this moment, Ukraine began to move closer to Western Europe, thus laying the foundations for the conclusion in 2013 of an Association Agreement with the European Union. After lengthy negotiations, Ukraine's leadership did not oppose the signing of the association agreement with the EU in November 2013, but Russia's top leadership categorically opposed it, so Moscow immediately put economic pressure on Kiev to ban imports from Ukraine.

Against this background, President Viktor Yanukovych and Prime Minister Nikolai Azarov suspended the association agreement with the EU. This was followed by protests from the Ukrainian opposition, which resulted in Yanukovych's escape to Russia on February 21, 2014.

Due to the lack of power in Kyiv, President Putin annexed Crimea to Russia, so that irremediable dissensions arose between the two countries. Moreover, Russian paramilitary forces (Russian separatists) managed in an offensive to take control of the mining area in eastern Ukraine, in the Donbas, self-proclaiming the "people's republics" of Donetsk and Lugansk. Since then, there has been a war for positions that continues today.

In December 2021, Putin officially demanded assurances from the United States that Ukraine would never join NATO and would not receive any military aid. NATO has rejected these demands.

Information about a possible referendum on the status of Crimea first appeared on February 24, 2014, during a visit to Simferopol by a group of deputies of the State Duma of Russia led by L. Slutschii.

As of February 23, 2014, rallies of Ukrainians and Crimean Tatars in support of Kiev have begun in the Crimean cities. Rallies for the separation of the peninsula from Ukraine were attended by members of Russian military families, employees of companies serving the Black Sea Fleet and pro-Russian activists of the "Russian Unity" and "Russian Bloc" parties, which were financially supported by Moscow.

In order to block the activity of the Crimean parliament, on February 26, 2014, supporters of the Crimean Tatars and the new Ukrainian government, led by M. Dzhemilev and R. Chubarov, gathered in front of the parliament building. They were opposed by supporters of S. Aksenov's pro-Russian "Russian Unity" movement.

Following the capture of the Crimean Supreme Council and Council of Ministers buildings by unmarked Russian soldiers, prosecutions and the arrest of pro-Ukrainian leaders began.

During the preparations for the referendum, Mejlis asked the population not to participate in it. Crimean Tatars have called on the presidents of Turkey, Kazakhstan and Azerbaijan not to allow Ukraine to leave Crimea, and to bring peacekeepers to the UN.

The referendum on Crimea's accession to the Russian Federation took place in the Autonomous Republic of Crimea on March 16, 2014. Official results show that 95% of voters voted in favor of Crimea joining

Russia. However, the results of the referendum are questionable and its legitimacy has not been recognized by Ukraine and the international community. The same position is taken by the United Nations General Assembly, which adopted Resolution 68/262, confirming "the territorial integrity of Ukraine within its internationally recognized borders. The resolution garnered 100 votes in favor and 11 against, with 58 other states abstaining, and 24 of the 193 states did not take part in the vote, being absent.

On March 17, 2014, the illegitimate Supreme Council of Crimea, based on the results of the "referendum", adopted a resolution "On the independence of Crimea". On the same day, the President of the Russian Federation signed a decree recognizing Crimea as an independent state.

On March 21, a federal constitutional law was adopted on the formation of two new federal subjects of Russia (Crimea and the city of federal significance Sevastopol)

On April 11, the constitutions of the Republic of Crimea and the federal city of Sevastopol were adopted, and on the same day the new federal subjects were included in the Constitution of the Russian Federation and on April 25, 2014, Russia's state border was unilaterally established "legally" between Crimea and Ukraine

II. ANTI-RUSSIAN RESISTANCE IN THE CRIMEAN OCCUPATION ZONE-VIOLATION OF HUMAN RIGHTS WITH REGARD TO ETHNIC TATARS, RESIDENTS OF CRIMEA AND SEVASTOPOL

Following the illegal annexation by the Russian Federation, the human rights situation in the Crimean peninsula has deteriorated significantly when it comes to ethnic Tartars.

The drama of the Crimean Tatars began in 1944[1],, when Stalin decided to completely deport this people, so that on May 18, 1944[1],, the

[1] Ayşe Şerife, who was born in the town of Oktiabrske (in Tatar Büyük Onlar) in the Kurman district (now Krasnohvardiiske, Crimea), remembered those moments bitterly in a 1999 interview: *I was left without tears from so much crying. I was 24 when we were deported. It was around 5:00 in the morning. I was at home sleeping with my mother, father, and my three brothers. We jumped out of bed when they knocked on our door as if they wanted to break it. The Russian soldiers in front of our door told us that we had to gather in 15 minutes in the village cemetery and that those who refused would be killed in their homes. I didn't know what to do. We couldn't take anything with us. My*

Soviet repressive apparatus - NKVD, was present in the Crimean Tatar villages.

The deportation procedure was very simple: the Russians surrounded the village, then the Tartars were announced that they would be deported in a maximum of two hours, being able to take with them only what they could carry in their hand. They were put up and crammed into cattle wagons, many of them dying on the road[2]. The conditions in which Crimean Tatars were transported to Uzbekistan did not differ much from those in which the Nazis transported Jews to Auschwitz.

Documents in the Soviet archives show that the entire Crimean Tatar people were deported in three days, for a total of almost half a million people.

After 1991, however, they began to return to their former lands, which are now still under Russian occupation.

At present, about 11 million Tartars live in the diaspora, of which 450,000 are in Uzbekistan. About five million Tatar descendants live in Turkey who fled Crimea to the Ottoman Empire after the Russians

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*old and sick mother was taken by my father and 18-year-old brother, Seyit. One of the soldiers locked the door of our house and put the key in his pocket. In the village cemetery there were mothers, fathers, people hugging, crying, screaming (...) I stayed in the cemetery at night. In the morning they put us in trucks like herds of animals. They took us to the train station in Kefe (today Feodosia, Crimea). We were waiting for black trains with wagons that usually carried animals. We tried not to break up with each other, we held hands (...) The doors of the wagons were closed, locked, and even nailed. That's how our dark days began. I didn't know in which direction, in which area we were going. All we knew was that we were deported. During the journey, the doors of the wagons were opened only once every two or three days to throw away our dirt. Many people died of starvation, thirst and disease. The wagons, which were very crowded at first, have become normal. I held out until the end of the twelve-day journey because of my father's snacks. The train stopped at Samarkand. We were taken down to Kattakurgan (now in Uzbekistan, near Samarkand). From there they took us by truck 12 km. to Karade*re.."

[1]For all Tatars, the day of May 18, 1944 is considered "Kara Kun" (black day) the beginning of "Surgun"

[2] Tatar writer Güner Akmolla said in an interview: "*Together with all Tartars around the world, I swore we would not forget that ... not genocide, but ethnocide. More than 46% of the exiled population died on the way in the first year of deportation. Some opinions reach the figure of 50% of the population* ".

occupied the peninsula during the reign of Empress Catherine II. And about 50,000 Tartars still live in Dobrogea and Quadrilater[1].

Today, after seventy-eight years, the situation of the Crimean Tatars is not much better. Thus, some of the deportees and their descendants managed to return to the Crimean Peninsula, as they call it "Yesil Ada" (green island), without daring to claim their forcibly abandoned houses and where one had brought Russians settlers.

Leaving behind all the torment of the past, they hoped that they could build a better future, only that their optimism collapsed in 2014, when the Russian Federation illegally annexed the peninsula.

Despite promises made by Moscow, which said it would respect their rights, Crimean Tatars, who throughout their history had lived through the experience of the tsarist and Soviet regimes, knew that this speech was, in fact, part of Russia's strategy. to legitimize their actions. Reality proves them right.

In the annexed Crimea by Moscow, the institutions representing the Crimean Tatars were banned, their leaders were imprisoned or they were no longer allowed to enter the peninsula, the independent Tatar media were silenced.

Today, seventy-eight years after the "Sürgün" and eight years since the illegal annexation of Crimea, Crimean Tatars are once again in a position to save their lives and identities. They must be strong when they were forced to emigrate because of tsarist pressures, be united as in 1917-1918 when they laid the foundations of their own state, be whole as in the Stalinist "Great Terror" and see hope as they did it in 1944.

As a result, in view of the European Court of Human Rights'[2]. reference decision of 14 January 2021, the European Union now calls on Russia to comply fully with international humanitarian law, international human rights standards and relevant General Assembly resolutions. UN, including Resolution 76/179 of 16 December 2021.

Peninsula residents face human rights abuses and violations, such as enforced disappearances, torture and murder, violence, politically

[1]Olah Lavinia and Iulia Boghirnea, *European Court of Human Rights, International Scientific Session "Romanian Economy:Present and Perspectives",* University of Suceava, 2002, ISBN 973-8293-57-X

[2]Metin Omer, *Emigration of Turks and Tatars from Romania to Turkey between the two world wars*, Cetatea de Scaun Publishing House, 2020.

motivated prosecutions, discrimination and harassment, need to be thoroughly investigated.

In particular, Crimean Tatars continue to be unacceptably persecuted, subjected to various pressures, as well as victims of serious violations of their rights.

There is a serious violation of the fundamental rights of the ethnic and religious communities of the peninsula in the sense that they are not given the opportunity to preserve and develop their culture, language, education, identity and traditions.

In accordance with UN General Assembly Resolution 76/179 of 16 December 2021, the Russian Federation is requested to allow access to international human rights monitoring mechanisms as well as non-governmental human rights organizations in Crimea and Sevastopol.

The politically motivated mass detentions of Crimean Tatars are constantly highlighted and condemned by the Union. All those detained on the Crimean peninsula and convicted of violating international law, including Nariman Dzhelyal, Emir-Usein Kuku and the other five defendants with him, Oleh Prykhodko, Halyna Dovhopola, Enver Omerov, Riza Omerov and Ayder Dzhapparov, must be arrested immediately. The ban on the activities of Mejlis, an autonomous body of Crimean Tatars, must end.

CONCLUSIONS

At present, in 2022, eight years after the illegal annexation of Crimea and Sevastopol by the Russian Federation, the European Union[1] remains steadfast in its commitment to Ukraine's sovereignty and territorial integrity within its internationally recognized borders.

Currently, with the launch of the offensive, on February 24, 2022 over the entire territory of Ukraine, new violations of territorial sovereignty and integrity are taking place. Moreover, Russia maintains its decision to recognize areas not controlled by the Ukrainian government in the Donetsk and Luhansk regions as independent entities.

[1] Elise Valcu, *Introduction to the material law of the European Union* (Bucharest: Hamangiu, 2012); Ioana Nely Militaru, *European Union Law, Chronology. Springs. Principles. Institutions. The internal market of the European Union. Fundamental Freedoms*, 3rd Edition, revised and added (Bucharest: Universul Juridic, 2017).

At the same time, the European Union considers the illegal annexation of Crimea, a violation of international law[1] with serious implications for the international legal order that protects the territorial integrity, unity and sovereignty of all states.

Last but not least, as a result of human rights violations in the occupied areas, the Member States strongly condemned the Russian Federation's action to change the peninsula's demographic structure by relocating its civilian population to the peninsula and persecuting ethnic Ukrainians and Crimean Tatars.

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[1] Elise Nicoleta Valcu and Iulia Boghirnea, *"Jurisprudence and the juridical precedent of the European Court of law as source of law"* Lex et Scintia International Journal, LESIJ No.XVI, vol 2/2009 indexata EBSCO HOST, proquest, HeinOnline etc.www.lexetscientia.univnt.ro; Ioana Nely Militaru, *Protection of Fundamental Rights in the European Union,* International Conference, "Perspectives of Business law in the Third Millenium" Section III. European Union Law. International Law, Volume 8, Issue 2, 8 noiembrie 2019, ninth edition, Bucharest

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CONSTITUTIONAL DUTIES IN THE CENTRAL AND EAST EUROPEAN COUNTRIES: COMPARATIVE OVERVIEW OF THE PAST AND PRESENT

Rafał CZACHOR[1]

Abstract:

The duties, along with rights and freedoms, define the legal status of the person in the state. However, the scientific literature pays more attention to the rights and freedoms, since they are considered as more important. The following paper tackles the issue of constitutional duties in the Central and Eastern European (CEE) countries. The investigation has both qualitative and quantitative character and presents results in a comparative way, revealing simmilarities and differences in this matter. It reveals that the the CEE countries have modified their catalogues of the constitutional duties after the democratic breakthrough and currently are in line with the European standard in this matter.

Key words: *constitutional law; constitutional duties; human rights; law and politics in the Central and East Europe***.**

INTRODUCTION

The behaviour of a person, as a social creature, is determined by different normative systems, including positive law, morality, customs, and religion. Each of these systems determines the social position of a person through the set of his or her freedoms, rights and duties. In the contemporary constitutional law of liberal-democratic states much less attention is paid to the duties and the focus is done on the issue of the freedoms and rights of a person. The issue of the significance of person's duties in the constitutional law was particularly expressed by the socialist political and legal thought, which stressed the principle of the unity of rights and duties. Actually, in the liberal-democratic countries pervades

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the opinion, that the constitution shall determine rights, is intended to be a basis for the protection of human rights from state intervention, not for imposing some obligations. The aim of a democratic country is to guarantee the freedom of a person, the possibility of his or her self-realization, the creation of a sphere free from state domination, so also free from instructions of a particular behaviour of a person. Indeed, not all liberal-democratic countries decided to include in their constitutions a catalogue of duties of a person. In these states, where the constitutions prescribe some duties, their number is relatively smaller than the number of guaranteed rights and freedoms. The lack of any duties in the text of the constitution does not imply that there are any duties of a person[1]. For instance, in Switzerland, the judiciary employs a concept of "unwritten basic legal obligations of a person"[2]. Hence, due to some reasons, some legislators decide to include in the text of the constitution some duties, while the other duties have a lower range and are fixed in other legal acts, mainly in bills produced by the parliament.

In fact, constitutional duties are of a different character. On the one hand, there are duties which bind the state institutions, i.e. guaranties for political pluralism, human rights protection and impose a duty for authorities to refrain from violating such rights. On the other hand, there are duties binding for persons, including the duty to observe the legal order and comply with the decisions made by legally chosen authorities. Such duties make a basis for the stability of the society and the very existence of the state. Usually, the constitutions make a distinction between the duties of citizens (i.e. the service in military forces), and of every person under the jurisdiction (i.e. the protection of the natural environment). It is also worth noticing that some duties can constitute rights simultaneously, i.e. the duty and the right to education. What is more, a duty of one person can create rights for the others, for instance, the duty to respect rights of the fellow citizens. The scope of duties of a person and citizen (not state institutions) is the matter of concern in the following paper.

[1] P. E. Quint, *Reflection on the Constitutional Duties of Citizens (and Persons)*, https://digitalcommons.law.umaryland.edu/schmooze_papers/92/ ; G.F. Ferrari, *Duties*, „Comparative Law Review" 2015, vol. 5(1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123820

[2] F. Fleinera and Z. Giacometti, *Schweizerischen Bundesstaadtrecht* (Zürich 1978), 208.

Due to the fact that the legal culture of democratic countries is oriented toward the protection of rights and freedoms, the duties of a person should be understood as a salient sphere of constitutional law and an important field of scientific inquiry. The following paper attempts to compare the duties of a person and citizen included in the constitutions of the Central and Eastern European countries: Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, and former Soviet republics: Moldova, and Ukraine. All these countries share a socialist past and are currently undergoing the democratic transformation. The Central European states have joined the European Union in 2004-2007, while the Eastern European countries are members of the Eastern Partnership and declare strengthening their cooperation with the EU. All abovementioned nations are members of the Council of Europe and party-states of the European Convention on Human Rights Protection what allows us to assume that they share common European constitutional values. The following paper reveals, that on the one hand, there is a vast catalogue of duties of a person in the constitutional law of most Central and East European countries which is in line with a worldwide democratic tendency, and on the other hand that there is no single model of duties, and each country has adopted an own concept.

THE DEFINITION AND THE ROLE OF DUTIES OF A PERSON UNDER CONTEMPORARY CONSTITUTIONAL LAW

Regardless represented type of the legal culture, the constitutional law of most countries in the world prescribes the duties of a person. Such duties are defined as "do's and don'ts in a particular legal situation"[1], "no choice of behaviour, in contrary: prohibition or injunction of a particular behaviour" [2], "obligation of acting for the common good" [3]. In the modern democratic countries granting citizens rights in XIX and XX centuries resulted in the necessity of the imposition of new obligations. It was desired *inter alia* due to the need for the precise delimitation of the rights and freedoms, to give a person the possibility to properly enjoy his or her

[1] B. Banaszak, *Podstawowe obowiązki prawne jednostki* (Wrocław 1997), 23.
[2] F. Siemieński, *Prawo konstytucyjne* (Warszawa-Poznań 1976), 124.
[3] C. Gusy, „Grundpflichten und Grundsgesetz", *Juristenzeitung* nr. 19 (1982), 657-663.

status in the society and to understand the rights and freedoms in line with the principles of the social order [1].

The concept of the legal duties of a person can take the form of two variants: individualistic and collectivist. The individualistic approach asserts that have the priority the interests and the rights of a person, and the state institutions should only facilitate its realization and protection. It diminishes the significance of the duties and gives them little meaning. The collectivist approach recognizes the superior sense of the aims and interests of a state, while a person serves only as a tool for achieving them. Hence the crucial role of the duties and even the dependency of rights enjoyment on the prior fulfillment of the duties. In the modern state, the duties should not be treated as measures aimed at counteraction against the rights' abuse, since for these purposes the criminal law is applicable.

THE DUTIES OF A PERSON UNDER PUBLIC INTERNATIONAL LAW

In public international law there no single act that comprehensively regulates the obligations of a person towards the state and that could serve as a pattern for domestic regulations. There is no doubt that from the international law stems the duty of a person to comply with *juris cogentis* norms and duties which can be derived from the United Nations' Charter, the Convention on the Prevention and the Punishment of the Crime of Genocide, the International Convention on the elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social, and Cultural Rights. In particular, they stipulate the duty of observation and contribution to the international peace, to refrain from racial any other hate, to comply with the international humanitarian law, to respect the dignity of other people, respect the principle of pluralism and cultural diversity.

In the European context the most comprehensive mechanism of human rights protection constitutes the European Convention on Human Rights adopted in 1952. It very modestly refers to the duties of a person. In the article 10(2) it states that "the exercise of the freedoms, since it carries with it duties and responsibilities, may be a subject to such formalities, conditions or penalties as are prescribed by law and are

[1] Banaszak, *Podstawowe obowiązki prawne jednostki*, 26.

necessary for a democratic society…" The article 17 announces that "nothing in this convention my be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein…". If the Convention does not define the duties, one can assume that there is one duty that can be derived from it: a standard enjoyment of freedoms and rights in z good faith and with the respect for freedoms and rights of others.

THE CONCEPT OF THE DUTIES OF A PERSON IN THE DEMOCRATIC AND SOCIALIST CONSTITUTIONAL THEORY

In a contemporary liberal democratic state, there is not a minimum set of the constitutional duties of a person. Very generally there are only a few duties. The precise study is difficult since a significant part of the duties is not included in the constitutions and stipulated by the bills. The overview of the Western European constitutions leads to the conclusion that the most frequent obligations of a person are the following: a) compliance with the law; b) fidelity to the motherland; c) defence of the country; d) paying taxes; e) education; f) upbringing of children; g) environment protection; h) participation in the elections[1]. Not all the abovementioned duties are envisaged in all European constitutions. For example, the Basic Law of Germany adopted in 1949 stipulates only two duties: "property entails obligations. Its use shall also serve the public good" (art. 14(2)), and "men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defence organisation (art. 12a(1))[2]. The Finnish constitution of 1999 does not provide any duties of a person or a citizen[3].

The socialist law school presented the theory of domination of state's and society's interests over a person. The Polish constitutional law scholars in 1981 wrote: "conscientious fulfillment of the persons' duties

[1] Banaszak, *Podstawowe obowiązki prawne jednostki*, 83-94.

[2] The Constitution of the German Federal Republic, https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en

[3] The Constitution of Finland, https://www.constituteproject.org/constitution/Finland_2011?lang=en

contributes to the development of the motherland, its strength and richness. This consecutively brings wide possibilities of enjoying citizen's rights"[1]. In such approach enjoying rights was conditioned by the fulfillment of duties. The Soviet constitution of 1977 stated that „Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations". The full scope of person's duties under the Soviet constitution was exhaustive and included 11 duties: a) to observe the Constitution of the USSR and Soviet laws, comply with the standards of socialist conduct, and uphold the honour and dignity of Soviet citizenship; b) duty and honour to work in socially useful occupation, and strictly to observe labour discipline; c) to preserve and protect socialist property and to combat misappropriation and squandering of state and socially-owned property and to make thrifty use of the people's health; d) to safeguard the interests of the Soviet state, and to enhance its power and prestige. The defence of „the Socialist Motherland" was called „a sacred duty"; e) military service in the ranks of the Soviet Armed Forces was called „a honourable duty"; f) to respect the national dignity of other citizens, and to strengthen friendship of the nations and nationalities of the multinational Soviet state; g) to respect the rights and lawful interests of other persons, to be uncompromising toward anti-social behaviour, and to help maintain public order; h) to bring up children, to train them for socially useful work, and to raise them as worthy members of socialist society. Additionally, children were obliged to care for their parents and help them; i) to protect nature and conserve its riches; j) to preserve historical monuments and other cultural values; k) "the internationalist duty" obliged to promote friendship and co-operation with peoples of other lands and help maintain and strengthen world peace (art.59-69). All mentioned duties were addressed towards the Soviet citizens [2]. The constitution of Romania adopted in 1965 stipulated a very modest range of only five duties: to respect the constitution and the laws, to defend socialist property, to contribute to the strengthening and development of the socialist order, the service in the

[1] T. Fuks and A. Łopatka, M. Rybicki, W. Skrzydło, *Ustrój polityczny Polskiej Rzeczypospolitej Ludowej* (Warszawa 1981), 101.
[2]V.P. Šennikov and N.V. Anciferov, *Ûridičeskie obâzannosti v sisteme konstitucii*, „Vestnik Kemerovskogo gosudarstvennogo universiteta", vol. 1 (61), (2015): 250-251; R. Czachor, *Obowiązki konstytucyjne w państwach postradzieckich*, „Prawo" 2019, vol. 327, 219-229.

army as a "honorary duty" and the defence of "the homeland" as a "sacred duty". All duties were applied towards the citizens, not mentioning about the duties of foreigners under Romanian jurisdiction. (art. 39-41). A similar approach was adopted in the Hungarian constitution of 1949 with numerous amendments (three duties), the Bulgarian constitution of 1971 (six duties), and the Czechoslovak constitution of 1960 (five duties). The Polish constitution of 1952 prescribed seven duties, the amendment of 1976 has brought two additional duties.

To conclude, socialist theory of law put forward the idea of the importance of the constitutional duties of a person. The catalogue of such obligations in the Central and East European countries before the democratic breakthrough in 1989-1991 included duties typical also for non-socialist states: a) the duty to uphold the constitution and other laws, b) to defend the state and perform military service frequently as a "supreme and honourable duty"; as well as other ideologically-based formulations: c) the duty to protect and to strengthen socialist ownership; d) to exercise vigilance against enemies of the nation, or e) to observe the rules of socialist conduct.

CONTEMPORARY CONSTITUTIONAL DUTIES IN THE CENTRAL AND EAST EUROPEAN COUNTRIES

During the democratic transformation in the early 90s, all former socialist states have transformed into liberal democracies. Such developments were reflected in the new constitutions with renewed catalogues of rights, freedoms and duties of a person.

The constitution of Bulgaria of 1991[1] provides in chapter 2 for fundamental rights and duties of citizens. As a result, it does not make a distinction between the duties of citizens and persons. There are six duties: all citizens shall observe and implement the constitution and the laws. They shall respect the rights and the legitimate interests of others (art. 58(1)), to defend the country shall be a duty and a matter of honour of every citizen (art. 59(1)), pay taxes and duties established by law proportionately to their income and property (art. 60(1)), and assist the state and society in the case of a natural or other disasters (art. 61). The

[1] The Constitution of the Republic of Bulgaria, https://www.constituteproject.org/constitution/Bulgaria_2015?lang=en

formulation of the last two duties suggests that they refer not only to the Bulgarian citizens but to every person under Bulgarian jurisdiction: "everyone shall have the right to a healthy and favourable environment corresponding to established standards and norms. They shall protect the environment" (art. 55). "School attendance up to the age of 16 shall be compulsory" (art. 53(2)).

In the Czech Republic not the Constitution adopted in 1992[1], nor the Charter of Fundamental Rights and Freedoms (a part of the Czech constitutional law) contain any duties of a person. The latter document stipulates briefly, that "duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms" (art. 4(1))[2].

The constitution of Hungary adopted in 2011[3] contains a section entitled "Freedom and Responsibility". Some of the duties are typical: All Hungarian citizens shall be obliged to defend the country (art. XXXI(1)). Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by a bill (art. XXI(2)). The remaining duties are unique for the Central and East European region: everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities (art. XII). Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children (art. XVI(3)). Adult children shall be obliged to take care of their parents if they are in need (art. XVI(4)). During a state of national crisis, or if the National Assembly decides so in a state of preventive defence, adult male Hungarian citizens with residence in Hungary shall perform military service. adult Hungarian citizens with residence in Hungary may be ordered to perform work for national defence purposes, performing national defence and disaster management tasks, to provide economic and material services (art. XXXI(3-6)). It should be mentioned that a similar duty to take care of children includes the constitution of Spain (art. 39(3)), to take care of

[1] The Constitution of the Czech Republic, https://www.constituteproject.org/constitution/Czech_Republic_2013?lang=en

[2] The Charter of Fundamental Rights and Freedoms of the Czech Republic, https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf

[3] The Constitution of Hungary, https://www.constituteproject.org/constitution/Hungary_2016?lang=en

elder parents – the constitution of Lithuania (art. 38). The obligation of special services during the state national crisis is envisaged by the Spanish constitution (art. 30(4)).

In the constitution of the Republic of Poland of 1997 the duties are included in chapter II "The freedoms, rights, and duties of persons and citizens"[1]. In total there are six duties. To the citizen refer the following duties: loyalty to the country and the concern for a common good (art. 82), the defence of the homeland (art. 85(1)). All persons should obey the duty of the observation of the law (art. 83), the compliance with responsibilities and public duties, including tax payments (art. 84), the care for the quality of the environment (art. 86). There is one more duty, included in the section of the freedoms and rights. It provides that "everyone shall have the right to education. Education to 18 years of age shall be compulsory" (art. 70(1)).

The constitution of Romania of 1991[2] contains a chapter III "Basic duties" that stipulates three duties of Romanian citizens: "sacred duty" of the loyalty to the country and of faithfully fulfilling the public functions by entrusted citizens (art. 54), the right and obligation to defend the country (art. 55(1)), and to pay taxes and fees (art. 56(1)). The next two duties refer to every person: the observance of the constitution and other laws (art. 1(5)) and the protection and the improvement of the environment (art. 35(3)).

The constitution of the Slovak Republic adopted in 1992[3] foresees that the bills, international agreements and the government's decisions may impose some duties (art. 13). Directly it stipulates that "the defence of the Slovak Republic is a duty and a matter of honour for citizens" (art. 25(1)), "everyone has the right to education. School attendance is compulsory" (art. 42(1)), "everyone is obliged to protect and enhance the environment and the cultural heritage" (art. 44(2)). Some duties are not articulated explicitly. The constitution guaranties that no one may be subjected to the forced labour or services with an exception to i.e.: military service or other service laid down by law in lieu of compulsory

[1] The Constitution of the Republic of Poland, https://www.constituteproject.org/constitution/Poland_2009?lang=en
[2] The Constitution of the Republic of Romania, https://www.constituteproject.org/constitution/Romania_2003?lang=en
[3] The Constitution of Slovakia, https://www.constituteproject.org/constitution/Slovakia_2017?lang=en

military service (art. 18(2)). The Slovak constitution repeats after the German constitution, that "ownership is binding". This is explained that "it may not be misused to the detriment of the rights of others, or in contravention with general interests protected by law. The exercising of the ownership right may not harm human health, nature, cultural monuments and the environment beyond limits laid down by law" (art. 20(3)).

The post-Soviet Republic of Moldova passed in 1994[1] contains a chapter III "Fundamental duties" with four duties applicable only to the Moldavian citizens. This is: "a sacred duty" of the loyalty towards the state (art. 56(1)), "a sacred right and duty to defence the Motherland" (art. 57(1)), the duty to contribute to public expenses by paying taxes (art. 58(1)), and the protection of the environment and the preservation of historical and cultural monuments (art. 59).

A modest catalogue of the duties is included in section II "Human and citizens' rights, freedoms, and duties" of the constitution of Ukraine adopted in 1996[2]. Only one duty imposes obligations on the citizens: "to defend the Motherland, the independence and territorial indivisibility of Ukraine, and to respect for its state symbols" (art. 65). The last three duties refer to every person under Ukrainian jurisdiction: to strictly abide by the constitution the laws, not to encroach upon the rights and freedoms, honour and dignity of other persons (art. 68), to pay taxes (art. 67), not to harm the nature and the cultural heritage (art. 66).

CONCLUSIONS

The duties of a person and citizen play an important role in the state and the society since it is built upon people who owe freedoms, rights and duties to each other. In the Central and East European countries almost all constitutions (except he Czech Republic) expressly contain obligations. These are the duties of a citizen and a person. To the first group first of all refer duties of the loyalty, and defence of the home country. To the latter group, i.e. the duty of environment protection and compliance with the law. The most popular duties, present in all

[1] The Constitution of the Republic of Moldova, https://www.constituteproject.org/constitution/Moldova_2016?lang=en
[2] The Constitution of Ukraine, https://www.constituteproject.org/constitution/Ukraine_2019?lang=en

constitutions (with the exception to the Czech Republic) are: defence of the state and the environmental protection. Slightly less popular are duties of paying taxes and education. The constitution of Hungary includes a unique for the Central and East European region set of duties, i.e. to take care of children and elder parents, but known to other European constitutions.

To conclude, the number and the scope of constitutional duties in the Central and East European countries match the Western-European model of constitutionalism. The former socialist model of the constitutional duties, which in fact did not differ significantly from the western one, was reduced, de-ideologized, and rearranged. Currently, any of discussed documents contain a duty that would be unknown to other European constitutions. This also refers to Moldova and Ukraine, erstwhile Soviet republics. In general, in terms of constitutional duties, the position of a person in the Central and East European countries is regulated in line with the European standards.

Table 1. The constitutional duties in the Central and East European states

	BG	CZ	HU	MD	PL	RO	SK	UA
Loyalty				C	C	C		
Compliance with the law	C				P	P		P
Paying taxes	C			C	P	C		P
Defence of the state	C		C	C	C	C	C	C
Environment protection	P		P	C	P	P	P	P
Education	P		P		P		P	
Proper exercising of the ownership							P	
Services during the state crisis	C		C					
Contribution to the enrichment of the community			P					
Care for			P					

children and parents								

C – the duty of a citizen
P – the duty of every person

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THE PRINCIPLES OF LAW: PHILOSOPHICAL APPROACH

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Abstract:

Any scientific intercession that has as objective, the understanding of the significances of the "principle of law" needs to have an interdisciplinary character, the basis for the approach being the philosophy of the law. In this study we fulfill such an analysis with the purpose to underline the multiple theoretical significances due to this concept, but also the relationship between the juridical principles and norms, respectively the normative value of the principle of the law. These us are being materialized extensive references to the philosophical and juridical doctrine in the matter. This study is a pleading to refer to the principles, in the work for the law's creation and applying. Starting with the difference between "given" and ''constructed" we propose the distinction between the "metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law.

Key words: *Principles of the law; "given" and "constructed" in the law; Moral value; juridical value; metaphysical principles; constructed principles.*

INTRODUCTION

In philosophy and in general, in science, the principle has a theoretical value and an explanatory one as it is meant to synthesize and express the basis and unity of human existence, of existence in general and knowledge in its diversity of manifestation. The discovery and the assertion of the principles in any science concedes the certitude of knowledge, both by the expression of the *prime element*, that's exist by

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itself, without having the need to be deducted or demonstrated, as throughout the achieving of cohesion within the system, without which the knowledge and scientifical creation cannot exist.

The principle has multiple significances in philosophy and science, but for our scientifical approach, one keeps in mind this one:" as element, idea, basic law on which a scientifical theory is grounded, a norm of conduct or the totality of laws and basic concepts of a discipline"[1]. The common place of the meanings of the term of principle makes the essence, a common category important both for philosophy as for the law.

The principle represents the *given as such*, that may have a double significance: a) what existed before any knowledge as apriori factor and ground for the science; b) theoretical and resulting element of the synthesis of the phenomenon diversity for the reality of any type. The distinction, but also the relationship between "given" and 'constructed" are important in understanding the nature of the principles in science and mainly in law. In his work "*Science et tehnique en droit positif"* published at the beginning of XX century, François Geny[2] analyzes for the first time the relation between science and juridical technique starting from two concepts" the 'given" and the 'constructed". In his opinion Geny one thing is given" when it exits as an object outside the productive realities of human. On this meaning the author distinguishes four categories: the *real given, the historical given; the rational given;* the ideal given. From our researching theme's perspective two of these categories are of interest, namely:" the rational given" that consists of those principles that come out from the consideration that needs to be shown to the people and human relationships, and the "ideal given" throughout which is being established a dynamic element, respectively the moral and spiritual relationships of a particular civilization.

One thing is being "constructed" when being achieved by man, as a reasoning, a juridical norm, etc. The "given" is relative in the meaning that is being influenced by a 'constructed", by human activity. Regarding the "given", man's attitude consists in knowing it by the help of science. Regarding the "constructed" the man is by hypothesis the "constructor",

[1] *Romanian explanatory dictionary* (Bucharest: Publishing House of the Socialist Republic of Romania, 1975), 744.
[2] Author quoted by Ion Craiovan, *Introduction into Law's Philisophy* (Bucharest: All Beck, 1998), 63.

he can make from this respect, art or technique. The sphere of the constructed stretches out onto the social and political order.

The question that arises is if the law is "given", object of science, in other words for a finding, recording or it is "constructed'' , as technical work? From historical perspective, the law is obviously "given", object of science, such as it appears in the old law, in the international or national contemporary law. The drafting of the positive law yet assumes a "construction" and the juridical rules are the work of technique on this respect.

In the juridical literature this distinction has been retained, in compliance with which the science explores the social climate that requires a certain juridical normality, and the technique is aiming towards the modalities through which the law maker transposes them into practice, "builds" the juridical rules. It was emphasized nevertheless upon the relativeness of this distinction, having into consideration that the juridical technique also assumes a creation, a scientifical activity[1].

Therefore the principles represent the "given" as ideal or background for the science and the 'constructed" in situation they are developed or transposed into a human construction, included by juridical norms.

A good systematization of the meanings which the principle notion has is done in a monography[2]: "a) the founding principle of a field of existence; b) what would have been hidden to the direct knowledge, and requires logical-epistemological processing; c) logical concept that would allow the knowledge of the particular phenomenon."

This systematization, applied to the law means: ''a) the discussion referring to the substance of law; b) if and how we may know the substance; c) the efficiency of placing into the phenomality of the law, related or not with the substance."[3]

The need of the spirit to raise up to the principles is natural and mostly persistent. Any scientifical construction or normative system must relate to the principles that will guaranty or substantiate them. This regressive motion towards unconditioned, towards what is prime in an absolute way is for example of the motion that Platon follows in the

[1] Jean Dabin, *Théorie générale du Droit* (Bruxelles, 1953), 118-159.
[2] Dabin, *Théorie générale du Droit*, 20
[3] Dabin, *Théorie générale du Droit*, 20

Book VII of the Republic[1], when he puts the essence of the "Good" as a prime and no hypothetical principle. In the same meaning another great thinker[2] speaks about the "first principles" or the eternal principles of the "Being", no demonstrable, a ground for any knowledge and of any existing one, beyond which is nothing else but ignorance.

The question then is to know if what seems necessary, in the virtue of logics of knowledge is necessary also in the ontological order of the existence. In the "Critic of the Pure Reason",[3] Kant will show that such a passing, from the logic to the existing, (the ontological argument) is not legitimate. If the unconditioned, as a principle, is put in a necessary way by our reasoning, this fact cannot and must not lead us to the conclusion that this unconditioned exists outside it and independently of any reality.

In consequence, as the principles aim the existence in all its fields, they cannot and must not be immutable, but are the outcome of the becoming. They are a "given", but only as a result of the existential dialectics or as a reflection of becoming into the phenomenal world and of the essence.

Since the law is assuming a very complex relationship, between the essence and the phenomena, and also a dialectics specific to each of the two categories in the plane of theoretical, normative and also social reality, cannot be outside the principles.

The problem of the statute of the principles of law and their explaining was always a concern for the theoreticians. The natural law school argued that the source, origin, and therefore the grounds of the juridical principles are of human nature. The historical school of law, under kantianism influence. The law historical school, under kantianism's influence, opens a new view in researching of juridical principles' genesis, presenting them as products of the people's spirit (Volkgeist) which shifts the grounds of law from the universe of pure reasoning, to the junction of some historical origins scattered in a multitude of transient forms. The versions of the positivist school claim that the principles of law are generalizations induced by the social experience. When the generalization covers a series of social facts, in a

[1] Platon, *Opere* – volume V (Bucharest: Scientifical and Encyclopedic Publishing House, 1982), 401-402
[2] Aristotel, *Metafizica, Book I* (Bucharest: IRI, 1996), 9-69
[3] Immanuel Kant, *Critica rațiunii pure* (Bucharest: IRI, 1994), 270-273.

sufficient number, we are in the presence of principles. There are authors such as Rudolf Stammler that deny the lastingness of any juridical principle, considering the contents of law diversified in space and time, lacking universality. In the author's concept the law could be a cultural category.[1]

Referring to the same problem, Mircea Djuvara asserted: "All law science does not consist in reality, for a very serious and methodical research, but merely in releasing out of a multitude of law dispositions, their essential, which are precisely these last principles of justice of which other dispositions derive from. In this way the entire legislation is of a large clarity and what it is called the juridical spirit comes into being. Only thus the scientifical drafting of a law is being done. "[2]

In our opinion this is the starting point for understanding the principles of law.

In the specialized literature there is no unanimous opinion regarding the definition of the principles of law[3]. A series of common elements are identified, which we mention below:

- The principles of law are general ideas, guiding postulates, fundamental provisions or bases of the law system. They characterize the entire law system, constituting in the same time features specific to a certain type of law;
- The general principles of law configure the entire structure and the development of the law system, provide the unity, homogeneity, balance, coherence and its development capacity;
- The authors differentiate between fundamental principles of law, that characterize the entire law system and which reflect what is essential within the respective law type and the principles valid for certain law branches or juridical institutions.

[1] Rodolf Stammler, *Theorie der Recktswissenschaft* (Chicago: University of Chicago Press, 1989), 24-25.

[2] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv* (Bucharest: All Beck, 1999), 265.

[3] On this meaning see also: Ioan Ceterchi and Ion Craiovan, *Introducere în teoria generală a dreptului* (Bucharest: All, 1993), 30; Gheorghe Boboş, *Teoria generală a statului şi dreptului* (Bucharest: Didactical and Pedagogical Publishing House, 1983), 186; Nicolae Popa, *Teoria generală a dreptului* (Bucharest: Actami, 1999), 112-114; Ion Craiovan, *Tratat elementar de teorie generală a dreptului* (Bucharest: All Beck, 2001), 209; Radu Motica and Gheorghe Mihai, T*eoria generală a dreptului* (Timişoara: Alma Mater, 1999), 75.

Thus in the doctrine were identified and analyzed the following general principles of law: 1) providing the juridical bases for state's functioning; 2) the principle of liberty and equality; 3) principle of responsibility; 4) principle of justice[1]. The same author considers that the general principles of law have a theoretical and practical importance that consists in: a) the principles of law are drawing the guiding line for the juridical system and orientates the activity of the law maker; b) these principles are important for the administering of the justice as "The man of law must ascertain not only the positiveness of the law, he has to explain the reason of its social existence, the social support of law, its connection with the social values"; c) the general principles of law take the place of the regulating norms when the judge, in the silence of the law, solutions the cause based on law general principles[2].

One of the main problems of the juridical doctrine is represented by the relation between the law principles, law norms and social values. The opinons expressed are not unitary they differ pending on the juridical conception. The natural law school, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside their norms, positive and superior to them. The principles of law are grounded on the human reason and configure valorically the entire juridical order. Unlike this, the positivist law school, the Kelsian normativism considers that the principles are expressed by the norms of law and in consequence there are no law principles outside the juridical norms system.

Eugeniu Speranţia established a correspondence between the law and law principles:"If the law appears as a total of social norms, mandatory, the unity of this totality is due to the consequences of all norms related to a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between them. "[3]

In connection to this problem, in Romanian specialized literature was emphasized the idea that the law principles are fundamental provisions of all juridical norms[4]. In another opinion, it was considered that the law principles orientate the drafting and enacting of the juridical

[1] Popa, *Teoria generală a dreptului*, 120-130
[2] Popa, *Teoria generală a dreptului*, 119.
[3] Eugeniu Speranţia, *Principii fundamentale de filozofie juridică* (Cluj: Ardealul, 1936), 8. On this meaning see also Popa, *Teoria generală a dreptului,* 114.
[4] Popa, *Teoria generală a dreptului*, 114.

norms, they have the force of some superior norms, that are found in the text of normative acts, but they can be deduced from the "permanent social values" when they are not expressly formulated by the positive law norms[1].

We consider that the general law principles are delimited by the positive norms of law, but undoubtedly there is a relationship between these two values. For instance, the equality and liberty or equity and justice are valoric foundations of social life. They need to find their juridical expression. In this way appear the juridical concepts that express these values, concepts that become foundations (principles) of law. From these principles derive the juridical norms. Unlike the norms, the general principles of law have an explanatory value because they contain the grounds for law's existence and development. [2]

Besides other authors[3] we consider that the juridical norms relate to the law principle in two meanings: the norms contain and describe most of their principles; the functioning of the principles is achieved by putting into practice of the conduct provided by the norms. In relation to the principles the juridical norms have an explanatory, teleological narrower value, the purpose of the norms being to preserve the social values, not to explain the causal reason of their existence. The principles of law are the expression of the values promoted and defended by the law. One can say that the most general principles of law coincide with the social values promoted by the law.

For a correct understanding of the problematic of the values in law and their expressing by the principles of law some brief comments are needed in the context of our researching theme. The different currents and juridical schools, from antiquity up to the present, have tried to explain and substantiate the regulations and juridical institutions by some general concepts appreciated as being special values for the society. The law is grounded on judgements of value. Indeed by its nature the law implies an appreciation, a value rendering of human conduct in relation to certain values, representing the finality of juridical order such as: justice, common good, liberty etc [4]

[1] Ceterchi and Craiovan, *Introducere în teoria generală a dreptului*, 30
[2] Popa, *Teoria generală a dreptului*, 116-117.
[3] Popa, *Teoria generală a dreptului*, 116-117, Radu Motica and Gheorghe Mihai, *Teoria generală a dreptului. Curs universitar* (Timișoara: Alma Mater, 1999), 78.
[4] Paul Roubier, *Théorie générale du Droit* (Paris: L.G.D.J., 1986), 267.

The values are neither of a strict nature nor of an exclusively juridical nature. On the contrary, they have a larger dimension, moral, political, social, philosophical, in general. These values must be understood in their historical-social dynamics. Though some of them are to be found in all law systems, for instance the justice, nevertheless the specific and historical particularities of the society leave their print on them. The values of a society must be primordially deduced from philosophy (social, moral, political, juridical) which leads and guides the social forces in the respective society.

The law maker, in the enactment process, oriented be such values, expressed mainly in the general principles of law, transposes them into juridical norms, and on the other side, once these vales "enacted" they are defended and promoted in the form specific to the juridical regulation. The juridical norm becomes both a standard for the appreciation of the conduct pending on respective social value, or a means to ensure the achieving of the exigencies of such a value and the prediction of the future development of society. Needs to be added that the juridical norms substantiate the juridical values in a relative way because, either as a whole or individually, they don't show totally a juridical value, they do not exhaust its richness in contents.

In regard to the identification the values promoted by the law, the opinions of the authors do not coincide, yet they stay in closed related spheres. Thus, Paul Roubier named few such values *the justice, juridical security and social progress*[1]. Michel Villey named four large finalities of the law: *justice, good conduct, serving people and serving society*.[2] François Rigaux speaks about two categories, namely: the primordial ones called by him formal, *order, peace and juridical security* and the material ones *equality and justice*.[3]

The undeniable value that defines the finality of the law, in the concept of the most distinguished thinkers, yet from the ancient times, is the *justice.* The most complex concept *justice* was approached, explained and defined by numerous thinkers – moralist, philosophers, counselors, sociologists, theologians – that start in defining it from the ideas of *just, equitable,* in the meaning to give everyone what deserves. The general

[1] Roubier, *Théorie générale du Droit*, 268.
[2] Quoted by Jean-Louis Bergel, *Théorie générale du Droit* (Paris: Dalloz, 1989), 29.
[3] Quoted by Ioan Ceterchi and Ion Craiovan, *Introducere în teoria generală a dreptului*, 27.

principle of law, equity and justice is the expression of justice as a social value. Many concepts about the law would be suitable, be it on a rationalist line or in a realistic one. The rationalists argue that the principle of justice is innate to men, it holds onto our reasoning in its eternity. The realists argue that the justice is an elaborate of history and human general experience.

Regardless of theoretical orientation, the justice undoubtly constitutes a complex ground of the juridical universe. Giorgio del Vecchio asserts that the justice is a conformation to the juridical law, the juridical law being the one that contains the justice. According to Lalande the justice is the owner of what is just; Faberquetes considers the law as a unique expression of the principle of justice, and the justice, as, naturally, the unique content of the expression of law. It has been said that the justice is the will to give everyone what it is his; is the balance or proportion of the relationships between people, is the social love or the harmonious fulfilling of the human being essence. [1]

The justice as a value and principle of the law exists throughout the juridical norms contained in constitutions, laws etc. This does not mean that the objective law, with expressings, carries on entirely and unavoidably the "justice": not all that is lawfully in force is just. On the other side there are juridical norms, such for instance, the technical ones that are indifferent to the idea of justice. There are circumstances when the positive law is inspiring more utility consideration than the justice ones, in order to maintain the order and stability in society.

In our opinion, the justice, as social value and also as a general principle of law, dimensions itself in the ideas of just measure, equity, lawfulness and good faith. Mainly the concepts of just measure and equity express the proportionality.

The principle of justice has a guidance contents on the cognitive-acting line: to give each one what deserves. A law system is unitary, homogenous, balanced and coherent if all its components "provide, protect, establish" in such a way that every physical and juridical person be what it is, to have what he deserves without injuring one another or the social system.

The equity is a dimension of the principle of justice in its consensuality with the moral good. This concept moulds the formal

[1] For enlarging the topic see Gheorghe Mihai and Radu Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului* (Bucharest: All, 1997), 128.

juridical equality, makes it human, introducing into the law systems in force the categories of the moral from the perspective of those for which the justification is a making for good and for liberty." Thus considered, the equity disseminates till the farthest spheres of the juridical norms system, fructifying even the strictly technical or formal fields, appearantly indifferent towards the axiological concerns" [1]. Understood by the idea of proportionality, the equity regards the diminishing of the inequality there where the establishing of a perfect equality (also named formal justice) is impossible due to the particularity of the situation in fact. In other words, in relation to the generality of the juridical norm, the equity suggests to take into consideration the situations in fact, personal circumstances, unicity of the cause, without falling into extreme.

The idea of justice develops under the influence of the social-political transformations. Thus, in the contemporary democratical states, in order to underline the economical, social, cultural rights, one speaks about the *social justice.* The achieving of the social justice is mentioned as a requirement of the lawful state in the document adopted at the Conference for European Security and Cooperation, Copenhague 1990.

Another problem of the juridical doctrine is to establish the relationship between the principles of law and those of the moral. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)[2], dinstinguished between the mission of the right to protect the external relationships of human individuals through provisions that form perfect and sanctionable obligations and the mission of the moral to protect the inner live of individuals, only throughout provisions that form imperfect and unsanctionable obligations. This difference between morals and law has become classic.

Undoubtedly, the law cannot be mistaken with the morals, for several reasons analyzed in specialized literature[3]. However, law and morals are from ancient times in a closed relationship that cannot be considered as accidental. The respective relationship is axiological. The juridical and ethical values have a common origin, respectively the

[1] Mihai and Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului* , 133.
[2] Quoted by Ion Dobrinescu, *Dreptatea şi valorile culturii* (Bucharest: Romanian Academy, 1992), 95.
[3] See also Giorgio del Vecchio, *Lecţii de filozofie juridică* (Bucharest: Europa Nova, 1995), 192-202; Dobrinescu, *Dreptatea şi valorile culturii*, 95-99; Mihai and Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, 81-86; Ceterchi and Craiovan, *Introducere în teoria generală a dreptului*, 39-42.

conscience of the individuals living in the same community. The theory of justrationalism – the modern form of juristnaturalism – tried to argument that there is a background of universal and eternal justice, because they are written within human reasoning where they connect with the principles of good and truth. Therefore, as law is rational, it is natural and because it is natural, it is also moral.

Of course, the law is eminamently governing the outer conduct of human individual. Nevertheless, the law is not disinterested by the morals, "by the fact that by means of equity it seeks the good acting to harmonize the exterior with the inside of the individual, throughout the same equity"[1].

We consider that indeed the morals and law have a common valoric structure and it can be deducted only from the assertion pretty often met and according to which "the law is a morals minimum" but also from the observation that there isn't a moral assertion to be denounced as unfair, yet sometimes are being discovered juridical assertions in disagreement with the moral principles. It is noticed the tendency of the law to make appeal to values with a moral character so that they can be introduced into juridical regulations. In this respect Ioan Muraru stated that: "the moral rules, though usually are closer to the natural rights and customary laws, they express ancient and permanent desires of mankind. The moral rules, though usually are not fulfilled, in case of need by using the coercive force of the state, they need to be juridically backed up in their fulfilling when they defend human life, freedom and happiness.Therefore in Romania's Constitution the referrings to moral hypostasis are not missing. These constitutional referrings provides efficiency and validity to the morals. Thus, for example, item 26, item 30 protect « good habits », item 35 mentions the « public morals » also the « good faith » which is obviously first a moral concept consecrated by item 11 and item 57[2]. Therefore the general principles of law and those of the morals have a common background of values. The norms of the law can express values that at their origin are moral and are to be found in the contents of the general principles of law, such as is for example the equity or its particular form, the proportionality.

[1] Mihai and Motica, *Fundamentele dreptului...*, 84.
[2] Ioan Muraru and Elena Simina Tănăsescu, *Drept constituţional şi instituţii publice* (Bucharest: All Beck, 2003), vol.I, 8.

The principles of law have the same features and logical-philosophical significances as the principles in general. Their particularities are determined by the existence of two systems of dialectical relationships specific to law:

1. principles – categories – norms;
2. principles – law, as social reality.

Few of the most important features of the principles of law can be identified, useful in order to establish if the proportionality can be considered a principle of law:

A) Any principle of law must be of the order of essence. It cannot be identified with an actual case or with an individual assesment of juridical relations. The principle must represent the stability and balance of the juridical relations, regardless the variety of normative regulations or particular aspects specific to juridical reality. In consequence, the principle of law must be opposed to the aleatory and should express the necessity as essence.

However, the principle cannot be a pure creation of the reasoning. It has a rational dimension, abstract of maximum generality, but is not a creation of metaphysics. Yet of substance order, the principles of law can neither be eternal nor absolute, but they do reflect the social transformations, they express the historical, economical, geographical, political particularities of the system which they contain and at their turn, which they substantiate. [1] The principles of law develop so that the realities they reflect and explain be subject to improving. The scientifical improving of the juridical analysis could never be ended. But in law, one needs to give immediate solutions so that the practical life does not wait"[2].

Being of the substance order the principles of law have a generalizing character, both for the variety of the juridical relationships as for the norms of law. At the same time expressing the essential and the general of the juridical reality, the principles of law are grounds for all other normative regulations.

There are great principles of law that do not depend on their consecration on the juridical norms as it is the juridical norm that

[1] On this meaning see Mircea Djuvara, *Drept şi sociologie* (Bucharest: I.S.D., 1936), 52-56 .

[2] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv* (Bucharest: All Beck, 1999), 265.

determines their concrete contents in relation to the historical reference time.

B) The principles of law are consecrated and acknowledged by constitutions, laws, customary, jurisprudence, international documents or formulated by the juridical doctrine.

The principles must be accepted internally and must be a part of the national law of each state. The general principles of law are consecrated in constitutions. The characters of the state's juridical system influence, and even determines, the consecration and acknowledging of the principles of law.

The work of consecration of the principles of law in the political and juridical documents is in full progress.

Thus, in the international documents such as U.N.O Charta or the Declaration of U.N.O. General Assembly in 1970, are consecrated principles [1] that characterize the democratical international law order. The regional law systems had known and acknowledged their own principles. For example, the community law consecrates the following most important principles: principle of equality, protection of the human fundamental rights, principle of juridical certitude, principle of subsidiarity, principle of authority of res judicata and principle of proportionality[2]. Most democratic constitutions consecrate principles such as: principle of sovereignty, principle of juridicality and supremacy, constitution, principle of democracy, principle of pluralism, principle of representation, principle of equality etc.

The jurisprudence has a significant role in the consecration and applying of the principles of law. There are situations when the principles of law are acknowledged by jurisprudential ways, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends to the judges to decide in the absence of some texts, in the light of the general principles of law.

There are systems of law in which not all principles have a normative consecration. We refer mainly to the great system known by the name of *common law*, consisting in essence of three normative, autonomous and parallel subsystems: common law (in a narrow

[1]Alexandru Bolintineanu and Adrian Năstase and Bogdan Aurescu, *Drept internațional contemporan* (Bucharest: All Beck, 2000), 52-71. ONU Charta specifies the "General Principles of Law Acknowledged by Civilized Nations" as source of law

[2] Craiovan, *Tratat elementar de teorie generală a dreptului* , 211.

meaning); equity; and statute-law. Equity represents a set of principles coming out from the practice of the instance and is a correction brought to the common-law rules.

With all variety of the conseratory manner and the recognition of the principles of law, comes out the need at least for their recognition in order to be characterized and enacted in the system of law. This consecration or acknowledging is not enough to be doctrine nevertheless it must be realized throughout norms or jurisprudence. However, a distinction between the consecration or acknowledging of the principles of law must be made, and on the other side, in their enacting.

C) The principles of law represent values for the law system, because they express both the juridical ideal, as the objective requirements of society, have a regulating role for the social relations. In situation in which the norm is not clear or it does not exist, the solving of the litigations can be achieved directly based on the general or special principles of the law. As ideal, they represent a coordinating ground for the work of law making.

D) In classifying the principles of law it is started from the consideration that between them there is a hierarchy or relation from the general to particular[1]. Starting from this observation one can distinguish:

1. General principles of law which form the contents of some norms with universal application with a maximum level of generality. These are acknowledged by the doctrine and expressed by the normative acts in the internal law or internationally treaties as having a special importance. As a rule these principles are written in constitutions having thus a superior juridical force in relation to the other laws and all law branches. Referring to the theoretical and practical importance for studying the law branches, Nicolae Popa remarks:"the general principles of law are fundamental provisions that cumulate the creation of law and its enacting…. In conclusion the action of the principles of law has as a result the conceding of *certitude of law* – the guaranty granted to individuals against the unpredictibilities of the coercive norms – and the congruence of the legislative system, namely the concordance of the laws, their social character, credibility, opportunity."[2]

The general principles have a role also in the administering of justice, because those in charge with the law enforcing must know not

[1] Ceterchi and Craiovan, *Introducere în teoria generală a dreptului*, 31.
[2] Popa, *Teoria generală a dreptului*, 117.

only the letter of the law, but also its spirit, and the general principles' make up of this spirit. As part of them one can include: principle of lawfulness, principle of consecration, respecting and guaranteeing human rights, principle of equality, principle of justice and equity etc.

2. The specific principles that express particular values and as a rule have a limited action to one or several branches of law. They are mentioned in codes or other laws. In this category can be included the principle of lawfulness of penalties, binding of contracts, presumption of innocence, principle of compliance with international treaties etc. The special principles have their source of values in the law's fundamental principles.

For instance the proportionality is one of the oldest and classic principles of law, rediscovered in the modern age. The significance of this principle, in a general meaning, is that of an equivalent relation, balance between phenomena, situations, persons etc, but also the idea of just measure.

Ion Deleanu specifies that: "At the origin, the concept of proportionality is outside the law; it calls up the idea of correspondence and balance, but also of harmony. Appeared as a mathematical principle, the principle of proportionality was developed also as a fundamental idea in philosophy and law receiving different forms and acceptions: "reasonable". "balance", "admissible", "tolerable", etc[1]. Therefore, the proportionality is a part of the content of principle of equity and justice, considered as being a general principle of law. At the same time by its normative consecration, explicit or implicit, and by jurisprudential applying, the proportionality has particular significances in different branches of law: constitutional law, administrative law, community law, criminal law etc. This principle definition, understanding and applying, in the above shown significances result from the doctrinal analysis and the jurisprudential interpretation.[2]

[1] Ion Deleanu, *Drept constituţional şi instituţii politice* (Bucharest: Europa Nova, 1996, volume.I), 264

[2] For details see, Marius Andreescu, *Principiul proporţionalităţii în dreptul constituţional* (Bucharest: C.H. Beck, 2007).

CONCLUSIONS

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law metaphysic these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law.*The distinction which we propose has as philosophical grounds the above shown difference between 'constructed" and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequently the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual

significances and metaphysical meanings are to be, after their later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no preconstituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a 'given" in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental 'given" and not a transcendent of the law, consequently, are not "beyond' the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation

that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental 'given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty.* In a future study, we will explain extensively the consideration that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the principes of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work *„Substamzbegriff und Funktionsbegriff"* (1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientifical knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that 'world of ideas" which Platon was talking about.[1]

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the

[1] For more details see also Constantin Noica, *Devenirea întru fiinţă* (Bucharest: Humanitas, 1998), 332-334.

juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality[1].

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the juristnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The juristprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16th 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: "The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the Consitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental

[1] Noica, *Devenirea întru fiinţă,* 327-367.

principles of the fundamental Law, mainly with the principles of lawfull state and the social state"[1].

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge respects the character of being of the juridical system, not only the functions or juridical relations.

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THE RIGHT OF GOOD GOVERNANCE IN WAR TIMES

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Abstract:

If 2020 and 2021 year were marked by the pandemic crisis, it seems that 2022 is more complicate and copies older times, when countries and governments act to change frontiers and territorial population distribution. These actions create a lot of problems to any govern, but it also helps the scholars to develop some ideas and concepts on specific areas.

In fact, we must underline that during such complex situation it becomes necessary to see if modern concepts – good governance, good administration, etc. – will be applied in neighbour countries and what are possible changes on their application. Not whole planet is on war, meaning that governments must adapt to such situations and to offer the same public service quality during all events, especially if that country is not on a war. Not to forget that governs can be changed too during such crisis, because human compassion to abroad events does not exclude pretentions to national governance and different results on general elections.

In such paradigm we need to analyse the governmental actions, because their costs will be supported by all citizens. Even for some days and weeks it might be a tolerance for politicians, because wars are not always predictable, after a while people will ask for the same quality of public administration.

Key words: *Good Governance; War; Quality; Citizens; Public Administration; Social Trust; Elections.*

INTRODUCTION

To write about good governance is not complicate, as many books and articles describe its requests. In fact, good governance is present as ideal of mankind since Antiquity and many wise people write to what states need to create/develop it. Such kind of wise people lists are

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available to any good university who study and teach social sciences. To create good governance is a science and an art, with an always specific result: the social trust from citizens to state institutions.

In fact, human history can be described as a continuous problem with a single topic: the quality of governance and the citizens answer to it. Even is not easy to accept, the dictatorships represent just a way to control and to prevent citizens' reactions, when a group of people – despite the single rules, his actions are always implemented by a number of people organised in some state institutions (police, army, gendarmeries, etc. – act and keep the legal violence against everyone who do not accept their rule. As much as dictatorships are more successful on years, as much the level of life reduction – and this result include life expectancy diminution.

Despite the fact of war number reduction since 1945 – and mainly after 1989 – political leaders did not renounce to such instrument of power. Truly, the costs of wars increased in the last decades, as military technology procurement increase, but war is still here and 2022 year show it clearly. In such case, is necessary to see where war legislation ends and when good governance principles appear.

1. Christopher Blattman, a prominent specialist in war theory considers as causes of war five reasons[1], which we'll briefly present in our text:

"This first is unchecked interests. The costs of war are the main incentive for peace, but when the people who decide on war aren't accountable to the others in their group, they can ignore some of the costs and agony of fighting. These leaders will take their group to war too frequently. Sometimes they expect to gain personally from conflict, and so they're enticed to start fights. Unchecked rulers like these are one of the greatest drivers of conflict in history". In a simple description, many dictators use this paradigm to start their aggression against other countries.

"The second reason is intangible incentives. There are times when committing violence delivers something valued, like vengeance or status or dominance. In other cases, violence is the sole path to righteous ends – God's glory, freedom, or combating injustice. For some groups, these

[1] Christopher Blattman, *Why we fight: the roots of war and the paths to peace* (New York: Penguin, 2022), 19 – 21.

ethereal rewards can offset the pain and loss from fighting. Any preference for them will run against the costs of war and tilt a group away from compromise.

The third way bargains fall apart comes from uncertainty. If you've ever called a bluff in poker, you've grasped this logic already.

Fourth is something called a commitment problem. Usually, when your rival grows powerful, your best option is to concede something. But what if you're warned of your opponent's rise in advance? You can strike now, while you're still strong, and avert your decline. If the looming shift in power is large enough, your incentive to attack may be irresistible.

Fifth and finally, our misperceptions interfere with compromise. We are overconfident creatures. We also assume others think like us, value the same things we do, and see the world the same way. And we demonize our enemies and attribute to them the worst motives. Competition and conflict make all these misjudgments worse".

2. We mention this war causes description because in every case governments can use different answers to prevent or to solve such crisis. From negotiation to armament procurement, every tool used can stop or prevent a war, but on this area other sciences and practices are involved. In every case, a war is nothing completely spontaneous, meaning that a dedicated government is able to recognise early signs of war. In such case, a wise government will act carefully, adopting measures to protect people and preventing good's damages and life's looses.

We also need to underline a specific characteristic brought by the last century: the speed of political career crush. In fact, during centuries to be an aristocrat offered a single position within society, a superior one, no matter mistakes you made. Only when rulers became disappointed it appeared a danger for aristocrats and mainly when they organised plots against rulers. Before that, it was very simple to live as aristocrats, because it was not a real penal liability for them, people being considered as "servants of king and local rulers". In such strength relations citizen's needs was not considered, with one exception – the military one.

Truly, some rulers adopted a good policy for commerce and to develop some working domains, but in most of the cases these evolution was just a way to create a balance in "power national game". Sometimes too strong aristocrats were able to create some cabbalas against rulers and in such "power game" the help of town inhabitants was very useful –

thus, many kings developed towns just to oppose their people against aristocrats' strength.

Since the last decades of the 19th century people started "to matter" as citizens, because they got the right to vote and with they become able to change political hierarchies within democratic countries. The big changes in military operation made in the second part of 19th century claim big number of soldiers and from that moment families asked for more rights and more governmental help for the blood offered. From that moment it become clear that government can resist only if citizens are satisfied with main pillars of governance.

For sure, we have not enough space here to describe how this process appeared and grown, but it is important to remember that the main change in Europe was made by war or by internal protests. If war was expressed in Two World Wars and some other local conflicts, internal protests appeared due to bad/low level governance, and main example is Russian protest from February 1917. To present history of European protests it takes also a lot of space and our text is dedicated to other topic, but is necessary to underline the direct connection between war strategies development, human needs and the fundamental change in legal practice: former king' servants become country citizens with rights and claims to government.

3. The after-World War 2 period becomes for mankind a special one, because in the name of perfect governance world had been separated into two blocks. No matter the military aspect of competition between them, the real dimension of propaganda was settled – in fact – on a single idea: "our system is a paradise, come and join to our system"; as example, Soviet Union presented itself as "paradise of workers".

A paradise means – above any criteria – to offer the best life possible to its inhabitants. Of course, a best life for people means a perfect public administration activity and a collaborative behaviour of politicians. Again, is not necessary to present the whole competition among communist block and free-world, but there was two important characteristics who appeared after 1945.

First, the number of wars strongly decrease, meaning people become less used with "wartime behaviour", meaning that "restrictions" become a forbidden word – in this case, the 1968 famous slogan remain for centuries: "is forbidden to forbid". This slogan – joined by other with

quite the same content – express not just a wish to not repeat war as military operations, but a strong need to left behind economic (food) restrictions and any psychological traumas. Helped by other technological improvement – from cars' use generalisation to contraceptive pills and from agricultural progress to public health benefits – human life become more controllable and people considered for the first time that war is not acceptable, even governments want so. As consequence, the level of pacifism had increased to highest level in mankind history and from this, the disgust on the aggressive leaders.

Secondly, the quality of economy and public services improvement become the main criteria for citizen's loyalty after 1945 year. Loyalty means in the post-war society two things: to change ruler by vote – even on anticipated elections – and to leave country, if the quality of government is decreasing. In the second case we found roots for good governance concept and its affirmation started as political promise, but also as a citizen' whish, able to be transformed into a right, recognised by legislation.

Good governance become a double-meaning concept, because scientists developed its contain after a specific methodology, who is not always totally correspondent with people perception of it (concept). After a while European legislators adopt this concept and start to develop partially in their national legal framework. Of course, European Union adopted the basics of good governance and in one its official documents the Council of Europe stated on 12 principles of this concept[1]. Some of them are easy understandable by ordinary people – rule of law; efficiency and effectiveness; participation, representation, fair conduct of elections; ethical conduct; accountability – but some others appeared more as cultural constructs.

No matter the scientific dimension of good governance's concept, citizens understand in a more practical way its conducts, adding protection of their lives against any criminal or economic menace. In this practical vision good governance become a right for citizen – as perception – and an obligation for any political and administrative leader. In fact, public administration must fulfil partially its conducts, in a conceptual neighbourhood with the right to good administration. Both of

[1] The Council of Europe, *12 Principles of Good Governance*, available at https://rm.coe.int/12-principles-brochure-final/1680741931, *consulted on 16 of May 2022*.

them have a specific administrative effectiveness, meaning that political concepts are expressed with administrative tools, able to be measured. As consequence, the maladministration becomes a symptom of good governance and good administration lack strong enough to justify a different political option during elections.

4. Cold War had been won by liberty and countries who live there were strong enough to impose worldwide after 1990 not just their economic force, but also their conceptual space. In this paradigm, many concepts became global, as Fukuyama underlined, even he was not right on rule of law universal spreading. This global concept spreading was considered natural and it was accepted without public opposition, despite the politicians' behaviour in the 21st century.

The global force of governance and administration concepts forced the last decades' legislators to implement in a good proportion their conducts, being helped by information technologies advent. People get easier informed about good governance achievements from any country or community (in Romania, for example, Ciugud commune become famous for this) and start to press politicians to change governmental behaviour into a specific one, close to such target.

On this purpose people got a precious help from few important statistics rankings which are measuring rule of law, transparency, corruption, economic efficiency, quality of governance, state' fragilities, etc. Despite their not totally-accurate data, these indicators offered enough possibility to learn about good governance and its basics, as any ranking is joined by a methodological presentation that covers many pages with definitions and examples. For example, the most recent good governance index ranking[1] analyses 104 countries in 132 pages, describing main items and presenting worldwide cases of good governance.

5. The Cold War ending was joined by a specific position, considered again war as being global prohibited not just by international law, but also by conscience. After 1990 people from Europe, America, Australia and partially Asia considered war as a part of history that will

[1] *Chandler Good Governance Index Report 2022*, available at https://chandlergovernmentindex.com/wp-content/uploads/CGGI-2022-Report.pdf?homepage=1, *consulted on 16 of May 2022*.

never come back and from this moment the good governance safety attribute will be considered mostly on internal situations, like organised crime and violence, with a single international menace – terrorism.

30 years of peace in a good part of globe made people used with a different language of safety and with specific claim on good governance, mostly on economic, social and digital areas. From this point of view, in many countries human psyche become "blank" to international conflicts consequences and only few wars – mostly in Asia and Africa – were far from deep press coverage to decrease this perception. As consequence, a real war in Europe will attract – and it made, in fact – more psychological reactions than in other centuries. A war means a strong effort given by two countries or more to a specific result and other countries reacting to it. For our text the main interest is given by the second group of actors, due the lack of space for an exhaustive analysis.

In the war times good governance must exist too. In the same time, is necessary to remember that rulers' elections are not cancelled and their mistakes during such crisis will be sanctioned by people with no mercy. In fact, the good governance standards and conducts are more carefully watched by citizens because an ancestral experience teach people that a war can issue a very restrictive legislation, with not very moral administrative and political behaviour behind (bribes for food and weapons contracts, as main example). Is true, some preparations for preventing war or aggression against a country are not always visible and in this case transparency principles is not respected, but after calm getting citizens will analyse facts and behaviours. Sometimes is forgot that after big conflicts in every country involved appeared some legal actions against some rulers and such kind of investigations/court cases appeared in neighbours countries too.

A specific position is given on these standards in citizens' participation on public things. Here there is a complicate equation, because some actions needed to be implement are known just by professionals, but if citizens got the perception of public administration absence the result is the lack of loyalty and – in worst case – a lack of support to their government. Loyalty during the 21 century – as the same Fukuyama underlines in one if his recent books[1] – become very important. This importance appeared because people see and compare

[1] Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (Farrar Straus and Giroux, 2018).

other good practices, having more rights to change their leaders – contrary to centuries of feudal oppression, when they have just the revolt solution during lack of satisfaction into aristocrats and kings. It will be necessary to find the correct proportion between citizens' participation on public things and specialists' competence on war preparation, preventing a state collapse.

In any situation, the accountability and proper financial activity will be fundamental in population perception. In such case, the leader who will violate their conducts will be considered as a menace for society. Despite the fact that war brings a budgetary recalibration, the financial equilibrium principle is not cancelled too. Good governance during war time means in fact to achieve good results spending less money that you predict (at conflict beginning), because war loans and any other mandatory contributions imposed by governments will be hardly accepted by people.

Good governance means also to protect people and their rights. Even war can be close or far, it not justifies restrictions before conflict starts. Restrictions must be proportional with their purpose and to not create social tension, because a war can be long and people's government mistrust can manifest in different ways, but with very expensive costs for a country. A good governance means today to do everything possible to prevent a war, but without losing moral compass. Again, good governance perfect equation is not created, but from researches it appeared a strong connection between human rights and human dignity, not just on domestic relations, but also on international area. Good governance means, at the end, a satisfied citizen about his position within country and about his state place on international space.

CONCLUSIONS

The right to good governance during war times requests a wide research, where its limits can be no smaller than a handbook for master degree students. Of course, our text tried to present just the basics of this topic, promising to add more explanations in a future article.

Good governance today becomes a real right for people, being real criteria of selection during elections. Being a (modern) right, its existence has a specific human dimension, as the word "good" express a specific result of its application. The word "good" means here a

satisfaction for citizens, but also a restriction applied to political space to adopt any kind of rule, because lack of "qualitative governance" can create complicate results during general elections.

During war times good governance is not cancelled, but in fact it becomes even stronger, because citizens measure their satisfaction with two criteria: less military losses/preventing a war against their country and smaller daily costs. In the second case good governance is related to whole conducts brought by this new right, applying all criteria in governmental work analysis. The governmental/political/administrative behaviour applied to prevent war creates some differences and a reduce on good governance precepts, but legislators must remember that after wars different investigations appear just to measure the equivalence between political speech and facts. Because political speech today is settled to good governance too, it means that after a war some investigations will follow just its implementation, with specific conflict' peculiarities.

Good governance can be modified during a war just after the hostile behaviour appears and not before. Its psychological nature – what is good for me can be not good for others – oblige governments to adopt a competent rules set with different results, but in any case, a full wallet for everyone means that politicians understood its contain and fulfil it.

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JURIDICAL RESPONSIBILITY OF THE STATE – THE CONSEGUENCE OF ILLICIT BEHAVIOR OF HIS REPRESENTATIVES

Elena MORARU[1]

Abstract:

The juridical responsibility of the state is grounded on necessity of the regulation and protect of social relationships, the creation of conditions of a normal and adequate living in society, the providing of legality and right order which in its turn grounds the necessity of existence of state as a sovereign subject of the public law. In this way as a basis of juridical responsibility of the state may be generally indicated the social grounds of the juridical responsibility that is non-admission of damages causes founded on the rigor of an efficient achievement of the state functions.

Key words: *state functions; providing of legality; public law; responsibility.*

INTRODUCTION

The order to put in charge of the state the support of the negative consequences generated of the commission of an illicit action by a cause of public law is settled by the procession norms which at the existence of legal basis appear procession relations. The degree of settling of diverse forms of juridical responsibility is different. But the juridical deliberation of the mechanism of juridical responsibility of the state represents the guarantee of its achievement, ensures thus the compensation of damages caused to citizens and other collective persons.

B.T. Bazilev appreciates the juridical responsibility as being a juridical relation in dynamics traversing three distinct stages the formation, concretization and achievement.

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The first stage begins with the commission of the illicit action[1] and is expressed in a set of procession reports having as parties the competent organs and the perpetrator, being especially indicated parts of the law or contract. Reported to the juridical – criminal responsibility, this stage will coincide with the phase of criminal pursuit concerning the civil responsibility this one would coincide with advancing claims to the debtor.

The second stage is a continuation of the fist and is being summarized by choosing the adequate, equitable and proportional sanction for the concrete illicit action. As a result is adopted the act of applying the law (the juridical decision) or is voluntary executed the act of achievement of the right (for example the parties conclude an agreement regarding applying the innovation rules, renewing in this way the pre-existent juridical report).

The third stage stipulates the proper applying of sanctioning measures with reference to the concrete perpetrator. As part of this stage occurs the materialization of the juridical responsibility and realization of the objectives of this juridical institution – the re-establishment of equity and legality regime and right order in society. Thus all those mentioned are being absolutely reported at the institution of the juridical responsibility of the state bodies and civil servants too.

Concerning the responsibility of the state as a person here the development of the juridical relation is a little differentiated. The first stage starts with the lamenting of the damage which should to be compensated from the state account. In this way, this stage is a premise and a reason for appearing juridical relationships for protection between the state and the citizen.

In the case of appealing of the citizen in the instance referring the repairing of this damage by the state he will adopt on application act of the right in which is deliberately need explained the counter-value of the caused damage that must be compensated.

The specific nature of this responsibility of the state consists in that the second phase can not at all be achieved voluntarily by these parties on the basis of their own agreement on the contrary it compulsory involves the judiciary instance. In the Republic of Moldova on the juridical report in which occurs the reparation of the damage by the state

[1] Б. Т. Базылев, *Юридическая ответственность (теоретические вопросы).* (Красноярск, 1985), 94-95.

it is being applied the rules of common right applied to appeared obligations as a result of caused damages[1].

The content of the illicit deed attracting the patrimonial responsibility of the state includes:

1) the commission of the deed running counter to the juridical norms by the person that caused the damage;
2) the damage occurred in relation to the person the rights of whose were violated and were not taken into account his interests;
3) the relation caused between the first two elements;
4) the guilt of the person that caused the damage;
5) the condition referring the subject[2].

The contradiction between the behaviour de facto and the disposition of the juridical norm is the distinctive sign of the objective side of juridical responsibility. In parallel with this specificity some authors, sometimes mention that by this non corresponding between the disposition of the juridical norm and the behaviours of the state or of his representative might be understood a visible non corresponding between the respective behaviour and social, moral of other nature non regulated norms on the juridical plan.

From the systemically interpretation of the norms of procession and material right we may conclude that the illicit deed of law body and of civil servant may be reflected in illegal act adopted of these ones in an action of other nature which violates or not take into account the rights and interests of right subjects. They should here take into account of the method of juridical regulation in the sphere of the state apparatus.

Thus the theory of the civil right mentions that the civil legislation concerning the civil offences, that is those ones in accordance with which the lamenting of a damage is recognized as being illicit and attracts the obligation of the damage repairing in all cases except rigour ones especially regulated by the law. Yet this principle is not reflected on the actions of the state bodies and civil servants because the authority act is presented by legal up to the opposite test ascertained in administrative and juridical order.

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[1] D. Baltag and E.Moraru, *Statul subiect al răspunderii juridice* (Chișinău, 2015), 80.

[2] С.Ю. Рипинский, *Юридическая природа имущественной ответственности государства за вред, причиняемый предпринимателям.(Принципиальные черты правового регулирования* //Юрист. 2001, №3), 16.

The existence of damage is the result of some actions or inactions of the persons which had caused it. This one may be caused by the body (a person with responsibility functions) both by active actions and inactive ones. The active actions are manifested in emission of individual acts such as: requirements, dispositions as well as normative acts[1]. They can also be expressed by the effecting practical actions of organization having a juridical importance. The non action of the body (of a person with responsibility functions) may be expressed in non-taking of decision, not committing actions of juridical importance[2].

The problem of damage defining is not completely solved in the science of the civil law. G. V. Ciubukov, proposes to explain the damage by the result of any deed with the impact on the objects of external factors, but the damage by the diminution the positive characteristics, the size of the losses and non-recovered expenses[3].

Thus, resulting from the met regulations in art.19, 20, 2006, 2007 CCRM[4], we ascertain that harm and damage are identified as meaning that is why by the damage caused by the state bodies or civil servants we must understand any violation or reduction of material or non-material benefits of the private persons, of the rights of these ones.

In this way, the patrimonial responsibility of the state is started as a result of illicit behavior of the state bodies or civil servants or other subjects indicated especially by the law, with generating a damage reference to the victim.

Concerning the subject of juridical responsibility of the state we mention that here is applied the special rule of the subject. But here on other specific character is that referring to the possibility of non coinciding of the subject compensating the caused damage with that one that de facto had caused the concrete damage[5].

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[1]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).

[2] V.Guțuleac, *Bazele teoriei dirijării de stat* (Chișinău, 2000), 242-243.

[3]Г.В. Чубуков, *Институт возмещения вреда: аспекты компенсации и ответственности*//Вестник МГИУ. (Серия «Гуманитарные науки». 2002. №1), 139.

[4] *Codul Civil al Republicii Moldova,* nr.1125-XV din 13.06.2002, Monitorul Oficial nr.82-86/663 din 22.06.2002.

[5] Б. Т. Базылев, *Юридическая ответственность (теоретические вопросы).* (Красноярск, 1985), 95.

As a subject generating the damage appears the state body or civil servant that acts in the name of the state and which exercises the functions of this one. The state, in its turn, assumes the obligation of repairing the damage in its own charge in other words said supports the risk of exercising its functions by their representatives – the state bodies/civil servants. It is exactly for these reasons, the measures of responsibility regulated by the art. 2005, 2006 CCRM, will be applied only in the conditions of damage causing as a consequence of exercising of concerned subjects competences. This is here that is being manifested the character of public law of juridical responsibility of the state. At commission of the deed with causing respective damages, by the special subject but out of his competence does not occur at all the juridical responsibility of the state.

The repairing of the damage by the state does not exclude no account the responsibility in order of regress of the power of body or of civil servant being culprit in causing the proper damage. (art. 2024 (2) CCRM)

Thus the right on demand of repairing of caused damage by a state body or civil servant in the process of achievement by these subjects of their competition it is being appeared in certain concrete conditions that generally forms the ground de facto of bearing of this right.

Thus, the ground de facto just mentioned is constituted of the following elements:

- The commission by the state body or the civil servant of some illegal actions /non actions or the adoption / emission of an illegal act (objective ground). We mention that the legal deeds of these subjects, if they attract the causing of the damage, will not unleash the procedure of hauling if the law does not warn otherwise;

- The existence of the caused damage by the illicit deed of the body/civil servant or by the emit illicit act/ adopted by these ones;

- The relation caused between the two previous elements. The proof of existence of this relation can be crowned with success only in the conditions in which it is evidently;

- The guilty of the body of civil servant. Though art. 2007 CCRM does not stipulate the guilty as a ground of reparation of the damage yet here will be apply the general rule settled by the art.2007 (2) CCRM.

L. A. Korotkova and D. E. Kovalevskaya mention that the existent practice certifies the fact that the competent instances on investigating the demands of repairing of the damages by the state catalogue as illicit actions coursing damages only those facts which at the moment examining of the demand are recognized by the instance of common right or by the arbitrary one[1].

Another specific belongs to the procedure of prosecuting to the constitutional responsibility. The constitutional responsibility is conducted toward the providing of the constitutional legality[2].

It occurs as a result of non-corresponding exercising of authority duties especially for non-carrying out or non-corresponding execution of authority duties by the bodies of public power or functioning of these ones. It embodies the result of appealing and interaction of material and procession norms[3]. The achievement of the constitutional responsibility is possible only in the result of the activity of applying of the right achieved by the state bodies, of civil servants and other employers indicated especially by the law.

The determine roll of the mechanism of achievement of the constitutional responsibility belongs to the jurisdictional instance. We opine that a such instance, reported to the responsibility of the state bodies and to civil servants in the Republic of Moldova would be the Constitutional Court of the Republic of Moldova. The juridical constitutional norms need to have a complex system of juridical sanctions which except originally sanctions from other branches of right would include juridical and constitutional sanctions too[4].

Moreover, some sanctions may be exclusively included in the text of norms of constitutional law. That is why a such settlement of the state body responsibility and civil servants we consider it not to be the most timely: the utilization of juridical constitutional sanctions concerning

[1] Д.Е. Ковалевская and Л.А. Короткова, *Судебная практика: некоторые аспекты возмещения в результате действий (бездействия) налоговых органов и органов налоговой полиции* (Налоговый вестник, август, сентябрь 2001, .№8, 9): 12- 14.
[2] Б. Н. Габричидзе, А. Г. Чернявский, *Юридическая ответственность: Учебное пособие*. (М., 2005), 213.
[3] D. Baltag and E.Moraru, *Statul subiect al răspunderii juridice* (Chișinău, 2015), 98
[4] D. Baltag, *Teoria răspunderii şi responsabilităţii juridice* (Chişinău: Tipografia Centrală, 2007), 58.

these subjects would raise problems that would complain the solution at an exclusively constitutional level.

The question is not that every juridical constitutional norm must be armed with constitutional juridical sanction. It is impossible to achieve it because it can not protect each constitutional norm only by constitutional sanctions, existing sanctions from other branches of law being applied at responsibility for violating juridical norms from at various branches of law inclusively, constitutional one. At the same time the references to the legislation often remain to be in determined.

The commission of the constitutional offence starts the mechanism of achieving constitutional responsibility to which also corresponds the applying of some specifically sanctions. The legislation in force on the territory of the Republic of Moldova does not exactly stipulate the composition of the constitutional offence but not even corresponding sanctions (if are not involved sanctions from other branches of law). Electoral right is exception which reached enough progressive level of constitutional responsibility. This thing is partly explained by the specific of juridical relations from their domain.

By virtue of the principle of power separation in the state that is sanctioned in the Constitution of the Republic of Moldova would be timely the investigation of the responsibility of civil servants, of the bodies from all power branches, and of head of the state too. But the first of all it is claimed the study of settling of juridical responsibility personally of the state[1].

The office workers carry juridical responsibility in their branch for committed illicit actions. The responsibility is being individualized and the culprit supports sanctions for own actions/ inactions which do not correspond to the settlement in force.

Between the state bodies and civil servants a special peace and the most superior belongs to the head of the state according with art. 81 CRM[2] this disposes of immunity. By virtue of immunity nobody can not apply physical or psychic violence with reference to the president, he cannot be arrested, be searched and not even be prosecuted to juridical

[1] D. Baltag, *Teoria răspunderii şi responsabilităţii juridice* (Chişinău: Tipografia Centrală, 2007), 31-34.
[2] *Constituţia R. Moldova din 29 iulie 1994*, Monitorul Oficial al R. Moldova nr.1 din 12.08.1994.

responsibility so much time so he is in the exercise of his function. Moreover he cannot be removed of his possessed function.

Settling the cases of criminal prosecuting of the head of the state art 81 CRM does not stipulate the possibility of prosecuting of this one to civil, administrative responsibility during the period of exercising his duties. The legislator on juridical sanctioning of this immunity took into account of the specific native of the held function of head of the state. At the same time we declare that excluding of the president from the circle of subjects liable of juridical responsibility exception being the commission of offenses of homeland treason or other being also serious not in the least cannot contribute to the reestablishment and consolidation of legality and right order.

CONCLUSIONS

In conclusion we would like to mention that the settlement of an immunity concerning the statute of civil servants is a necessary phenomenon but to respect the limits of common sense and the principles of the right. At the same time the practical application of the procedures nominated above lead often to the releasing of these ones of responsibility and generally of the state (that is the liberation of the office worker of responsibility before the state and of the state with reference to the citizens. Yet the juridical responsibility of the state bodies, civil servants and generally of the state, constitute an essential guarantee of the legality and right order on the territory of Republic Moldova.

The persons with liberty privation may obtain the repairing of the caused damages by the representatives of the state and the protection of their legal right. This possibility is due to the settlement of responsibility juridical-civil of the state that put in charge of this one the obligation of repairing of the damage on ascertaining of illicit deed and the damage caused namely of this deed.

In the case of responsibility of state bodies and civil servants, appears the difficulty of wording of making-up of their illicit deed, as it is enough difficult the identifying concrete subject being guilty in committing the illicit deed in the process of exercising his duties. At the same time, it is absolutely necessary to establish an equilibrium between necessity of independence ensuring and inviolability of the civil servants

and exclusion of utilization with dishonesty of own duties by these subjects.

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ANALYSIS OF THE PRINCIPLE OF COMPETENCE OF THE CIVIL SERVICE FROM THE PERSPECTIVE OF THE EUROPEAN UNION STAFF REGULATIONS AND THE ROMANIAN ADMINISTRATIVE CODE

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Abstract:

In contemporary society, public administration has a fundamental role to play in influencing sustainable economic prosperity, social cohesion and people's well-being.

The current pace of social, technological and economic change requires the public administration to adapt to new realities. This adaptation cannot be achieved without taking into account the most important factor, namely the human one. Hiring civil servants on the basis of clear competency criteria will allow the public administration to improve its efficiency, but also to increase the attractiveness of the public sector.

The principle of competence in the public service is a fundamental principle both at the level of the European Union and at the level of each Member State. This article aims to make a brief analysis of this principle from the dual perspective of Union regulations and regulations in Romanian law in order to highlight its value in strengthening public administration.

Key words: *competence; public office; public servant; public administration; Romanian Administrative Code; European Union Staff Regulations.*

Creating a merit-based public administration is a stated goal of the European Union. Achieving this goal requires the implementation of effective strategies to attract competent people, ensure the transfer of knowledge and provide opportunities for career development.

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Professionalism and professional integrity in the public service clearly lead to the same trust and predictability of the public administration[1].

Since the end of the 19th century, the presence of an independent and meritocratic bureaucracy has been seen as an advantage for effective bureaucratic behavior and a means of curbing corruption[2].

Merit in administration and public service was (and is) the ideal and purpose, and the civil service was the mechanism for acquiring the merit[3].

Meritocratic recruitment is one of the factors that increase the efficiency and performance of public administration, along with competitive salaries, internal promotion and career stability.

Moreover, social and economic efficiency is necessary for social and economic development, and this development is in turn necessary for the development of robust democracies. In general, the merit-based employment system, and the civil service in particular, has a direct influence on both the consolidation of economic development and democracy[4].

In this context, the European states have enshrined in the legislation since the last century the principle of merit as a condition of access to public office[5], a principle that has been maintained in current national legislation and which has been taken over in the European Union.

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[1] SIGMA – Support for Improvement in Governance and Management for Central and Eastern European countries
available at https://www.sigmaweb.org/publications/Principles-ENP-Eng.pdf accessed on 01.04.2022

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[4] Cardona, F., *Civil Service, Democracy and Economic Development*, (Viešoji politika ir administravimas, Nr. 7, Vilnius, 2004), 16-22; available at https://ojs.mruni.eu/ojs/public-policy-and-administration/issue/archive accessed on 04.04.2022

[5] See also the Spanish Constitution of 1978 which in Art 103 Para 3 states that the law shall regulate the status of civil servants, entry into the civil service in accordance with the principles of merit and ability. The document is available at https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf and has been accessed on 01.04.2022

According to the specialized literature[1], the professional competence of the civil servant must be analyzed in relation to two moments:

- recruitment
- promotion.

From the perspective of the recruitment stage, is the professional merit in terms of public office the answer to the following question: "Does this candidate have the best combination of skills, experience, personal qualities and development potential that would make him suitable to get that position?"[2]. In other words, the recruitment competition must have two fundamental objectives:

- identifying the competencies, qualifications and skills and selecting and selecting the candidates who best fit the position,
- identifying and attracting competitive candidates.

The fulfillment of these two conditions also means for the administrative system, not only for the private organizations the success of the whole staff insurance process.

With regard to promotion, it refers on the one hand to the desire of the civil servant to advance in his career and on the other hand to the desire of the public administration to benefit through civil servants from intellectual assets, knowledge and experience gained leading to increased administrative efficiency and performance.

THE PRINCIPLE OF COMPETENCE FROM THE PERSPECTIVE OF THE STAFF REGULATIONS OF OFFICIALS OF THE EUROPEAN UNION

In the preamble of Regulation (EU, EURATOM) no. 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and

[1] Donald P. Moynihan and Patricia W. Ingraham, "The Suspect Handmaiden: The Evolution of Politics and Administration" in the *American State* (Public Administration Review, December, 2010): 229-237; Salvador Parrado and Miquel Salvador, "L'institutionnalisation de la méritocratie dans les organismes de régulation d'Amérique latine" , in *Revue Internacionales des Sciences Administratives* 4, vol. 77 (2011): 715-741; Mosher, Frederick C., *Democracy and the Public Service*. 2nd Ed. (New York: Oxford University Press, 1982).

[2] Diana Marilena Popescu Petrovszki, *Statutul fucţioarilor publici din România şi din Uniunea Europeană. Principii, drepturi şi obligaţii* (Bucharest: I.R.D.O, 2011), 102

the Conditions of Employment of Other Servants of the European Union, point 7 states that a more general objective should be to optimize the management of human resources a European civil service characterized by excellence, competence, independence, loyalty, impartiality and stability, as well as cultural and linguistic diversity and attractive conditions of employment[1]. This principle is also resumed in art. 27 of the Statute which states that „Recruitment must aim to ensure the employment of officials with the highest level of competence, efficiency and integrity".

Verification of compliance with these standards can be done only by organizing recruitment competitions, these becoming the rule, the exception being appointments based on internal competitions[2].

Meritocracy as a concept has in its content the condition that the appointment targets those civil servants who fulfill according to art. 5 of the Regulation the minimum study conditions as follows:

a) for AST group of positions and AST/SC group of positions:

i) a level of higher education graduated with a diploma or

ii) a level of secondary education with a diploma, which allows access to higher education and appropriate professional experience of at least three years, or

iii) where the interest of the service justifies it, professional training or equivalent professional experience;

b) for 5 and 6 degrees of the AD group of positions:

i) a level of education corresponding to a complete university degree of at least three years completed with a diploma or

ii) where the interests of the service so warrant, vocational training of an equivalent level;

c) for 7 to 16 degrees of the AD group of positions:

[1] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, available at
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1023&from=EN, accessed on 05.04.2022

[2] Art 10 Para 1 of the Statute mentions that: "maintaining the principle of recruitment of the vast majority of officials on the basis of general competitions, the appointing authority may decide, by way of derogation from point (d) and only in exceptional cases, to organize an internal competition within the institution which shall be open and to contract agents".

i) a level of education corresponding to a complete cycle of university studies completed with a diploma, if the normal duration of those studies is four years or more or

ii) a level of education corresponding to a complete cycle of university studies completed with an appropriate diploma and professional experience of at least one year, if the normal duration of such university studies is at least three years, or

iii) where the interests of the service so warrant, vocational training of an equivalent level.

The development of knowledge, skills and competences throughout the period of professional activity is not only a right of the European civil servant but also an obligation of his related to the management of his career. According to art. 43 "The competence, efficiency and conduct of each official shall be the subject of an annual report, in accordance with the provisions of the appointing authority of each institution that report shall specify whether the official's level of performance has been satisfactory or not".

If an official, "after three unsatisfactory consecutive annual reports as provided for in art. 43, does not make any progress as regards his professional competence, he shall be demoted by one grade. If the next two annual reports continue to show unsatisfactory performance, the official shall be dismissed"[1].

Another aspect of meritocracy is related to the conditions and especially to the criteria on the basis of which the promotion of civil servants is carried out. In this sense, art. 45 of the Statute mentions that the promotion of the civil servant has in view first of all the comparative analysis of the merits aspect that results from the analysis of the annual evaluation reports.

In conclusion, the principle of competence regulated at Union level is a complex one and has in its content elements regarding both the recruitment and promotion of civil servants, being closely related to the general objectives of a successful public administration.

The implementation of the meritocracy principle at EU level has led all Member States to adapt their national laws to increase their administrative capacity and to promote human resources policies that focus on performance and the development of employee potential.

[1] Art 51 of the Statute of civil servants of the European Union and the Regime applicable to other agents of the European Union

THE PRINCIPLE OF COMPETENCE IN THE ROMANIAN ADMINISTRATIVE CODE

Adopted in 2019, the Romanian Administrative Code[1] had among its objectives that of ensuring the premises of stability, independence and professionalism in the exercise of public functions.

In this context, in art. 373 lit. b stipulates that one of the principles underlying the exercise of public office[2] is the principle of competence.

This principle is integrated by the Romanian legislator in the same aspects that are mentioned in the Staff Regulations of Officials of the European Union.

Thus, the level of education differentiates public functions as follows[3]:

a) class I includes the public positions for which the occupation requires undergraduate studies graduated with a bachelor's degree or equivalent;

b) the second class includes the public positions for the occupation of which short-term higher education is required, graduated with a diploma, in the period prior to the application of the three Bologna-type cycles;

c) the third grade includes the public positions for the occupation of which high school studies are required, respectively high school secondary education, completed with a baccalaureate diploma.

The different level of studies also determines the nature of the civil service that can be accessed because according to disp. art. 387 para. 2 civil servants appointed to public positions in the second and third grades may hold only public executive positions, while for the occupation of leading public positions, candidates must be graduates with a master's degree in the field public administration, management or in

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

[2] The civil service is defined according to art. 5 letter y of the Administrative Code as the set of attributions and responsibilities, established under the law, for the purpose of exercising the prerogatives of public power by public authorities and institutions.

[3] Art 386 of the Administrative Code classifies the public positions depending on the level of studies

the specialty of studies necessary for holding public office or with an equivalent degree[1].

The recruitment of civil servants in Romania is generally done on the basis of a competition whose stages are established by the provisions of the Administrative Code[2] supplemented by the provisions of the Government Decision no. 611/2008[3]. The actual verification of the candidate's competence is carried out during the written test and the interview test.

The written test[4] verifies the theoretical knowledge and practical skills needed to hold the position for which the competition is organized, including the general knowledge of the candidate in the field of public administration, as well as knowledge of respect for human dignity, protection of fundamental human rights and freedoms, prevention and combating incitement to hatred and discrimination.

The stage of the interview[5] has the role to test the skills, aptitudes and motivation of the candidates. In this sense, the Romanian legislator has established a series of evaluation criteria to verify aspects such as:

a) communication skills;
b) capacity for analysis and synthesis;
c) the skills required by the position;
d) the motivation of the candidate;
e) behavior in crisis situations.

For management positions, the interview plan also includes elements related to:

a) the ability to make decisions and assess their impact;
b) exercising the decision-making control;
c) managerial capacity.

[1] Art 465 of the Romanian Administrative Code
[2] Art 618 Para 10 of the Government Emergency Ordinance no 57/2019, with subsequent modifications and amendments
[3] Government Decision no 611/2008 approving the norms for the organization and development of the career of civil servants, published in the Official Gazette no 530/14 April 2008
[4] Art 51 of the Government Decision no 611/2008 approving the norms for the organization and development of the career of civil servants
[5] The interview is mentioned by Art 51-57 of the Government Decision no 611/2008 approving the norms for the organization and development of the career of civil servants

In accordance with the communitarian regulation, the principle of competence is mentioned as well as principle founding the organization and development of the civil servant's career[1], being defined as principle according to which the persons aiming to acquire or promote in a public position must have and confirm the knowledge and necessary skills to perform that public position.

In this sense, the promotion[2] is the way to develop the career of civil servants by occupying, in accordance with the law, as a result of promoting the competition or exam organized in this regard:

a) a public office with a higher professional rank than the one held prior to the promotion;

b) a public office of a higher class;

c) a public management position.

The importance of professional competence is also linked in the Romanian legislation to the concept of promotion. In particular, in order to be promoted, the civil servant must cumulatively meet the following conditions:

a) to have at least 3 years of seniority in the professional degree of the public position from which he/she is promoting;

b) to have obtained a minimum number of credits by participating in training programs, advanced training, seminars, conferences, exchanges of experience or study visits, in accordance with the law or to have followed a form of professional development with a duration of at least 30 hours in the last 3 years of activity;

c) to have obtained at least the grade "good" in the evaluation of individual performance in the last 2 years of activity;

d) not to have an uncancelled disciplinary sanction under the conditions of the Code.

Between the time of recruitment and the time of promotion, the civil servant has the obligation to improve his professional training and to acquire the practical skills and abilities necessary to exercise a public function. The importance of professional development has led the Romanian legislator to impose on the public authority or institution the obligation to draw up an annual training plan for civil servants and to

[1] Art 4 of the Government Decision no 611/2008 approving the norms for the organization and development of the career of civil servants

[2] Art 14 of the Government Decision no 611/2008 approving the norms for the organization and development of the career of civil servants

ensure the participation of each civil servant in at least one training and professional development program every two years, organized by the National Institute of Administration or other training providers. Failure by the civil servant to fulfill the obligation of professional development will be reflected in his annual evaluation report and in the grade obtained.

In relation to the aspects presented above, it results that the Romanian legislator understood the importance of adopting legal regulations to support the promotion of human resources policies in the public administration that would allow attracting and maintaining in the system those high-performing civil servants to face the challenges of modern society.

CONCLUSIONS

Civil servants are factors in the public sphere of society, the sphere that falls within the area of public law that must protect civil servants in exercising their special role in democracy, and on the other hand, to strengthen professional standards by virtue of delicate issues with which these people meet in their work.

The quality of public services provided to citizens is always correlated with the level of trust in public administration and consequently in civil servants.

In view of these aspects, both the Union and the Romanian legislators shave established as a fundamental principle of the civil service, the principle of competence. Based on this principle, civil servants are recruited and promoted on the basis of competitiveness because their skills, resources and capabilities need to be aligned with their responsibilities.

The professionalism and political neutrality of civil servants are institutional guarantees that will allow both social development and the consolidation of democracy.

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CONSIDERATIONS ABOUT THE CONCEPTS/MODELS OF PREVENTION CRIME

Aura Marcela PREDA [1]

Abstract:

The contemporary criminology is due to propose, by turn to account on the advanced measurement and evaluation techniques regarding concrete measures for the diminution of the criminogenic risk factors, implicitly actions with preventive specificity. The concern for crime prevention becomes a priority, especially in the context of extensive studies on the cost of crime. Thus, the phrase "preventive criminology" becomes justified by referring to the broad types of prevention developed by different criminological schools. The concept of crime prevention is indispensably correlated with that of social control.

Key words: *prevention; social control; safety; criminogenic risk; criminogenic factors.*

INTRODUCTION

The chosen topic is suitable in the section Prevention and social control of crime, since it deals with theoretical aspects which, as a rule, are not found in a homogeneous form in the specialized literature.

The prevention is very linked with the social control[2] of crime, that why it become key concepts in contemporary criminology, notions that need to be found and articulated in a national prevention strategy, as a result of a certain criminal policy. This need can be motivated by at least from two perspectives. At the macrosocial level, the relatively high

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[2] The term social control as defined by Merriam Webster certain rules and standards in society that keep individuals bound to conventional standards as well as the use of formalized mechanisms

crime rate represents a serious threat against democracy, public security, the rule of law and institutional capacity in Romania. [1] On the other hand, at the micro level, fundamental rights and freedoms are endangered every time when a citizen becomes a victim of crime. Consequently, crime generates fear among the population, weakens its confidence in the authorities and their ability to be actively involved in the economic development of the state.In view of these premises, a crime prevention strategy is naturally required as a national priority.

As Andre Lemaitre rightly points out, "whether it is an academic or professional concern, no observer can escape the fact that in recent years we have witnessed a great return of interest in crime prevention"[2].

1. CHRONOLOGICAL STAGES IN THE DEFINITION OF "*CRIME PREVENTION*"

TYPES OF PREVENTION

The issue of prevention has begun to occupy a much more important place, now being accessed even to the sub-branch status of Criminology[3]. Therefore, in the contemporary definition of criminology, one of its essential elements is precisely the purpose of "*preventing crime, humanizing the system of repression and social reintegration of offenders*"[4].

Anyway, prevention goes back to the origins of humanity,whether against wild beasts, against a neighboring clan or against bad weather, the man has always been concerned to ensure *his safety and that of his community* by anticipating events that could affect his quality of life.[5] Therefore, prevention has always been an important part of the organization of our societies. Over time, man was concerned in identifying complex methods to guard against external threats, but "*the*

[1] https://lege5.ro/Gratuit/guydqobr/strategia-nationala-de-prevenire-a-criminalitatii-pe-perioada-2005-2007-hotarare-2074-2004?dp=geztoobxgqyte

[2] A. Lemaitre, *Elements de prevention du crime* (Paris : Harmattan, 2014), 9

[3] D. Szabo, « Discours inaugural », le IX Congres International de Criminologie, in *Annales Internnationales de Criminologie*, 9 apud http://www.icj.ro/Tanase-Constantin.pdf

[4] R. M. Stănoiu, *Introducere în Criminologie* (Bucharest: Academiei Române, 1988), 153.

[5] http://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=3

threat does not lie only in the periphery. Most often, it is intra-group, intrafamiliale, intraconjugale, etc."says André Lemaitre[1]. That is why, the society establishes rules of common life whose application will be ensured by various organs of social control always more hierarchical.

Opinions of Beccaria and Bentham, representatives of classical criminology, on the humanization of the repression system and especially on the effect that the certainty of the punishments has on the individuals constitute for some specialists "*the essence of general prevention and special prevention*".[2]

The general prevention is based at the beginning on two main ideas, namely: the severity of the punishment, the more severe it will be, the more the individual will avoid committing crimes. For *special prevention* the essence consists in the certainty of the application of the punishment, the more this appears as inevitable as the individual will refrain from committing crimes. So, the special prevention aims to act on the criminogenic factors that have influenced the "fate of the offender".

Representative of positivist criminology, Enrico Ferri elaborates a multifactorial theory considering that it is necessary to act on criminogenic factors of physical, anthropological and social nature, which negatively influence the individual, by preventive means, with a "curative" character. Therefore, he proposes to substitute the sentence of deprivation of liberty with other measures that will improve the standard of living such as: reducing working hours, street lighting, reducing alcohol consumption.[3] So, therefore, he proposes an indirect prevention.

Regarded as peacekeepers until the nineteenth century, the police have added to their daily duties the job of investigators and hunters of offenders. The multiplication of consumption patterns and the bursting of places to live, work and play are all factors that weigh heavily on the emergence of the crime rate. In the face of these societal changes, justice is forced to turn away from a whole section of crime to deal with emerging forms of delinquency. The causes of their appearance are numerous and they differ according to the times as well as the individuals. "*Delinquency is the result of societal or individual*

[1] Professor at the Faculty of Social Sciences of the University of Liège and author of *Elements of Crime Prevention*
[2] R. M. Stănoiu, *Criminologie* (Bucharest : Oscar Print, 1998), 125.
[3] Roberta Bisi, *Enrico Ferri e gli studi sulla criminalita* (Milano: FrancoAngeli, 2004), 164.

dysfunction. We can not identify a single, universal cause. On the contrary, there are different manifestations and different phenomena that coexist. The response provided by a society will be specific as the problem it tries to solve",says Andre Lemaitre[1].

Of the currents subsequent to positivism, from the first half of the 20th century, significant are the doctrine of "*social defense*" and Chicago school. First one , the doctrine of "social defense", promoted by the Italian Filippo Gramatica argued that the criminal system must be replaced by a system of social defense. Thus, he proposed that fundamental notions, such as: delinquent, criminal liability and punishment, to be replaced with *subjective antisociality*[2] and preventive or curative social defense measures, appropriate to each individual.

His doctrine was continued in the sense that it was substantially reconsidered and enriched by Marc Ancel in 1954, with a criminal theory called "*New Social Defense*" which consists of rethinking the entire penal system around the offender's social rehabilitation. The "*New Social Defense*", advocates a humanist conception of social reaction to criminal facts, in which the main focus is on treatment of resocialization by extra-penal measures. Therefore,his work was, for Robert Badinter, the foundation of the drafting of the New Penal Code in France[3].

The second one, Chicago school[4] developed the ecological theory based on which a prevention program called the "Chicago Area Project" was launched.

After the Second World War another stage begins in the definition of concepts, the stage marked by two famous criminologists, meaning Jean Pinatel și Etienne de Greef, considered as founders of dynamic criminology. They managed to give a new content to the special prevention, focusing on solutions for the prevention of recurrence through the different resocialization treatments.

The effects of these criminological currents were reflected in the replacement of repressive criminal policies with preventive ones, respectively in legislative changes. So, the treatment measures were

[1] http://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=3

[2] Raymond Gassin and Sylvie Cimamonti et Philippe Bonfils, *Criminologie*, 7 ed. (Paris: Dalloz, 2011), 786.

[3] https://fr.wikipedia.org/wiki/Marc_Ancel

[4] https://en.wikipedia.org/wiki/Chicago_school_(sociology)

diversified and appropriated to the criminogenic profile of the offender, both at the time of judicial individualization of the sanction and at the time of its execution.

New guidelines appear in sec. XX, when the representatives of the current social reaction, promoters of the theories of labeling[1], consider that prevention, in the case of crimes, is an attribute of civil society, the only one capable of influencing the group of political decision-makers and the judiciary regarding the scale of values, the protected interests, to the imposed behaviors, unanimously accepted.

Critical criminology and social reaction are two currents in criminology due to the renunciation of the phrase „*crime prevention and repression*" and its replacement with the expression „*crime prevention and social control*".

After 2000, two tendencies are distinguished, one that tends to turn to a repressive model of criminal policy, the other outlines a humanistic model in which the deprivation of liberty is the *last ratio*.The second tendency is also justified by the studies on the costs of justice, thus enhancing the general prevention, by reducing the pre-criminal situations, by increasing the risks in case of passing by the offender.

2. SOME MODELS ON CRIME PREVENTION

While many agree that prevention is a necessity, every society has embraced the security model that best responds to the current political trend and the values conveyed. By focusing on one aspect of prevention rather than another, it tends to influence the crime rate in the sense of reducing it, identifying the criminogenic risks and acting on the criminogenic factors. A historical incursion seems to be necessary to highlight elements of continuity and discontinuity in building types of models or returns to the diversity of existing models and presents the different forms that can take the prevention of delinquency.[2]

[1] https://en.wikipedia.org/wiki/Labeling_theory
[2] http://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=3

1.1. THE 1980S: THE EMERGENCE OF A PARTNERSHIP MODEL OF PREVENTION

The emergence of the consumer society gives rise, for example, to a vertiginous number of burglaries. However, the means deployed to deal with them in the different European countries are inadequate. In the 1980s, the situation reached a threshold of criticality such that many complaints were filed with local politicians. This general discontent reveals the flaws in the security system prevailing across the European continent at that time. "*Policymakers and police chiefs are becoming aware of the need to redo prevention especially at the urban level. From this moment, a new reflection emerges to palliate this lack. We will wonder about the causes of delinquency and the tools to develop to make prevention differently. Criminal prevention, which hitherto relied on the limited activity of the police and the courts, is reinforced by scientific research. At the end of this development, an alternative is emerging. We are relaunching prevention at the local level, relying on partnerships*. " affirms Prof. Lemaitre.

The local leaders of the different countries then become the conductors responsible for bringing to the table all the actors concerned, from near and far, by the problem of urban delinquency. The police, the voluntary sector, victim services, schools, ... all are given a role to play in this model of partnership type. Agencies will also be specially created and tasked with prevention. In Belgium, a permanent secretariat for prevention policy is set up.

2.2. THE MODELS FROM QUEBEC

Representative of contemporary criminology, Prof. Maurice Cusson conducts analyzes of modern criminality in two of his volumes, bringing to the fore, through the titles of the works, elements related to social control and crime prevention. Thus, in the volume entitled „ *The Social Control of Crime*"[1], he proposes a typology in which are distinguished the therapeutic, moral, dissuasive social controls, as well as those which are based on justice and relations of reciprocity. In

[1]Maurice Cusson, *The Social Control of Crime*, 27

"*Preventing Delinquency, Effective Methods*"[1], he takes stock of the state of knowledge, which leads him to criticize community prevention, the results of which are far from convincing. In his view, two major categories of intervention are more resistant to scientific examination: situational prevention[2] and developmental prevention[3]. In response to the tendency of criminologists to underestimate the intimidating effect of punishment, he constructed a theory of deterrence that he refined over his books and articles[4]. He draws from his analyzes the general idea that social controls have a structuring effect on crime.

The latter should be low where social controls of all kinds are fully operational and should be high where they are faulty or down. If it implements security actions "punch", situational prevention also burden the average citizen a part of its own security (home alarm systems, locks, locks, private insurance, etc.) further accentuating inequalities social.
But, we have to mention some perverse effects, because increased security enhancement as pursued by situational prevention can lead to undesirable effects such as moving crime to other lusts, restricting people's freedom of oppressive surveillance, a climate of permanent suspicion or reinforcement in the escalation of means and violence. "*The more the means used to protect oneself are massive, the more the measures to seize it will be strong. Originally, a bank was simply made up of employees who were distributing and collecting money behind a table. Over time, offices have been replaced by glazed windows with security doors and access codes. As the cashier is less easily accessible, criminals will more easily attack customers and hold them hostage to enter the safe.* "[5]

Another authors from Quebec, A. Normandeau[6] proposed within the community prevention model, seven ideological, theoretical and

[1] Maurice Cusson, *Prevenir la delinquance Les methodes efficaces* (Paris: PUF, 2002), 166
[2] Cusson, *Prevenir la delinquance Les methodes efficaces,* 38-75
[3] Cusson, *Prevenir la delinquance Les methodes efficaces,* 86-108
[4] https://fr.wikipedia.org/wiki/Maurice_Cusson
[5] https://fr.wikipedia.org/wiki/Maurice_Cusson
[6]Normandeau A. and B. Leighton, 1990, *Une vision de l'avenir de la police au Canada*, Defi 2000. *The Future of Policing in Canada* (Ottawa : Challenge 2000), Solliciteur général du Canada and Normandeau Andre and B. Leighton, « La police communautaire en Amérique », *Revue Internationale de Criminologie et de Police*

practical elements, elements that we will present below.[1] He considers that these elements are both indicators to characterize a professional community-type police service.[2] This notion of community policing was born on 1994, starting from two ideas: the scientific research that challenged on effectiveness of methods and police work and the recognition that the community must take more diverse and constantly changing a greater role in crime prevention, because our society became more diversified in a continuous change.

These twenty-one elements are indicators that only cover the main qualities of the model.[3] Moreover, they do not all exist at all times in the life of a so-called community police service.

The seven ideological elements of the police activities[4]:

- *an increase of bureaucracies* and also of certain administrative shackles that stifle the initiative and dynamism of the police.
- *a revision of the paramilitary model* which requires a redefinition of authority and discipline within the police services.
- *a private entrepreneurial spirit* (nuanced) characterized by: a taste for (calculated) risk; the right to make mistakes (under certain conditions): personal responsibility; a reward for effort, quality, innovation and creative imagination: a customer perspective and service to the consumer in matters of public safety, and excellence, effectiveness and efficiency, beyond the clichés.
- *a professional motivation* that is renewed by: recruitment as well as basic and continuous training of high quality; a career plan and a promotion system based on a balance between the diversity of tasks, specialization, professional autonomy and accountability, as well as a more differentiated salary scale.
- *innovative visionary leadership* with character, entrepreneurial type, found at all levels of the police service.

Technique et Scientifique, no. 45 (1992) : 1-61, https://journals.openedition.org/champpenal/7982?lang=en

[1]A. Normandeau, *Une police professionnelle de type communautaire* (2 tomes), (Montréal : Édition du Méridien, 1998).

[2]A. Normandeau, "Local police, community police, police insurance for the year 2000", *Review of criminal law and criminology*, no.6 (1994): 707.

[3] A. Normandeau, La police communautaire en Amerique du Nord: Le modele de police de quartier a Montreal, Problemes de Sciences criminalles (Universite d"Aix- Marseille, 2001).

[4] Lemaitre, *Elements de prevention du crime*, 43

- *multiple partnerships* between the community (via associations), elected politicians, service managers, the police union, the police service, public services (education, health, labor, etc.) and other justice services (community prevention projects, private security, justice and corrections[1].
- *participatory management* that takes shape by replacing conformational unionism (old-fashioned) with consultation unionism (more modern), and replacing authoritarian hierarchical management with consultation management.

The model of Normandeau continuous with seven theoretical ingredients:

- the police mission is essentially based on peace, the people have to see the policeman as agents of peace. So, the police officer should works with respect for people
- the police aa a public service, should adopt a crucial strategy: a consultation systemic of the community and its associations.
- the attitude and behavior of the police should be definitely proactive and interactive (police-community)
- the police partly must focus their energies on solving problems related to crime and social disorder. It means that, in collaboration with the appropriate partners, it aims is to ,at least partially, solve certain causes of the problems through prevention as well as repression activities.
- the police, linked with the other major public and private services, contribute, in the end, to improving the quality of life, because through its community prevention programs, it aims not only to contain and reduce crime, but also to reduce the fear of crime and to increase the community's real feeling of safety.
- even in the front-line, the police officers are generalists rather than specialists, whose level of responsibility and autonomy is high within a decentralized and decentralized organization.
- the obligation to report rigorously to the community and to legitimate elected politicians characterizes a police service (known as community-type) of quality.

Still according to the same author (2001), the communal police is also based on seven practical elements:

[1] In the North American sense of the term

- a multitude of community crime prevention projects, under the leadership of the police and community organizations, often in partnership with other public and private services.
- a multiplication of the police presence by opening community-type mini-stations (mini-station, sub-station, neighborhood-station) in the four corners of the city or even a district, depending on the demographic and geographic dimensions.
- additional police visibility is also enhanced by the return to the neighborhood landscape of police patrols on foot, by bicycle or on horseback, preferably attached to mini-posts.
- the establishment of citizen advisory committees at the near the police department, at the city and neighborhood level,is an important element.
- an active participation of political and local elected representatives within a local public security council or a municipal police commission is considered also essential.
- adequate functioning of a police ethics committee to respond to citizens' complaints against certain police officers.
- a type of recruitment that better reflects the demographic spectrum of the city (cultural communities, women). Also is recommending a basic and continuous training focused on a police profession community type and working methods more fine and more rigorous (better and smarter).

On peut affirmer que the preventive objective is double: to respond to petty crime and to regain the inhabitants' lost confidence in the police. In this way, the police not only prevent crime, but also they will develop the feeling of security in commnunties.

In other words, as Normandeau[1] writes, "*the objective of this strategy is to open up the world of policing to the local community, as allies, partners in the of a social contract of community crime prevention, selective repression of crime, problem solving, for a better quality of life. The feeling of security (and de facto security) is a very important element of this qualite".* Also establishing justice and ensuring community peace remains a viable goal for police services around the world could return.

[1] Normandeau, 722

2.3. THE BELGIAN MODEL

Belgium displays a mixed model of both situational and social prevention. If it is not at the top of the list of countries where social security is non-existent and where individual rights are erased in favor of a rigid security ideal, the supporting pillars set up by a welfare state nevertheless begin to be undermined in favor of an ambient individualism. "*Belgium is a beautiful laboratory because it has mastered its neo-liberal policy of a fund that remains based on a social policy while maintaining security demands on the part of the population. In the North, we were inspired by the Anglo-Saxon model, while in the South, we are culturally more turned towards the experience of the Latin countries. Its prevention policy is still very much focused on the search for security, particularly with the construction of new prisons, but we can see that the penitentiary model as it is developing at the moment is deteriorating*".[1]

According to André Lemaitre, there is no ideal archetype of prevention and, "*if there were to be one, it would probably be a cocktail of the different individual models"*[2].

Urbanization galloping and the emergence of metropolises or megalopolises all over the world is fertile ground for crime and insecurity. And, to face the great challenges that lie ahead, lessons must be learned from past experiences. "*The prevention of tomorrow is to reinvent. One thing is certain, it must be less focused on the security crackdown. The more inclusive policies that take into account the interests of all, not just the most advantaged, the more likely we are to see improvements for the future. Every component of the community must be considered without exception. This is not a battle where the rich must protect themselves against the poor but a common fight*. "[3]

To meet this challenge, the societies of tomorrow must aim for an important social cohesion with the maintenance of a social and educational policy that relies on efficient public services. Several

[1] http://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=3
[2] http://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=3
[3] http://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=3

attempts to question the dominant political decisions have timidly emerged but they remain a minority. Alternatives to the use of the penal system, the reinforcement of mediation actions and community prevention projects have been proven in some cases. Even if the results remain weak, they deserve to spend more time and reflect on other alternative models.

These decisions, which are flourishing throughout Europe, are the result of predominantly social democratic governments. They rely on a prevention model based on an extended system of social protection (access to health care for all, education and assistance to the poor, etc.). These political choices are not trivial. "*The decisions made by policy makers to put more emphasis on this or that aspect of prevention say a lot about the social project that lies behind*," argues André Lemaitre. By guaranteeing a minimum threshold of well-being for all and improving the general living conditions of individuals, policy makers hope to reduce the rate of delinquency.

Regarding the types of prevention, the same author retains the following classification[1]:

- social prevention which will seek to target the deeper root causes of delinquency and which generates three particular forms which, without excluding each other, proceed from different scales:
- primary prevention concerns any general action on the socio-economic or psychological factors of the appearance of delinquency, such as the improvement of education, health or occupational integration;
- secondary prevention aims at different forms of assistance, which are developed with the aim of reducing certain processes of criminalization;
- tertiary prevention consists of implementing specific means aimed at ending or reducing a well-defined criminal situation, or detecting criminal situations that have not yet been revealed. These means generally take the form of psycho-social assistance.
- police prevention involves measures, specific to police services, aimed at a defined form of crime. These are, writes the rapporteur, short-term actions intended to put the potential offender on their guard and warn potential victims by advising them of certain measures to be taken.

[1] is taken up in the Report to the King linked to the Royal Decree of 6 August 1985 establishing a Higher Council and provincial Commissions for the prevention of crime.

- technical prevention concerns the use of material means which make it possible to limit the opportunities for delinquency or the consequences thereof. These are the physical architectural or electronic processes that can be used by the public without direct intervention by the police.
- the notion of criminal or post-criminal prevention is based on the impact of the functioning of criminal justice on potential offenders (possibly repeat offenders).

As we can see, this typology includes the tripartite classification of the types of primary, secondary and tertiary prevention, but also add other types of prevention for which there would be no classification criterion.

Thus if the World report on violence and health of the World Health Organization (WHO)[1] of 2002 is particularly enlightening, because the public health interventions are generally characterized by three levels of prevention:

- primary prevention, which aims to prevent violence from occurring.
- secondary prevention, which emphasizes the most immediate effects of the violence, such as taking action and providing urgent care to the victims.
- tertiary prevention, which concerns care after the violence, such as attempts at rehabilitation aimed at alleviating the trauma or its consequences resulting from the acts of violence in the longer term.

At a brief analyze of this the classic division, we notice that this puts more emphasis on the aspects linked to the temporality of the preventive action. The measures to be taken before the phenomenon occurs that we wish to prevent (here acts of violence) to be taken immediately (or as soon as possible) after the facts and finally those to be implemented sooner rather than later.

A second notice concerns another dimension, also makes it possible to add the beneficiary dimension of the intervention: most often oriented towards people but also leaving room for actions intended for people (here violence, but we will see that this is also true).

[1] *World Report on violence and health* (Geneva, World Health Organization, Jan. 2002).

2.4. THE NEOLIBERALISM MODEL

This social model, which once seemed to dominate the European political scene, nevertheless appears to be a minority today. In question, the arrival of a more individualizing political model. Incarnated in Britain in the early eighties by Magaret Tatcher, neo-liberalism tends to empower the individual to the detriment of socialist ideals. It advocates the development of situational prevention. This model was developed by Anglo-Saxon criminologists before spreading across the Atlantic in Scandinavia to the Netherlands. It is based on an essentially pragmatic approach to crime and starts from the observation that delinquency occurs in a context where all the right conditions are met for a passage to the act. Starting from this principle, increased security measures will be taken. These "*do not attach to the offender and his personality but to his environment"*, as written by André Lemaitre in his book. "*These measures are put in place to force the potential offender to give up his criminal project, given the risks that he faces and the obstacles placed in his way. It complicates the acting out and reduces the advantage and the booty hoped for.* "[1]

CONCLUSIONS

For a long time, criminal prevention has two routes. First of them, rests on the fear of the sanctions incurred, executions are indeed practiced publicly to mark the spirits and establish a dissuasive climate. It is then carried out via the exercise of a justice of proximity. "*Until the industrial revolution, people move on foot. They are born and die in the same region which induces a very strong knowledge. The police, with a preventive role, carry out surveillance rounds in the neighborhoods. With industrialization and large-scale migrations, this proximity control gradually fades to the point of being relegated to the background*", explains André Lemaitre.

Also, it is generally recognized that the concept of prevention has its origins in the field of public health, the adage " *Prevention is better than cure is certainly*" an illustration of this. The medical imprint is found in the vocabulary before talking about prevention, it was about

[1]https://www.reflexions.uliege.be/cms/c_406085/en/la-prevention-criminelle-miroir-de-notre-societe?part=2

prophylaxis[1] that it was a question and from medical prophylaxis we drew and used the expression criminal prophylaxis, declined in medical or psychopathological criminal prophylaxis and prophylaxis the one that interests us here.

A global assessment of the impact on criminality of the different models and strategies of criminal policy proposed by various schools / authors would be required. Also, a theory of prevention would be required in which the concepts - premise would be unanimously accepted.

The fundamental concept around which Cusson tries to base a theory of prevention is that of social control.

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[1] The Petit Robert dictionary defines prophylaxis as "*method aiming to protect against a disease, to prevent a disease*". The image of "contagious" criminality sometimes remains present, just like that of the "rotten apple" contaminating its neighbors in the basket. Prevention is to treatment what sanitary measures and vaccination are to public health; as in the field of public health, the failure of preventive measures could lead to the spread of contagious diseases, the absence or weakness of preventive measures can promote an increase in delinquent behavior.

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THE INTERNATIONAL CONFERENCE
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THE ISSUE OF CRIME VICTIMS AT EUROPEAN LEVEL. ENSURING THE ACCESS TO LEGAL AID AND PROTECTION FOR VICTIMS OF CRIMES

Carmina TOLBARU[1]
Andreea DRĂGHICI[2]

Abstract:

The issue of criminality plays an important part at European level, all the more so as the Covid-19 pandemic elicited extreme social reactions, having registered an increase in the cases of domestic violence, sexual abuse on children, computer crime and racist or xenophobia hate crimes. The efforts at the European level aim at guaranteeing the victims' rights, regardless of the type of offence accomplished, but at the same time, they wish an intervention on the specific needs of the victims of certain offences. Starting from the struggling of the victims to have access to justice, the main objective is represented by the reinforcement of the framework for granting legal aid and protection to such victims, including the guarantee of resilience in crisis situations. However, such an objective cannot be reached without some awareness on behalf of the Member States, regarding the integral transposition of the instruments adopted at the European Union level, in matters of minimum standards agreed concerning the victims' rights.

Key words: *criminality; protection; access to justice; victim's right; Covid-19; European strategy; framework.*

1. NEED FOR AWARENESS OF THE ISSUE OF CRIMINALITY AT GENERAL LEVEL

At present, we witness an increase of the crime index at the level of all the European Union Member States, setting up the need to ensure a minimum level of rights for crime victims. The major difficulty is that, at

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the level of the European Union Member States, there is not any unity regarding the criminal proceedings and the legal contents in the matter, reason for which, at European level, several legal instruments were adopted to establish some common rules concerning the protection and support of victims in general, and also in particular, for specific victim categories.

The pandemic situation generated by SARS Cov-2 virus had an overwhelming impact on criminality, as, on this occasion, they saw the opportunities to get some financial benefits, by enhancing the carrying up of cyber-attacks, online scams and other online offence-related activities. According to a Europol report, the COVID-19 pandemic augmented the risk of infiltration in the society and in the legal economy of the organised crime groups and allowed them to develop new criminal-related activities, such as the sale of counterfeit medical products[1]. According to the Threat assessment represented by the organised crime in the virtual space, the crisis caused by the COVID-19 pandemic created opportunities for offenders to take advantage of the vulnerability of the society, which are emphasized by such exceptional situations[2]. The need to fight the plague of criminality which is increasing, escalating all the levers of the economic and social life, has become lately the main focus at the European Union level[3].

2. OVERVIEW ON THE MAIN TYPES OF CRIMINALITY MANIFESTED AT EUROPEAN LEVEL

At European level, criminality has different forms of manifestation, affecting some essential values, such as life, physical integrity, freedom, assets, personal and familial safety, and social peace in its entirety. The main criminal-relate activities in Europe drug

[1] How Covid-19 - related crime infected Europe during 2020, 11 November 2020, how_covid-19-related_crime_infected_europe_during_2020.pdf (europa.eu)
[2] Serious and Organised Crime Threat Assessment (SOCTA), Identifying the priorities in the fight against major crime, 14 December 2021, Serious and Organised Crime Threat Assessment (SOCTA) | Europol (europa.eu)
[3] Communication from the Commission to the European Parliament, the European Council, The Council, The European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, Brussels, 24.7.2020, COM/2020/605 final.

trafficking, computer crimes, economic and financial crimes, migrant smuggling and human trafficking.

2.1. DRUG TRAFFICKING.

Drug trafficking is one of the main sources of income for organised crime groups within the European Union. 38% of the total of criminal-related activities within the EU is related to drug trafficking[1]. This type of criminality has a relevant percentage within the crime world, which determined, at European level, the adoption of a new strategy in the matter of drugs during 2021-2025[2].

Romania is an access lever toward this type of criminality, due to the position of our country, as a transit area with high potential for high-risk drug trafficking towards the international consumption market. Also, on the domestic market, the drug consumption has a high percentage, the synthetic drugs being more and more common, especially among young people. Not to be neglected, there are the illegal activities of "carrier", with offering of financial advantages and blackmail-type constraints[3].

2.2. COMPUTER CRIMES

The computer crime phenomenon has a rapid evolution and spread at global level, as it has spread through the variety of forms of manifestation: offences involving ATMs; card cloning; publication of fictitious ads on intensely-accessed e-commerce websites, and also the use/exploitation of crypto currency coins for carrying out illegal economic activities. According to the EU Strategy on fighting against organised crime, at present, over 80% of the offences committed have a digital component. And at the level of our country, there is a significant increase of the index of this type of criminality, being identified a series of enabling factors: rapid development of the internet network in Romania, increase of the number of users on mobile devices with an

[1] The EU's fight against organised crime - Consilium (europa.eu)
[2] Council of the European Union, General Secretariat of the Council, *EU drugs action plan 2021-2025*, 2022, https://data.europa.eu/doi/10.2860/698571
[3] The national strategy of 1 September 2021 on the approval of the National strategy against organised crime 2021-2024, Approved by decision no. 930 of 1 September 2021, published in the Official Journal, Part I, no. 898 of 20 September 2021.

option of connection to internet (laptop, smartphone, tablets), increase of the number of trading companies that carry out their economic activity online, massive spread of social networks, including among minor or elderly persons.

2.3. ILLEGAL MIGRATION.

Illegal smuggling of migrants is a world level crime exposing migrants to life-threatening risks. Considering the involvement of the crime-related networks and enhancement of their activities in this area of criminality, the European Union makes great efforts regarding the setting up and ensuring a sustainable framework in matters of migration and asylum., a key instrument is the EU Action Plan against the illegal smuggling of migrants (2021-2025) which will contribute to prevention and fighting the illegal smuggling of migrants by reducing the illegal and unsafe migration, and by facilitating the regularized management of migration. Romania has a strategic position, as a transit area for facilitating illegal migration, which requires operational support from the European Union, to manage the situation at all its external borders.

2.4. ECONOMICAL AND FINANCIAL CRIMES.

The Covid-19 pandemic created the opportunity for offenders to take advantage of the economic-sanitary crisis generated also by the insecurity that invaded population at global level. The interest area within the economic criminality at the European Union aimed at the following domains:

- Online fraud systems
- Excisable product fraud
- Intra community fraud with "ghost" companies (MTIC fraud)
- Intellectual property-related fraud
- Merchandise counterfeit and coin counterfeiting
- Funds originating from committing offences
- Money laundry.

A significant percentage within the economic and financial criminality is tax evasion. The fight against this type of crime is registered among the European Union and its member States' prerogatives, the European Parliament creating a commission to deal

with the tax issues and financial transparency, and also with the fight against frauds, tax evasion and avoiding tax obligations. Also, in the National Strategy of 1 September 2021 on the approval of the National Strategy against organised crime 2021-2024, they mention the main tendencies of the tax evasion phenomenon, the increase of customs frauds, the increase of the number of criminal-related networks involved in huge tax evasion activities. Not only the tax evasion has a significant percentage in the category of the forms of manifestation of the economic and financial criminality, but also the smuggling and usury are phenomena which represent a social danger in terms of the patrimonial negative consequences caused to the victim.

2.5. HUMAN TRAFFICKING AND CHILD TRAFFICKING.

Human trafficking is a serious offence violating the human fundamental rights. Although the European Union made tireless efforts to fight human trafficking, this type of criminality still remains a serious threat[1]. It is an extremely profitable criminal activity, because with minimum efforts they can get significant economic gains, systematically and constantly. But the consequences are extremely traumatic, this type of criminal exploitation aiming at vulnerable persons, especially women and children. Within the recruitment process, they use different approaches, starting from fake promises of getting some well-paid jobs or sentimental enslaving, until abuse and emotional blackmail or different forms of violence.

At present, there is an evolution of the procuring offences, especially the offences of sexual exploitation or exploitation for beggary purposes, forced labour or other types of offences. Victims are usually minor persons, the offenders taking advantage of their lack of judgment and also of their condition of minority meant to remove the criminal liability. Sexual exploitation is the most spread form of traffic within the EU (50%), followed by exploitation through labour (21%), forced beggary, forced marriages and domestic slavery[2]. The EU took several

[1] Communication from the Commission to the European Parliament, the European Council, The Council, The European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025, Brussels, 14.4.2021 COM(2021) 171 final
[2] The EU's fight against organised crime - Consilium (europa.eu)

measures to prevent human trafficking, to punish offenders and protect the victims.

3. SUPPORTING THE VICTIMS OF CRIMINALITY AT EUROPEAN LEVEL

By committing the offences, especially the violent ones, we witness a serious violation of the human rights in general, and a violation of the victims' fundamental rights in particular. Certainly, violence represents an obvious violation of the victims' rights, especially of their human dignity and their right to dignity[1]. In this context, there is the issue of the right to life, to human dignity and to integrity, along with the access to justice and non-discrimination in the treatment granted to the victim when offences are reported.

Article 47 of the Charter of the Fundamental Rights of the European Union grants all persons in the European Union the right to an efficient way of appeal. In this context, the possibility of victims to claim their rights cannot be ensured outside a concrete and efficient legal framework. An essential role is the supply of the support services for the victims of crimes that should include the provision of assistance before, during and after criminal proceedings, including provision of psychological and emotional support and of counselling on legal, financial and practical topics, and on risks of re-victimisation[2]. Therefore, victims have to be ensured the possibility to exert the right of access to justice, as provided in article 47 in the Charter of the Fundamental Rights of the European Union: „the right to an effective way of appeal and to a fair trial". But, in order to talk about the effective compliance with this right, it is imperative that victims are aware of the existence of such a support and be helped to make use of it. Thus, the Directive on the victims' rights represents an important step for the support and protection of the victims of crimes[3]. At the level of member

[1] Art. 2 and 3 of the Charter of Fundamental Rights of the European Union (2012/C 326/02, The Official Journal of the European Union C 326/391, The Charter of the Fundamental Rights of the European Union (europa.eu)

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[3] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of

States, there are different approaches regarding the support of the victims, as it is necessary to ensure the access of all victims to support services corresponding to their needs. At present, the Member States do not comply with the requirements of the Directive on victims.

Pursuant to the EU Strategy on the victims' rights (2020-2025)[1], it is extremely difficult for the most vulnerable victims, such as the victims of gender violence, children victims, disabled victims or the victims of the hate crimes, go through criminal proceedings and cope with the follow-ups of the offences. The difficulties of the victims in having access to justice are due mainly to the lack of information and to the fact that they do not benefit from enough support and protection, and this deficit has impact all the more on the persons who are victims of crimes during journeys abroad, the Directive on victims' rights provides the right to have access to information, right to support and right to protection, in accordance with the specific needs of the victims, as well as a set of of procedural rights. In order to identify the victims with specific needs of protection, the Directive imposes upon the Member States to give special attention to cases involving violence within close relationships and gender violence, sexual violence, hate offences and other offences related to personal characteristics of victims, also of disabled victims. Thus, in accordance with articles 8 and 9 of the Directive on victims' rights, the victims with particular needs should have access to organisations offering specialised support and having enough personnel and financing. Article 18 also imposes special protection measures for the safety of victims against risks of secondary victimisation and of repeated victimisation, of retaliation and revenge on behalf of the author of the crime.

The Strategy has five key priorities: (i) efficient communication with the victims and creation of a safe environment, allowing them to report the crimes; (ii) improvement of the support and protection granted to the most vulnerable victims; (iii) facilitation of victims' access to compensations; (iv) strengthening of cooperation and coordination

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crime, and replacing Council Framework Decision 2001/220/JHA, EUR-Lex - 32012L0029 - EN - EUR-Lex (europa.eu)

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Strategy on Victims' Rights (2020-2025), COM/2020/258 final, EUR-Lex - 52020DC0258 - EN - EUR-Lex (europa.eu)

among all relevant actors; and (v) strengthening of the international dimension of victims' rights.

Therefore, they desire a union of equality that can only be achieved by ensuring the right to justice for all victims of crimes, regardless of the place where the crime was committed, within the European Union, and in what circumstances.

CONCLUSIONS

At the European Union level, they make concerted efforts in order to ensure a better protection of the victims' rights, with reference to their specific needs. The international cooperation at the level of the Member States is a key priority in order to strengthen the resilience of the victims' support structures, especially as a result of the COVID-19 pandemic. Through the Directive on the victims' rights, the European Union wants to ensure the access to justice for all victims of crimes, including for the most vulnerable ones, by supplying information and by facilitating their participation in the criminal proceedings.

The EU Strategy on the victims' rights for 2020-2025 grants special attention to the actions necessary to answer the specific needs of the victims of gender violence, through actions meant to strengthen the rights of this group of victims, including through the strengthening of physical protection, creation of a EU network to prevent gender and domestic violence, and to provide EU financing.

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BRIEF CONSIDERATIONS ON THE FEATURES AND PRINCIPLES OF CRIMINAL LAW SANCTIONS

Cătălin BUCUR[1]

Abstract:

Combating the criminal phenomenon involves, on the one hand, combating the causes and conditions that generate it, and on the other hand, it involves the adoption of effective means of combating the variety of causes and conditions that generate it.

Usually, the means of combat are applied ante delictum and take into account the so-called virtual crime.

The actual crime involves all the acts committed in a given period of time and on a given territory, so it refers to acts already produced for which it is necessary to apply legal sanctions.

Thus, criminal law sanctions are applied post delictum and aim to prevent the commission of crimes.

The legal institution of criminal sanctions is a set of legal rules that provide for the type of sanctions, their content, their limits and their application.

Key words: *criminal phenomenon; criminality; criminal sanctions; features.*

INTRODUCTION

Criminal law sanctions differ from other legal sanctions by several characteristic features.

Thus, unlike the sanction of civil law, which has a predominantly reparative character, its basic function being to ensure a fair and complete reparation (restitutio ad integrum), the sanction of criminal law is dominated by its coercive character – affective, determination to be concretely individual, presupposing the consideration, necessarily, of some retributive criteria, deriving from the gravity of the deed, and

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personal criteria, deriving from the real state of antisociality of the offender.

The following features of criminal law sanctions are retained and accepted in the criminal doctrine: legal character, repressive character (retributive), preventive character, necessary and inevitable character, post delictum character, criminal sanctions are applied to criminals.

1. THE NOTION OF SANCTION

By applying criminal law sanctions, the rule of law is restored and at the same time the prevention of new crimes committed by the sanctioned (special prevention), as well as the prevention of crimes committed by criminal law by other members of society (general prevention).

Criminal law sanctions are the consequences that the criminal law imposes in case of violation of its precepts, the coercive measures that the commission of the deeds provided by the criminal law entails and, at the same time, instruments for the realization and restoration of the rule of law[1].

Sanctions (punishments) are a basic institution of criminal law along with crime and criminal liability, representing the three fundamental institutions of criminal law.

The system of criminal sanctions is a set of legal rules that provide for the type of sanctions, their content, their limits and their application[2].

2. THE FEATURES OF SANCTIONS

The features of criminal law sanctions are the following:

a) The legal feature.
b) The repressive feature.
c) The prevention features.
d) The necessary and inevitable feature.
e) The post-delictum feature.

[1] Alexandru Boroi, *Drept penal. Partea generală*, 2nd Edition (Bucharest: C.H. Beck, 2014), 424.
[2] Viorel Paşca, *Drept penal. Partea generală*, 4th Edition (Bucharest: Universul Juridic, 2015), 435.

f) The criminal law sanctions are applied to perpetrators, namely to criminally liable individuals.

a) The legal feature

This feature derives from the principle of legality of incrimination and punishment according to which no sanctions other than those provided by the criminal law can be applied (*nullum crimen sine lege* – "no crime shall exist outside the law", *nulla poena sine lege* – "no punishment shall exist outside the law").

Being provided by the criminal law, the sanctions are obligatorily applied by the criminal courts.

b) The repressive feature (retributive feature)

All criminal law sanctions have a repressive feature, as they involve a certain amount of suffering, deprivation imposed on the offender independently of his will, and also have a strong coercive force.

The coercion is applied by the state through the competent bodies and considers the restriction of some rights or freedoms of the person who violated the criminal law[1].

c) The prevention features

The purpose of criminal law sanctions is prevention, as they aim to protect the fundamental social values. Prevention can be of two types: general and special prevention.

Special prevention refers to the situation in which the criminal law sanctions aim to prevent the offender from repeating the committed deeds and to prevent him from harming the other members of the society.

General prevention refers to the situation in which the criminal law sanctions seek to prevent the perpetrators of criminal law from committing crimes and at the same time to bring to their attention the importance of complying with criminal law.

The preventive nature of criminal law sanctions differs depending on the type of sanction. Punishments are predominantly of this nature, while educational and security measures are exclusively preventive[2].

[1] Traian Dima, *Drept penal. Partea generală*, 3rd Edition (Bucharest: Hamangiu, 2014), 461.
[2] Gheorghe Diaconu, *Răspunderea penală* (Bucharest: Lumina Lex, 2013), 29.

d) The necessary and inevitable feature

The application of criminal law sanctions is necessary and inevitable precisely because of their purpose, that of defending fundamental social values.

The inevitable nature is that criminal action, in case of criminal prosecution and the application of the corresponding sanction is an obligation of the judiciary and is exercised ex officio, unlike other extra-criminal legal sanctions that can be removed by the will of the holder of the action (e.g., in the case of civil action).

However, criminal law sanctions can only be removed in cases expressly provided by law (prescription of criminal execution, pardon, post-conviction amnesty).

e) The post-delictum feature

The post delictum character expresses the fact that the sanctions of criminal law are applied only after committing certain crimes. Thus, criminal law sanctions have the character of legal consequences of violating certain rules of conduct[1].

f) The criminal law sanctions are applied to perpetrators, namely to criminally liable individuals

Criminal law sanctions generally apply to perpetrators of criminal offenses, namely those who can be prosecuted.

As an exception, the safety measure of medical hospitalization and the measure of obligation to medical treatment apply to perpetrators who, being in a psychophysical state, need medical treatment.

3. THE PRINCIPLE OF CRIMINAL LAW SANCTIONS

The principles of criminal law sanctions are common to the fundamental principles of criminal law.

These principles are as follows:

a) the principle of legality of criminal law sanctions.

b) the principle of establishing sanctions compatible with the moral and legal conscience of society.

c) the principle of establishing revocable sanctions.

d) the principle of individualization of criminal law sanctions.

[1] Dima, *Drept penal* , 461.

e) the principle of personality of criminal law sanctions.

a) The principle of legality of criminal law sanctions

This principle is a consecration of the fundamental principle of legality in criminal law, namely the principle of legality of incrimination and punishment, according to which only the sanctions provided by the criminal law can be applied (*nullum crimen sine lege* – "no crime exists outside the law"; *nulla poena sine lege* – "no punishment exists outside the law").

In the doctrine, depending on the degree of determination of the sanctions, they are classified in:

i) absolute penalties (e.g., life imprisonment)
ii) relatively specific sanctions (e.g., imprisonment)
iii) indefinite sanctions (for example, the safety measure of medical admission or the obligation to undergo medical treatment)[1].

The criminal law established a framework of punishments with general minimum and maximum limits, but also with special limits for each crime.

For example, in the case of imprisonment, it has its general minimum and maximum limits provided in art. 60 of the Criminal Code, namely a determined duration, between 15 days and 30 years.

Regarding the special limits of the punishments are different depending on the type of crime. For example, for the crime of aggravated theft, the special limits of the penalty are from one to 5 years in prison.

The determination of the nature, duration, amount and manner of execution of a sentence in a specific case is made only within the legal limits.

b) The principle of establishing sanctions compatible with the moral and legal conscience of society

This principle appears as an effect of the principle of humanism (fundamental principle of criminal law), the latter aiming at the defense of man and the rule of law.

According to this principle, criminal law sanctions must be fully compatible with the moral and legal conscience of society, so that they do not cause physical suffering or undermine human dignity.

[1] Dima, *Drept penal*, 463.

c) The principle of establishing revocable sanctions

According to this principle, criminal law sanctions must be adaptable (i.e., by their nature they can be divided and graded), and on the other hand, they must be revocable, i.e., in case of judicial error they can be withdrawn[1].

The Criminal Code no longer provides for the sanction of the death penalty, but in the event that a person is sentenced to death and executed, subsequently a judicial error is found, the sentence could not be withdrawn.

d) The principle of individualization of criminal law sanctions

According to this principle, the sanctions of criminal law must be established by the legislator, having as reference the gravity of the incriminated deed and the danger of the perpetrator.

Based on these benchmarks, the extent and amount of the punishment can be determined. This explains the fact that for some offenses, lighter sentences are regulated, and for other offenses, more severe penalties are provided.

However, the individualization that the legislator makes when criminalizing criminal acts should not be confused with the individualization made by the judge when judging the criminal case, nor with the administrative individualization made by the administration of the place of execution of the custodial sentence.

e) The principle of personality of criminal law sanctions

It is the rule according to which both the obligation deriving from a criminal norm to have a certain conduct, and the criminal responsibility deriving from the disregard of that obligation belong to the person who did not fulfill his obligation, committing the forbidden act, and not to another or to a group of people.

In criminal law, one cannot incur criminal liability for the act of another. The personal character of the criminal liability implies the application of the punishment only to the one who committed a crime, and the other sanctions of criminal law, especially the security measures can be taken only against the one who by his deed created the state of social danger which must be removed.

[1] Dima, *Drept penal*, 464.

It is a fundamental principle, being a guarantee of the person's freedom, it is also a principle of criminal responsibility[1].

The principle of the personality of criminal law sanctions refers to the criminal sanctions applied exclusively to the person who committed the crime. Having a personal character, they will be extinguished with the death of the person to whom they were applied and will not be able to be transmitted to his successors.

This principle also applies to convicted legal persons, in the sense that a sanction applied to one legal person cannot be transferred to another except in the cases expressly provided by the provisions of art. 151 of the Criminal Code.

CONCLUSIONS

In order to effectively combat the phenomenon of crime, coercive measures have been adopted, called legal sanctions under criminal law aimed at preventing the commission of crimes.

These sanctions are applied according to the law, by the court, in each specific case, taking into account the person of each offender and also, they must be revocable and compatible with the evolution of society (moral and legal conscience of society).

By applying criminal law sanctions, the rule of law is restored and at the same time the prevention of new crimes by the sanctioned (special prevention) is prevented, as well as the prevention of crimes committed by criminal law by other members of society (general prevention).

Sanctions (punishments) are a basic institution of criminal law along with crime and criminal liability representing the three fundamental institutions of criminal law.

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TAX LIABILITY OF EMPLOYEES AND EMPLOYERS TO PAY THE SOCIAL SECURITY CONTRIBUTIONS, BETWEEN NATIONAL REGULATION AND SOCIAL REALITY

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Abstract:

Starting with 2018, the direction of tax policy focusing on social security contributions in Romania fundamentally changed, along with the entering into force of the provisions of OUG (Government Emergency Ordinance) 79/2017 for amendment and addition of Law no. 227/2015 on the Tax Code. The government based this emergency solution on the need of reforming the public social security systems in Romania in order to increase the level of collection of incomes to the state social security budget and of responsibility of employers regarding the on-time payment of compulsory social security contributions due both by them and by employees. In this regard, they pursued the decrease of the number of compulsory social security contributions, the employer hereafter aiming at establishing, withholding, declaring and paying the tax liabilities due by employees and also directly. But the balance between employer and employees was unbalanced through these amendments, with regard to the tax liability payment of the social security contributions, having major consequences on the employees´ net salary rights.

Key words*: security system; social policy; contribution reform; inequity of obligations.*

INTRODUCTION

Pursuant the provisions of art. 7, point 10 of the Tax Code[1], compulsory social security contributions represent compulsory levies

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made on the basis of the law, having as purpose the protection of natural persons obliged to insure themselves against certain social risks, in exchange for which these persons benefit from the rights covered by the respective levies. In the case of income from salaries and assimilated to salaries, the tax burden is borne by both employees and employers, social security contributions representing the main source of income for the state social security insurance system[2]. Changes in tax legislation, the purpose of these changes regarding the proportion in which the tax burden is borne by the employer and the employee is the object of analysis of this study. The changes were made four years ago with the sole aim of there being better collection of budget revenues, with complete disregard for the rules established in the field by legal instruments of international law.

1. INTERNATIONAL REGULATIONS ON THE OBLIGATION TO PAY SOCIAL SECURITY CONTRIBUTIONS FOR THOSE WHO PERFORM WORK FOR THE BENEFIT AND UNDER THE AUTHORITY OF AN EMPLOYER.

In accordance with the provisions of art. 71 of the Convention no. 102/1952 of the International Labour Organization on minimum social security standards[3], the total of the insurance contributions borne by protected employees must not exceed 50% of the total of the financial resources allocated to the protection of employees, their spouses and their children. For the purpose of ascertaining whether this condition is fulfilled, all the benefits provided by the Member in compliance with this Convention, except family benefit and, if provided by a special branch, employment injury benefit, may be taken together. The Member State

[1] Law no. 227/2015 on the Tax Code published in the Official Gazette of Romania, Part I, no.688 of 10 September 2015, as subsequently amended and supplemented

[2] Cosmin Flavius Costaș, *Drept financiar*, Second edition, reviewed and added (Bucharest: Universul Juridic, 2019), 327

[3] Pursuant to art. 6 of the Order of the Minister of Foreign Affairs no. 47/2010, on 15 October 2009 entered into force for Romania Convention no. 102/1952 of the International Labour Organization on minimum standards for social security, adopted at Geneva on 28 June 1952 at the General Conference of the International Labour Organization, ratified by Law no. 375/2008 published in the Official Gazette of Romania, Part I, no. 325 of 15 May 2009

shall accept general responsibility for the due provision of the benefits provided in compliance with this Convention, and shall take all necessary measures to achieve this aim; it shall ensure, where appropriate, that the necessary actuarial studies and the calculations concerning financial equilibrium are established periodically and, in any event, prior to any change in benefits, the rate of insurance contributions, or the taxes allocated to covering the contingencies in question.

The Member States of the Council of Europe, considering that the purpose of the Council of Europe is to achieve greater unity among its members, in particular with a view to promoting social progress, being convinced of the need to establish a European social security code at a higher level than that laid down by the minimum standards contained in the International Labour Organisation Convention No. 102 on minimum social security standards, adopted in Strasbourg on 16 April 1964, the European Code of Social Security of the Council of Europe, entered into force on 17 March 1968 and signed by Romania on 22 May 2002[1].

In the content of the European Code of Social Security, the provisions of art. 70 of the ILO Convention 102 were taken over in their entirety.

Pursuant to the provisions of the two international legal instruments ratified by Romania, the tax burden of the social security contributions must be balanced between the employer and the employee, the employee's share cannot exceed 50% of the financial resources necessary for the payment of social insurance benefits. Consistent with these principles, Romania had a fiscal policy brought into line with the international rules, the social security contributions being, until 31 December 2017, established in a balanced way in the responsibility of the employees and in the responsibility of the employers, the part of the employee being much less than 50% of the total financial resources collected for the payment of social security benefits. This method of determining the tax obligations corresponded to the specificity of the legal employment relationship, an authority relationship of the employer and the assumption of the risk of the individual employment contract by the latter.

[1]Pursuant to art. 5 of the Order of the Minister of Foreign Affairs no. 47/2010, on 10 October 2010, the European Code of Social Security of the Council of Europe, adopted in Strasbourg on 16 April 1964, ratified by Law no. 375/2008 published in the Official Gazette of Romania, Part I, no. 331 of 19 May 2009

Starting with 1 January 2018, by the entry into force of the Emergency Ordinance no. 79/2017 amending and supplementing Law no. 227/2015 on the Fiscal Code[1], however, the Government of Romania understood to no longer comply with the two legal instruments of particular importance within the fiscal policies of social insurance and to dramatically change the proportion of social insurance contributions paid by the employer and the employee.

2. AMENDMENTS MADE TO THE TAX CODE[2] BY GEO 79/2017.

Paragraph (2) of art. 2 of the Tax Code was amended, establishing the copulsory social security contributions as follows:
a) social security contributions, due to the state social scurity budget;
b) social health insurance contribution, due to the budget of the Unique National Health Insurance Fund;
c) insurance contribution for work, due to the general consolidated budget.

By amending art. 138 of the Tax Code, the social security contribution rates were established as follows:
a) 25% owed by natural persons who have the quality of employees or for whom there is an obligation to pay the social security contribution;

[1]Published in the Official Gazette Part I no. 885 of November 10, 2017, not legally authorized until the date of this study

[2] Approved by Law 227/2015, published in the Official Gazette of Romania, Part I, no. 688 of 10 September 2015, amended by GEO 41/2015; GEO 57/2015; L 340/2015; GEO 50/2015; GEO 8/2016; HG 1017/2015; GEO 32/2016; L 57/2016; GEO 46/2016; GEO 84/2016; GEO 3/2017; L 2/2017; GEO 7/2017; GEO 9/2017; HG 1/2017; L 7/2017; L 107/2017; L 177/2017; OG 4/2017; OG 25/2017; L 209/2017; GEO 79/2017; L 61/2017; L 196/2017; L 3/2018; GEO 2/2018; GEO 3/2018; GEO 18/2018; L 72/2018; GEO 25/2018; L 111/2018; GEO 63/2018; L 198/2018; L 203/2018; GEO 89/2018; L 285/2018; GEO 114/2018; L 354/2018; L 175/2018; L 30/2019; GEO 15/2019; L 47/2019; L 50/2019; L 60/2019; GEO 26/2019; GEO 35/2019; GEO 31/2019; GEO 43/2019; L 156/2019; L 172/2019; L 179/2019; L 185/2019; GEO 89/2019; GEO 1/2020; L 263/2019; L 5/2020; L 6/2020; OG 6/2020; GEO 29/2020; GEO 33/2020; L 32/2020; GEO 48/2020; GEO 70/2020; GEO 69/2020; L 68/2020; L 104/2020; L 131/2020; L 155/2020; L 153/2020; GEO 181/2020; L 239/2020; L 258/2020; L 262/2020; L 296/2020; GEO 226/2020; L 230/2020; L 241/2020; GEO 13/2021; L 16/2021; GEO 19/2021; GEO 59/2021; L 196/2021; OG 8/2021; L 287/2021; L 286/2021; GEO 130/2021; L 318/2021; L 291/2021; L 322/2021; OG 4/2022; OG 11/2022; GEO 20/2022; L 72/2022.

b) 4% due in case of particular working conditions, as provided in Law no. 263/2010 on the unitary public pension system, as subsequently amended and supplemented, by natural and legal persons who are employers or are assimilated to them;

c) 8% due in the case of special working conditions, as provided in Law no. 263/2010[1], by natural and legal persons who have the quality of employers or are assimilated to them".

By amending art. 156 of the Tax Code, the health insurance contribution rate was set at 10%, only for natural persons who have the quality of employees or for whom there is an obligation to pay the health insurance contribution, pursuant to this normative act. The natural and legal persons who have the quality of employers or are assimilated to them have the obligation to calculate and withhold the health insurance contribution due by the natural persons who earn income from salaries or assimilated to salaries.

A new category of social security contribution was established, namely the insurance contribution for work, by entering the article 220^1 in the Tax Code, thus establishing the obligation of its payment by the natural and legal persons who have the capacity of employers or are assimilated to them, for Romanian citizens, citizens of other states or stateless persons, during the period in which they have, pursuant to the law, their domicile or residence in Romania, in compliance with the provisions of the European legislation applicable in the field of social security, as well as the agreements on social security systems to which Romania is a party.

The insurance contribution for work is due for income from salaries and assimilated to salaries paid to own employees. The rate of

[1] Law 263/2010 on the unitary public pension system, published in the Official Gazette of Romania, Part I, no. 852 of 20 December 2010, as amended and supplemented by GEO 117/2010; GEO 80/2010; GEO 1/2013; L 76/2012; L 37/2013; L 340/2013; L 380/2013; L 187/2012; GEO 83/2014; L 155/2015; L 192/2015; L 325/2015; L 340/2015; GEO 65/2015; L 142/2016; L 155/2016; L 172/2016; L 222/2016; GEO 99/2016; L 1/2017; L 144/2017; GEO 2/2017; L 160/2017; L 217/2017; L 216/2017; GEO 116/2017; GEO 103/2017; GEO 18/2018; GEO 82/2017; L 177/2018; L 221/2018; GEO 89/2018; GEO 114/2018; L 23/2019; L 127/2019; L 135/2019; L 215/2019; L 6/2020; GEO 10/2020; GEO 108/2020; L 163/2020; L 188/2020; L 201/2020; L 207/2020; GEO 163/2020; L 212/2020; L 235/2020; L 279/2020; L 297/2020; L 16/2021; L 113/2021; L 197/2021; GEO 94/2021; L 270/2021; L 318/2021; L 74/2022; L 76/2022

the insurance contribution for work is 2.25%, applied to the monthly basis for calculating the insurance contribution for work which consists of the sum of gross earnings from salaries and income assimilated to salaries, in the country and abroad, in compliance with the provisions of the European legislation applicable in the field of social security, as well as the agreements regarding the social security systems to which Romania is a party.

From the insurance contribution for work collected to the state budget, it was established the monthly distribution, until the end of the current month, of a rate of:

a) 15%, which was made income to the Guarantee Fund for the payment of salary claims established under Law no. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, as subsequently amended;

b) 20%, which was made income to the unemployment insurance budget;

c) 5%, which was made income to the insurance system for work accidents and occupational diseases;

d) 40%, which was made income to the budget of the Unique National Health Insurance Fund for the payment of sick leave;

e) 20%, which was made income to the state budget in a separate account.

Currently, however, following the changes made in the fiscal legislation after the entry into force of GEO 79/2017, of the insurance contribution for work collected to the state budget is distributed monthly, until the end of the current month, a rate of:

a) 12%, which is made income to the Guarantee Fund for the payment of salary claims established under Law no. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, as subsequently amended;

b) 17%, which is made income to the unemployment insurance budget;

c) 2%, which is made income to the insurance system for work accidents and occupational diseases;

d) 22%, which is made income to the budget of the Unique National Health Insurance Fund for the payment of medical leave;

e) 47%, which is made income to the state budget in a separate account.

During the period 1 January 2019 – 31 December 2028 inclusive, the insurance contribution for work collected to the state budget from employers who carry out activities in the construction sector is fully distributed to the Guarantee Fund for the payment of wage claims established under Law no. 200/2006, as subsequently amended and supplemented.

As we can see, the insurance contribution for work is given to employers at a very small percentage, its share in the financial resources necessary for the payment of social security benefits being well below 50%. Moreover, this very small proportion is not intended solely for the provision of the financial resources necessary for the payment of social security benefits. An important percentage, 47% of the insurance contribution for work paid by employers and their assimilates, is made to the state budget, in a separate account. This distribution further reduces the percentage of the employer's contribution to the social security budgets, with the deepening of the imbalance between the tax burdens established for employees and employers and the disregard of the principles that must govern the social security tax obligations in the case of legal employment relationships.

3. CONSEQUENCES OF CHANGES IN THE FIELD OF ESTABLISHING THE OBLIGATION TO PAY SOCIAL SECURITY CONTRIBUTIONS.

Starting with 01/01/2018, the date of entry into force of the changes made in the way of establishing the tax obligation to pay social security contributions, in a total percentage of 35% of the monthly gross income, borne by the employees, approximately 1.2 million employees suffered, their net income being diminished. They fully supported the transfer of contributions from the employer to the employee, because the employers did not compensate this change from their own revenues.

The employees in the private sector were the most affected by this measure, and in their case the mechanisms created by the Government proved to be completely ineffective, as the trade union confederations had warned. One of the instruments used by the Government had an imperceptible effect. By the Emergency Ordinance 82/2017, the employers were obliged to negotiate with the employees' representatives

how to bear the tax burden generated by the transfer of the contributions from the employer to the employee.

The second instrument used by the Government was the gross national minimum wage. Employees who, on 31/12/2017, had basic salaries at the level of the minimum wage of Lei 1450 benefited from protection, because the increase of the basic salary was established taking into account the transfer of social security contributions. Thus, starting with 01/01/2018, the minimum gross wage in the country was increased by Lei 450, reaching the value of Lei 1900.

Through the changes made in the tax legislation, the State transferred to the employees all the risks faced by the two major social security systems. The two systems - the public pension system and the health insurance system - have faced sustainability problems in recent years.

The legislative measures adopted by GEO no. 79/2017 ignores the history of the regulation of professional contributions in Romania, as well as the foundations on which they were based and, at the same time, contravenes the fundamental law, as well as the international treaties on human rights, ratified by Romania.

The violation of the European Code of Social and the ILO Convention 102/1952 is revealed by detailing the way in which the social protection system is financed, starting with 2018, respectively the structure of the financing for the 3 insurance funds to which the social benefits are contributed and from which the social benefits are granted: the unemployment fund - covers the risk of unemployment and of the employer's insolvency, the social security fund – covers the risk of old age, invalidity and death, and the risk of work accident or occupational disease and the unique health insurance fund – covers the risk of illness and the temporary loss of the work capacity as a result of the usual illness and accidents outside work, maternity, maternity risk). We note, therefore, that employees contribute to the financing of the scheme by more than 80%, well above the 50% limit imposed by the European Code of Social Security and ILO Convention 102. The fiscal reform carried out by GEO 79/2017 is clearly unfavourable to employees, but also to the balance of social security budgets.

Demographic changes will continue to change the structure of Romania's population. The rapid ageing process will change the ratio between the population of retirement age and the working population,

which will bring major changes in the age structure and negative implications on the labour market and in the mass of taxpayers to social security budgets. In these circumstances, the establishment of the fiscal obligations to pay the social security contributions almost exclusively borne by the employees is an inadequate legislative measure, with major consequences in establishing the financial resources necessary for the payment of the social security benefits meant to reduce the impact of the occurrence of the insured risks: old age, illness, accident, temporary incapacity for work, invalidity, loss of employment.

CONCLUSIONS

As it results from the Annual Report of the Tax Council for 2018, the first year in which the transfer of contributions from the employer to the employee was made, in the case of tax revenue, the most important reduction was recorded in the case of the tax on wage and income as a result of the reduction of the tax rate from 16% to 10%, a reduction counterbalanced, however, by the increase of social security contributions as a result of the entry into force of GEO no. 79/2017 amending and supplementing Law no. 227/2015 on the Tax Code, "these materializing in a reestablishment of the tax structure of income from salaries, without having major effects on the entire budget revenues"[1]. An additional argument in order to comply with the point of view expressed by the Tax Council pursuant to which "the major change of fiscal philosophy by shifting social security contributions almost exclusively to the employee, a unique case at least at the level of the EU Member States, is not accompanied by a justification that would make this approach credible and acceptable to the social partners"[2].

In view of the above, we consider that the paradigm of tax policy in the field of social security must be changed and brought into line with the European rules and the specifics of legal employment relations, which is characterized by the subordination relationship between the employee and the employer, with the consequence of the latter bearing a proportion of at least 50% of the tax burdens for income from work.

[1] http://www.consiliulfiscal.ro/raport2018final.pdf, accessed on 28/04/2022, 23:00
[2] The opinion of the Tax Council on the draft Emergency Ordinance amending and supplementing Law no. 227/2015 on the Tax Code, http://www.consiliulfiscal.ro/opinie-cod-fiscal-11.2017_final-site.pdf accessed on 28/04/2022, at 23:15

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THE COVID-19 PANDEMIC AND ITS EFFECTS ON THE CONCEPTS OF QUARANTINE AND TEMPORARY INCAPACITY FOR WORK, SOCIAL SECURITY RISKS INSURED WITHIN THE INSURANCE SYSTEM FOR HEALTH INSURANCE LEAVES AND ALLOWANCES

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Abstract:

The national regulatory dynamics generated by the need of an answer to the changes of social life created by the sanitary emergency situation, also influenced the provisions of the Government Emergency Ordinance no. 158/2005, as approved with amendments and additions by Law no. 399/2006, with further amendments and additions. These regulatory provisions were correlated to the ones of Law no. 136/2000 on the establishment of some measures in the field of public health in situation of epidemiological and biological risk, as republished, with further amendments and additions, with regard to providing an easier access to the medical leave certificates in cases where the isolation of insured persons is imposed. Another purpose of the amendments was to make responsible the persons travelling for personal interest in areas where there is an epidemic, epidemiologic or biological risk with another high pathogen agent, and who, upon their return to the Romanian territory, entered in medical quarantine leave in order not to become such risk factors for the persons coming into contact with them.

Key words*: Covid-19 pandemic; sanitary emergency; quarantine; isolation; public heath; temporary incapacity for work.*

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The social insurances are the most important means of achieving the protection of the active population, mainly of the employees, in case of loss of incomes due to unemployment, maternity leave, sickness, invalidity, old age, disease, quarantine, and so on[1], holding the biggest part of the social security system. The main objective of the social insurances is granting some cash benefits or services to the insured persons who were in the impossibility to get some salary incomes in certain risk situations.

The social security legal report is based on a series of characteristics, such as:

- the objects of the insurance report are, on one hand, the insured natural person, and on the other hand, the insurer, through its competent bodies;
- in the contents of the insurance legal report, that is pre-defined, there are the mutual rights and obligations of the parties, respectively the right of the insured person to receiving the social security allowance and the correlative obligation of the insurance institution to pay it, the obligation to pay the social security contribution, correlatively with the right of the insurance institution to claim the payment of the contribution;
- the insurance report is usually born *ex lege*, not being based on the will of its subjects; the insurance is therefore compulsory;
- the object of the insurance report is mainly the provision of some services which represent incomes that would replace the earning from professional activities;

The notion of *security* originates in the Latin word *securitas* (*in French sécurité*, in English *security)*, semantically having the meaning of protection, defence, state of safety, sheltered of any danger[2]. The International Labour Organization (ILO) defines health nsurance as the protection granted by the society to its members through a set of public provisions against the misery threatening them in case of loss or important reduction of professional gains due to sickness, maternity leave, work accident, unemployment, invalidity, old age or death, as well as granting medical care and allowances to families with children.

With regard to health insurance, we have in view the health insurance, the maternity benefits, the death benefit or burial allowance,

[1] Elena Zamfir and Catalin Zamfir, *Politici sociale, România în context European* (Bucharest: Alternative, 1995), 80.
[2] Ion Coteanu and Luiza Seche, Mircea Seche (coordonatori), *Dictionarul explicativ al limbii romane*, ediția a II a (Bucharest: Universul Enciclopedic, 1998), 969.

the unemployment benefit, the right to pension, insurances for work accidents and professional diseases, the allowance for temporary work incapacity, the quarantine allowance, and so on.

1. THE CURRENT LEGAL REGULATION OF THE QUARANTINE LEAVE AND ALLOWANCE.

The legal regulation regulating the way of granting the leaves and allowances of health social insurances in Romania is the Government Emergency Ordinance OUG 158/2005[1]. In order to prevent sicknesses and recovery of work capacity, the insured persons can benefit from: allowance for reduction of work time; leave and allowance for quarantine; balneological treatment in accordance with an individual recovery programme.

The leave and allowance for quarantine are granted to the insured persons who are forbidden to continue the activity because of a contagious disease, for the duration established by the certificate issued by the public health authority. During such period, the individual labour agreement is suspended pursuant to art. 50 "c" of Labour Code, the employee being in the impossibility to perform his/her activity, due to a reason beyond the control of his/her will or of the employer´s will.

Although the insurance contribution period is an essential condition to be able to benefit from leaves and allowances of social health insurance, with a purpose to prevent sicknesses, the insured persons have the right to leaves and allowances for quarantine, without complying with the condition of the insurance contribution period.

a.At present, the leave and allowance for quarantine are granted to the insured persons pursuant to art. 20 of Law no. 136/2020.[2] The leave and allowance for quarantine are granted to the insured who are forbidden to continue their activity, which cannot be performed at home, due to a suspicion of a contagious disease, for the duration established by the certificate issued by the public health authority. The medical leave

[1] Published in the Official Journal of Romania no. 1074 of 29 November 2005, with further amendments and additions

[2] Law no. 136/2020 on the establishment of some measures in the public health domain, in epidemiologic or biologic risk situations, republished in the Romanian Official Journal MO no. 884 of 28.09.2020, with further amendments and additions

certificate for quarantine is issued by the current physician based on the certificate issued by the specialised bodies of the public health authorities. In case of quarantine, the medical leave certificate can be issued at a subsequent date, but only for the current or previous month.

b.The duration of the medical leaves for quarantine are not cumulated with the duration of the medical leaves granted to an insured person for other affections. In case the duration of the quarantine period established by the specialised bodies of the public health authorities exceeds 90 days, the certification of the health insurance medical expert is not necessary.

The monthly gross quantum of the allowance for quarantine or isolation is 100% of the calculation basis established according to the law and it is borne fully out of the Unique National Health Insurance Fund. By exception, the allowance for quarantine is borne for a five-day period from the budget of the Unique National Health Insurance Fund, in case the measure of quarantine is established upon the return on the Romanian territory, for a person who travelled for personal reasons into an area were, at the moment of the journey, there was an epidemic, an epidemiological or biological risk, with another high pathogen agent, in the conditions established by the regulations of application of the legislative rule, approved by the Order of the Ministry of Health and of the President of the Health Insurance National House no. 15/2018/1.311/2017[1], with further amendments and additions. The medical leave certificates are issued by the current physicians who registered such persons. In these cases, the duration of the medical leaves is established by the current physicians, according to the evolution of the disease.

2. THE LEAVE AND ALLOWANCE FOR TEMPORARY WORK CAPACITY, FOR THE PERSONS AGAINST WHICH THE ISOLATION MEASURE WAS DECIDED.

For the insured persons against which the isolation measure was decided, pursuant to the provisions of art. 8 para. (3^1) of Law no. 136/2020, as republished, the medical leave certificates are issued by the general practitioners who registered and monitored these persons, for a

[1] Published in the Romanian Official Journal MO, Part I no. 31 of 12 January 2018

period established according to the evolution of the disease and the duration of the monitoring.

The isolation of persons is established with the consent of the persons subjected to examination, and in its absence, when the physician ascertains the risk of transmission of and infectious-contagious disease with imminent risk of community transmission, in order to perform the clinical and paraclinical examinations, and the biological assessments, until the reception of their results, but no more than 48 hours. Until the confirmation of the infection with an infections-contagious disease, the persons having suggestive signs and symptoms specific to the case definition, as well as those that, after the confirmation of the diagnostic of infectious-contagious disease by paraclinical investigations, according to the case definition, do not show suggestive signs or symptoms or show symptoms that do not require isolation into a sanitary facility or, if any, into an alternative location attached to the sanitary facility, are isolated at their domicile or to another location, chosen by him/her for a period that cannot exceed the infectiousness period specific to the disease determined by the pathogen agent, established according to the existing scientific data. In case such persons do not agree with the isolation measure, under the conditions mentioned above, the measure shall be established by decisions of the county public health authorities, respectively the public health authority in Bucharest.

For the decisions issued by the county public health authorities, respectively the public health authority in Bucharest, pursuant to para. (3^1), the following provisions are applicable: any person who consider himself/herself injured into a right or legitimate interest by an individual administrative deed issued pursuant to art. 8 para. (3), can file, within at most 24 hours from the date of communication of the decision of the county public health authority, respectively the public health authority in Bucharest, an action to the court in the district where he/she lives or has the residence, or to the court in the district where the sanitary unit or facility is, where he/she is isolated, requesting the annulation of the deed. The claims are exempted from the payment of the judicial stamp fee. The judgement of the claims provided at para. (1) are made within at most 24 hours from the seizing of the court, the provisions of art. 200 of Law no. 134.2010 on the Civil procedure code, as republished, with further amendments and additions, not being applicable. The parties will be summoned pursuant to the ptovisions regarding the summoning in

emergency trials, in order to ensure the compliance with the judgement term provided at para. (2), the legal assistance of the person being compulsory. The communication of the procedural acts, including the registration of the action, is made in hard copy and by electronic means.
In order to benefit from health insurance leaves and allowances, the insured persons should accomplish cumulatively the following conditions:

a) to accomplish the minimum insurance period, which is six months achieved during the last 12 months previous to the month for which the medical leave is granted; The insurance contribution period in the health insurance system, provided at art. 7, is made up of the addition of the periods: for which the insurance contribution for work was paid; for which the contribution was paid for leaves and allowances by the employer and, if any, by the insured person, respectively by the insurance fund for work accidents and professional diseases, or by the unemployment insurance budget;

The following periods are assimilated to the insurance contribution period in the health insurance system: the insured person benefits from the health insurance leaves and allowances; benefited from invalidity pension; attended the full-time courses of the university education organised according to the law, for the normal duration of such studies, subject to their graduation with a bachelor or diploma examination organised during the first session. The proof of graduation of full time classes of the university education is made with the diplomas issued by the authorised authorities, according to the law. The proof of the normal duration of such studies is made with the graduation diploma, the academic record or a certificate issued by the higher education institution; benefited from a monthly allowance during the adjustment leave period, pursuant to Law no. 273/2004 regarding the procedure of adoption, as republished, of allowance for raising children in accordance with the Government Emergency Ordinance OUG no. 111/2010 on the leave and the monthly allowance for raising children, approved with amendments by Law no. 132/2011, with further amendments and additions.

The insured persons have a right to leave and allowance for temporary work incapacity, without having to accomplish with the condition of insurance contribution period, in case of medical-surgical

emergencies, of some types of burns established through the application rules of this emergency ordinance, including for the recovery period, tuberculosis, infectious-contagious diseases from group A, established by Government decision, neoplasias, AIDS, as well as in case of infectious-contagious diseases for which they impose the measure of isolation provided at art. 8 para. (1) of Law no. 136/2020 regarding the establishment of some measure in the domain of public health in epidemiological and biological risk situations.

b) to show the certificate issued by the payer of allowances, showing the number of days of temporary work incapacity leave, had within the last 12/24 months, if any.

By exception from these legal provisions, the insured persons benefit from health insurance leaves and allowances without showing the certificate, in case of medical-surgical emergencies, of some types of burns established through the application rules of this emergency ordinance, including for the recovery period, of infectious-contagious diseases from group A, in case of infectious-contagious diseases for which they impose the measure of isolation provided by Government Decision no. 921/2020[1] regarding the approval of the List of infectious-contagious diseases for which they establish the isolation of persons at their homes, at the location declared by them or, if any, in sanitary facilities or alternative locations attached to them, as well of the List of sanitary basic facilities where they treat sick persons, such as the case of quarantine. There are established 25 infectious-contagious diseases, for which they establish the isolation of the persons at their homes, at the location declared by them or, if any, in sanitary facilities or alternative locations attached to them, such as: poliomyelitis, diphtheria, rubella, pertussis, typhoid fever, meningococcal disease (MCSE), pulmonary tuberculosis with positive microscopic, pulmonary anthrax, human rabies, cholera, pest, variola/varioloid, human flue caused by a new subtype of flu virus, A/H5N1 flue, Lassa haemorrhagic fever, Ebola, Marburg haemorrhagic fever, Crimean-Congo haemorrhagic fever, yellow fever, Nipah, SARS, MersCoV2, SarsCov2, the disease caused by an unknown/emerging infectious pathogen agent.

The monthly gross quantum of the allowance for isolation is 100% of the calculation basis established pursuant to art. 10 and it is

[1] Published in the Romanian Official Journal MO, Part I no. 1010 of 30 October 2020

borne fully out of the Unique National Health Insurance Fund, pursuant to art. 20 para. (7) of Law no. 136/2020. Thus, the calculation basis is calculated as the means value of the monthly gross incomes from the last six months out of the 12 months from which the insurance contribution period is established, until the limit of 12 gross minimum salaries per country, monthly, based on which the insurance contribution for work is calculated.

The leaves and allowances for temporary work incapacity determined by infectious-contagious diseases for which they establish the isolation measure, according to the law, are granted until the date of confirmation of the person as being healed, based on the clinical and paraclinical examinations or on the recommendation of the physician who establishes that the risk of transmission of the disease no longer exists. From the duration of granting medical leaves, expressed in calendar days, the working days are paid. For establishing the number of days to be paid, they have in view the legal provisions regarding the public holidays declared as non-working days, as well as the ones regarding the establishment of the work schedule, provided by the collective labour agreements.

3. IMPORTANT AMENDMENTS OPERATED IN THE REGULATIONS REGARDING THE LEAVES AND ALLOWANCES FOR ISOLATION AND QUARANTINE, AFTER DECLARING THE STATE OF EMERGENCY

Taking into account the necessity of aligning the provisions of Government Emergency Ordinance OUG no. 158/2005 with the ones of Law no. 136/2020 on the decision of some measures in the public health domain in epidemiological and biological risk situations, they adopted several emergency ordinances and laws: OUG 30/2020; OUG 49/2020; DCZ 229/2020; OUG 126/2020; OUG 145/2020; OUG 180/2020; OUG 74/2021; OG 14/2021; L 73/2022; L 24/2022.

These successive amendments were grounded on the extraordinary situation determined by the infection with COVID-19, by the state of emergency decided at national level pursuant to the provisions of Government Emergency Ordinance OUG no. 1/1999 on the regime of curfew and the regime of the state of emergency, approved with amendments and additions by Law no. 453/2004, with further

amendments and additions, and the high number of persons in quarantine. They amended the regulations regarding the conditions and modality of granting the medical leave certificates and the allowing corresponding to such certificates, in order to improve the access of insured persons to the benefits granted by the health insurance system.

The emergency legislative intervention at the level of the special primary legislation regulating the health insurance leaves and allowances, targeted the amendment of the regulations regarding the granting of medical leave certificates to insured persons for which the quarantine or isolation measure is established, and who have the right to health insurance leaves and allowances for quarantine and isolation. They had in view all the situations provided in the treatment protocols of some infectious-contagious diseases, so that, regardless of the place of granting the medical care and the type of disease, any insured person could benefit from health insurance leaves and allowances, considering the fact that the State is a guarantor of the right to protection of the public health and it has to take measures to ensure this right.

As for ensuring an easier access to medical leave certificates in the situation when the isolation of insured persons is imposed, they reconsidered the obligation of such persons to show the certificate from the contribution payers. As, pursuant to the legal provisions in force, in the category of insured persons for health insurance leaves and allowances, they included both persons with payment of a contribution, and insured persons without the payment of the contribution, and in the entire contents of the Government Emergency Ordinance OUG no. 158/2005 on the health insurance leaves and allowances, approved with amendments and additions by law no. 399.2006, with further amendments and additions, the phrase ”period of contribution” is replaced with ”period of insurance (contribution)”.

CONCLUSIONS

Taking into account the necessity of regulation of some measures that would support the insured persons that suffer from temporary work incapacity or those against which the measure of isolation or quarantine was established, the Romanian Government acted mainly by adopting emergency ordinances, gradually amending the main legislative act, OUG 158/2005 respectively. Not all amendment proved to be efficient

and that is why they had to make amendments, abolitions or new meanings of the terms and concepts from the primary legislation on insurance for health leaves and allowances.

Measures were also adopted to control the expenses with medical leave allowances, taking into account that the insured persons benefited from leaves for isolation and quarantine, for a great number of calendar days. Taking in to account the increase of the expenses borne from the Unique National Health Insurance Fund, determined by the increase of the number of beneficiaries of health insurance allowances, they also implemented measures meant to ensure the smooth settlement of these rights whose beneficiaries are the insured persons, for health insurance leaves and allowances.

The sanitary state of emergency was the element generating such adjustments of the legislation, but it is imposed a more thorough analysis of the legal rules regulating the right to health insurance leaves and allowances. Thus, these rights are granted excessively and ungrounded, with major consequences on the efficiency of work, affecting the economy, and on the level of budgetary expenses destined to cover the health insurance allowances.

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THE INTERNATIONAL CONFERENCE
"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
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TAXATION OF INCOME OF INDIVIDUALS - HISTORY AND MODERN TRENDS

Adriana Ioana PANȚOIU [1]

Abstract:

Fiscal policy is one of the tools by which the state can influence economic development. At the same time, the level of public services depends on the quality of the fiscal system, and, in close correlation with them, the degree of satisfaction of the taxpayers.

The amounts resulting from the collection of taxes due for the income obtained by individuals are, at European level, the second most important source of public revenue, after the amounts collected as VAT. Therefore, states pay more attention to how these revenues are taxed. At national level, the return to the progressive taxation system, which would replace the single quota system, has been discussed.

For these reasons, this article aims to present some of the most important aspects of personal income taxation.

Key words: *taxes; taxation; income; individuals.*

INTRODUCTION

Numerous theories have been formulated over time that have served to explain the right of the state to establish a tax system. It is a well-known fact that the state uses its power to impose, in order to ensure an optimal level of public revenues necessary to fulfill its duties. The source of this power of the state has been explained by researchers through theories such as organic, sociological, social contract, equivalence theory, security theory or sacrifice theory.[2]

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[2]See in this sense Cosmin Flavius Costaș, *Tax Law* (Bucharest: Universul Juridic, 2016), 18.

1. THE ROMANIAN FISCAL SYSTEM - GENERAL ASPECTS

The general revenues of the state and of the administrative-territorial units constitute the system of budgetary revenues. These consist of tax revenue and non-tax revenue. In turn, tax revenues come from direct taxes, indirect taxes and compulsory social security contributions.

Direct taxes are those that are established and paid in a direct relationship between the taxpayer and the tax authority. These taxes relate to movable and immovable property, income, benefits or profits of natural or legal persons. In the direct taxes there are also included the profit tax, the dividend tax, the personal income tax, the land tax, etc. Indirect taxes are those that are levied as a result of the sale of goods, the execution of works or the provision of services. Those who bear these taxes are not the payers, but the final consumers, respectively the buyers of the goods or the beneficiaries of the works / services[1].

In public revenues, the share of indirect taxes is considerably higher than that of direct taxes. According to experts in the field, indirect taxation is preferable to direct taxation, the former being considered more equitable and less burdensome[2].

This does not mean, however, that the share of direct taxes can be neglected. On the contrary, there is a concern of the legislator to improve the way direct taxes are set.

Regarding the income taxation of individuals, there is a tendency to simplify and improve the way of taxation.

2. TAXATION OF INCOME OBTAINED BY INDIVIDUALS

In Romania, the taxation of the incomes obtained by the natural persons is made based on the provisions of the Fiscal Code, respectively based on the provisions of art. 58-131 of the code.

Both resident and non-resident individuals are subject to taxation for income obtained from any source, both in the country and outside

[1] Alin Trăilescu and Constantin Dragoș Popa, *Public Finance Law* (Bucharest: Universul Juridic, 2021), 78.
[2] Costaș, *Tax Law,* 180.

Romania. Their provisions apply to natural persons resident in states with which Romania has concluded agreements for the avoidance of double taxation.

Also, for economic or social reasons, the legislator exempts certain categories of persons or income from paying taxes. According to art. 60 points 1 and 2 are exempted from paying taxes, for some income obtained, individuals with severe or severe disabilities or individuals who earn income from salaries and assimilated to salaries, provided by art. 76 para. (1) - (3) of the Fiscal Code, as a result of the activity of creating computer programs. According to art.62, are considered non-taxable incomes the ones granted, to natural persons, according to the law, for temporary incapacity for work, other than those who obtain incomes from salaries and assimilated to salaries or the indemnities for maternal risk, maternity, raising the child and caring for the sick child, according to the law.

They are subject to income tax, according to art. 61 of the Code, the income from independent activities, the income from wages and assimilated to wages, the income from the transfer of use of goods, the income from investments, the income from the transfer of real estate from personal property, the income from pensions, the income from agricultural activities, forestry and fish farming, the income from prizes and gambling and the income from other sources.

The taxable period is, as a rule, the fiscal year (calendar year), and the tax rate is a fixed one, of 10%.

3. FIXED TAXATION VERSUS PROGRESSIVE TAXATION

Recently, in the case of income from salaries, has been discussed the replacement of fixed taxation with progressive taxation. The reason for rethinking the way of taxing the income obtained by individuals from salaries is the need for public revenues, necessary to cover public expenditures, which are constantly growing. On the other hand, it should not be overlooked that progressive taxation is perceived as "fair", being considered a social measure aimed at reducing wage disparities in society.

Progressive taxation involves a percentage increase in the tax rate, depending on certain salary thresholds. Progressive taxation is not new to the Romanian legislator. It was regulated both during the

communist period[1] and in the period that followed. Such a progressive system of taxation was regulated and applied in our country until 2004.

In the last year of progressive taxation, the collection of income tax was 2.9% of GDP. The transition to the single quota led to declining revenues in the first year, after which percentages began to rise, returning to 2.8% of GDP the following year and reaching 3.2% in 2007 and 3.7% of GDP in 2016, which was the last year with a single share of 16%. In 2018, the single share decreased from 16% to 10%. According to researchers in the field, the progressive quota did not bring, however, more money to the state budget, but on the contrary[2].

Progressive income taxation is successfully practiced by many economically developed countries (Italy, Spain, Germany, France, Poland a.o.). It is estimated that this method of taxation acts as a regulator of the economies of those states. Thus, when the economy grows and, as a consequence, revenues increase, a (larger) share of the revenue increase will go to the state. Among the notable benefits of progressive taxation are: limiting the too rapid growth of aggregate demand, which in turn slows down price growth and reduces the public deficit in times of economic boom[3].

On the other hand, progressive taxation is often seen as a system of taxation directed against luxury and wealth[4]. More simply and more directly, it is appreciated that this system is built on the principle of "taking from the rich and dividing to the poor."

In Eastern and Central Europe, progressive taxation is applied in countries such as the Czech Republic, Slovakia, Latvia and Lithuania,

[1] See in this sense art. 1 of Decision no. 545 of April 30, 1970 on the regulation of taxes on the income of the population, issued by the Council of Ministers, published in the Official Gazette no. 1 of January 1, 1971, available at https://legislatie.just.ro/Public/DetaliiDocumentAfis/21360, accessed on 20.04.2022, 15.00.

[2] Andreea Pora, "Taxation of "wealth". The advantages and disadvantages of progressive tax", https://romania.europalibera.org/a/cot%C4%83-unic%C4%83-vs-impozit-progresiv/31555211.html, accessed on 18.04.2022, time 12.00.

[3] Eugen Rădulescu, "Progressive taxation: between ideology and economic reality", https://www.contributors.ro/impozitarea-progresiva-intre-ideologie-%C8%99i-realitatea-economica/, accessed on 20.04.2022, at 16.00.

[4] This is the reason why people who make a considerable income, artists, athletes, etc., are oriented towards jurisdictions in which the tax rate, for these incomes, is the lowest. See in this regard Dan Alexe and Ana Ceapai, "Wealth Taxation", https://moldova.europalibera.org/a/27622009.html, accessed on 19.05.2022, 10.00.

while countries such as Bulgaria, Estonia and Hungary continue to apply the fix tax.

Regarding the opportunity to introduce progressive taxation in Romania, the opinions of specialists are contradictory.

According to one opinion, progressive taxation is not indicated in the case of states whose economy is developing, such as Romania. It is believed that the concern of these states should be economic growth. This would increase the income of citizens, at which point the system of progressive taxation in developed countries could be taken over in which this system has been successfully implemented[1].

In a similar way, the following aspects were highlighted: in addition to the fact that in our country the level of taxation is the lowest in the European Union, and the fact that we have many categories of taxpayers exempt from this tax, revenues are very low, hence the small share of personal income taxes in public revenues. In developed countries, where incomes are much higher and the amounts collected through the application of income tax are proportionally higher. The income tax, set at a progressive rate, itself increases in proportion to the level of income, reaching 60-70%[2].

At the same time, it is considered that the introduction of progressive taxation will lead to an increase in the tax burden, which would lead to an increase in the underground economy and, in the medium term, a decrease in budget revenues, thus undermining the very purpose of establishing this system[3].

In the opposite direction, there are specialists who promote the idea of reintroducing progressive taxation. Among its advantages are highlighted: the increase of state budget revenues, the limitation of social polarization and the European cultural ethos, being necessary to bring to the fore values such as solidarity, tolerance, care for the close, etc[4].

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[1] Radulescu, "Progressive taxation".

[2] Răzvan Botea, "For 13 years on the last place in the European Union to collect taxes ..", quoting Ionuț Dumitru, chief economist of Raiffeisen Bank, https://www.zf.ro/eveniment/13-ani-ultimul- place-european-union-tax-collection-the-big-19730037, accessed on 17.04.2022, 18.20.

[3] Bogdan Glăvan, "The lizard of progressive taxation", https://www.contributors.ro/%C8%99oparla-impozitarii-progresive/, accessed on 17.04.2022, time.11.30.

[4] Valentin Lazea, "Three reasons to return to progressive taxation", https://www.opiniibnr.ro/index.php/macroeconomie/421-trei-motive-pentru-revenirea-

Raising taxes appears to be a necessity, but this must be accompanied by an increase in liability. In this sense, it is necessary to develop tools to verify how money is spent and to hold accountable those who are guilty of non-compliance with relevant regulations.

According to the opinion, the reintroduction of progressive taxation, although it will not generate an economic gain in return for the most affected taxpayers, respectively, those with higher incomes, they will benefit, in compensation, from "more peace and social and political peace. In a highly polarized society like the one in Romania, in a country where there are a lot of poor and poorly educated people (potential maneuvering mass for demagogues) the resurgence of populism, nationalism, right and left extremism should not be underestimated. . Whoever thinks that the horrors of the 1930s and 1950s cannot be repeated means that he has learned nothing from history. The dissatisfied masses now will be more educated than they were then, but they have much less faith in God (and moral values) and much more entitlement, consisting of demanding rights unrelated to the fulfillment of obligations.

Of course, progressive taxation will not eradicate poverty in Romania. But, at least, the wealthy class will be able to claim, with some justification, that it did not passively witness the growth of the social chasm (which risks swallowing it)"[1].

INSTEAD OF CONCLUSIONS

The opportunity to return to progressive taxation remains at the discretion of specialists in economics and public finance. From a legal point of view, a new regulation of personal income taxation will certainly bring with it many challenges, with the expected increase in tax evasion being one of them.

Despite the challenges, I believe that a change in the way taxation is designed and perceived would be welcomed, both among taxpayers and among those who manage public finances. The participation of taxpayers in the creation of public revenues is necessary, but the state must make concerted efforts to improve public services, so that taxpayers

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la-impozitarea-progresiva?highlight=WyJsYXplYSJd, accessed on 16.04.2022, at 12.00.

[1] Lazea, "Three reasons".

are motivated to make a conscious, voluntary and committed contribution to increasing the level of public revenues.

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THE LEGITIMACY OF THE JUDICIARY AND ITS ELEMENTS

Florina MITROFAN[1]

Abstract:

The Romanian Constitution recognizes and creates the normative framework regarding the role of the judiciary in upholding the principles of the rule of law and in resolving disputes by applying the law to specific cases brought before the court.

From the point of view of the judicial organization, we must start from the delimitation of the judicial function from the other fundamental functions of the state: legislative and executive.

The judiciary does not act in its own name, exercising its powers on the basis and within the limits conferred by legal provisions, and an independent and efficient judiciary is the function of the rule of law.

Key words: *judiciary; legitimacy; authority; society; citizen.*

INTRODUCTION

In the system of separation of powers, the judiciary has a number of essential functions for ensuring the proper functioning of state mechanisms in order to guarantee the fundamental rights and freedoms of citizens.

By acting as a balancing act between the legislature and the executive, the judiciary ensures the rule of law and helps to eliminate any abuses that may arise in the exercise of the attributions of other powers.

In the above sense, the main provisions of the relevant legislation in the subject matter should be highlighted. Thus, the Romanian Constitution establishes in Chapter VI entitled "judicial authority", three

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categories of bodies, respectively: the courts, the Public Ministry and the Superior Council of Magistracy.

Of these, only the courts exercise their own judicial activity, while the Public Ministry, although a component of the judicial authority, has no jurisdiction, fulfilling specific attributions expressly regulated by law.

The Superior Council of Magistracy also does not exercise common jurisdictional attributions, and membership in the judicial authority is given by the competence of its magistrate members and by the object of the activity, which cannot be included in another form of exercising power in the state.

The Romanian Constitution regulates separately from the judicial authority another institution, the Constitutional Court, which, without being part of the category of courts, exercises jurisdictional attributions expressly and limitingly provided by law.

The role of the courts is to apply the law and not to create rules of law, and in connection with this last aspect, the provisions of Art 5 Para 4 of the Code of Civil Procedure provide that: "it is forbidden for the judge to lay down generally binding provisions in the judgments he gives in cases before him".

Moreover, Art 488 Para 1 Point 4 of the Code of Civil Procedure provides as a ground for quashing the exceeding of the powers of the judiciary by the court.

The principle of legality of justice is the essence of the rule of law, an aspect that results from the provisions of Art 126 Para 1-2 of the Constitution, as well as of Art 23 Para 12 of the same normative act and governs the activity of the courts.

The organization and functioning of the courts are carried out only according to the law, as a legal act of the Parliament and also by law the procedure according to which they carry out their activity is established.

At the same time, the law is the one to which the judge must submit in the activity of trial and the law is also the one that establishes the courts, their competence and the procedure according to which the trial activity is carried out.

The courts are the ones that form the judiciary, but the High Court of Cassation and Justice is the only court expressly named by the Constitution; regarding the other courts, the constitutional provisions referring to the law.

Law no 304/2004, Art 2 Para 2 thus provides that justice is administered by the High Court of Cassation and Justice, courts of appeal, tribunals, specialized courts, military courts and judges, and Art 56 Para 1 of the same normative act expressly provides for the military courts.

Regarding the Supreme Court, Art 126 Para 3 of the Constitution establishes that the High Court of Cassation and Justice ensures the unitary interpretation and application of the law by the other courts, according to its competence.

The same principle is enshrined in Art 18 Para 2 of Law no 304/2004.

No constitutional text prohibits the specialization of court panels, but, on the contrary, the fundamental law even allows the establishment of specialized courts in certain matters, [Art 126 Para 5 second line of the Constitution].

ASPECTS OF JURISPRUDENCE

Starting from the state of affairs of the justice system and taking into account the vast jurisprudence of the Constitutional Court, we considered it necessary to highlight some jurisprudential aspects related to the analyzed topic.

"Justice is administered by the High Court of Cassation and Justice and by the other courts established by law".

As for the concrete way of achieving justice, the court of constitutional control found that, according to Art 126 Para 2 of the Constitution, this is limited to the law that establishes both the jurisdiction of the courts and the trial procedure. Thus, the full jurisdiction of the authorities called upon to administer justice is structured, and not limited, according to certain procedures, terms and conditions, the observance of which is inextricably linked to the act of justice. In other words, what prevails, from the perspective of reporting on the purpose of the courts, is the fact that the conflicting aspects deduced to the court should be resolved by a court. The only limitations of the full jurisdiction of the courts are represented by the competence granted to the Constitutional Court according to Art 146 of the fundamental law (in this sense is also Decision no 302 of March 27, 2012, published in the Official Gazette of Romania, Part I, no 361 of

May 29, 2012) and the areas excluded from judicial control according to Art 126 Para 6 of the fundamental law[1].

In the sense of the above, it can be stated that the courts established by law have full legitimacy, according to the powers established by law, to rule on all cases given in their jurisdiction, in compliance with legal requirements.

Moreover, the legal regulation of the constitutional principles regarding the trial procedure, contributes to ensuring the right of the parties to adapt their conduct in relation to the normative hypothesis, these aspects leading to the creation of the premises for the courts to achieve a single, impartial and impartial and equal justice, according to the provisions of the fundamental law.

The full jurisdiction of the courts is not absolute, it can be structured by establishing deadlines, legal conditions or limited powers.

Thus, by Decision no 766/15 in June 2011, it was noted that: "It is in principle that the imposition, by law, of such requirements as the establishment of procedural terms or conditions for the exercise by the holder of his subjective right, even if it constitutes restrictions on free access to justice, has a solid and indisputable justification in terms of the purpose pursued, consisting in limiting in time the state of uncertainty in the development of legal relations and in restricting the possibilities of abusive exercise of the respective right. Through them, the rule of law is ensured, indispensable for the capitalization of one's own rights, respecting both the general interests and the rights and legitimate interests of the other holders, to whom the state is equally obliged to grant protection"[2].

The Court, in its jurisprudence, has ruled that public power, axiomatically, has a unique and organized character, and in the continental legal system, the primary legal instrument ordering public power is the fundamental act of the state, namely the Constitution or the fundamental law, as the case may be. It, by its nature, implies, on the one hand, a constitutive dimension, which aims at establishing the powers of the state and fundamental public authorities, and, on the other hand, an attributive dimension, which aims at conferring and defining the

1 Decision no 122/2 March 2021, published in the Official Gazette of Romania, Part I, no 537/24 May 2021

2 Decision no 766/15 June 2011, published in the Official Gazette of Romania, Part I, no 549/3 August 2011

attributions/competences of the prior public authorities. Therefore, the public power does not exclude, but, on the contrary, it presupposes the division of functions between the different public authorities, and with regard to those of constitutional rank, this obviously has its direct and original basis in the Constitution[1].

In order not to make the organization of the judiciary itself random and to prevent the emergence of arbitrary elements, the constituent legislator established that the judicial procedure is established by law, and with special regard to the High Court of Cassation and Justice established that both its composition and the rules of operation are established by organic law. Thus, when the constitutional legislator refers to the composition of the supreme court – an autonomous notion used by the Constitution – it does not take into account its total number of judges, but the organization and composition of sections, united sections, panels that perform its jurisdictional function. Therefore, the Court finds that the constitutional legislator gave great importance to the ordering of the action of the judiciary both at the level of the supreme court and at the level of the other lower courts. This constitutional construction has led to the legal qualification of the issues related to the composition of the court, as norms of public order procedure. This is why the violation of the provisions of the law regarding the composition of the panel of judges expresses a requirement of public order, the violation of which entails the absolute nullity of the acts pronounced by it.

Such a vision ensures the coherence of the judiciary's action, while guaranteeing the independence and impartiality of the judge. The right to a fair trial is based on exactly these two essential characteristics, and the very violation of the rules on the composition of the court itself certainly raises a reasonable suspicion/doubt as to whether the courts may not be independent or impartial.

The notions of "independence" and "objective impartiality" are closely interlinked, so that, in the light of the jurisprudence of the European Court of Human Rights, they must be considered together [see mutatis mutandis Court Decision of 9 October 2008 in *Moiseyev v Russia*, Para 175]. Therefore, the constant jurisprudence of the European Court of Human Rights, regarding the application of Art 6 of the Convention – the right to a fair trial and the general guarantees of a fair

[1] Decision no 358/30 May 2018, published in the Official Gazette of Romania, Part I, no 473/7 June 2018

trial, show that the independence of the tribunal cannot be separated from its impartiality, and these two conditions must be met cumulatively when assessing compliance with Art 6 of the Convention. In the same sense, in the doctrine it was emphasized that Art 6 Para 1 imposes distinctly both the condition of the impartiality of the tribunal and that of its independence. However, in cases brought before the Court, these conditions appear to be closely linked, which has determined the European Court to examine them together.

With regard to the independence of the judge, the Court finds that Art 2 Para 3 of Law no 303/2004, as amended by Law no 242/2018, states that: "Judges must make decisions without any restrictions, influences, pressures, threats or interventions, direct or indirect, from any authority, even judicial authorities". The wording "even judicial authorities" refers to the inappropriate conduct, contrary to legal regulations, of persons holding various positions (management/execution) in the judiciary or of institutions that are part of the judicial authority and which, through administrative decisions, take their position or activity, creates a fear of the magistrate in the exercise of his function, likely to influence his decisions. The rule expresses a principle, that the independence of the judge, in resolving the case that he judges, cannot be limited by any person or authority of the state. Of course, the independence enjoyed by the judge does not mean arbitrary, it must be subject to the law (Decision no 45 of January 30, 2018, Para 108).

The Constitutional Court notes that, in accordance with the jurisprudence of the European Court of Human Rights, in determining the independence of the court, appearances play a special role, as what is at stake is the trust that the courts have in a democratic society.

CONCLUSIONS

The purpose of the judiciary is to ensure respect for the fundamental rights and freedoms of human beings, as set out in the following international documents: the International Charter of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union,

as well as to guarantee the observance of the Constitution and the laws of the country.

Its main objective is also to ensure that the right to a fair trial is respected and that the courts are analyzed impartially and independently by the courts.

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QUALIFYING THE LEGAL STATUS OF EMPLOYEES OF PRIVATE MILITARY AND SECURITY COMPANIES

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Abstract:

The nature of the presence and participation of private military and security companies in contemporary armed conflicts is omnipresent. The rights and obligations of these companies in general and their employees in particular are an important element of legal research in the field of international humanitarian law.

This article examines the constituent elements of the legal status of employees in the light of the following categories of participants in the conflict: combatants, mercenaries, civilians following the regular armed forces and civilians.

Thus, it is very important to establish the rights and obligations of employees of private military and security companies in both international and non-international armed conflicts, in order to establish the mechanisms and legal instruments to ensure their compliance with the international humanitarian law rules.

Key words: *private military and security companies; combatants; mercenaries; civilians following the regular armed forces; civilians.*

INTRODUCTION

Qualifying the legal status of employees of private military and security companies proves to be an important subject and a strictly necessary element for establishing their rights and obligations in order to identify the instruments and legal mechanisms necessary to ensure

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compliance of these subjects with international humanitarian law in contemporary armed conflicts.

There are at least three reasons why it is extremely important to determine the legal status of PMSC employees:

1. To let the opposing armed forces know whether they are a legitimate military target;

2. For PMSC employees to know whether or not they have the right to participate directly in hostilities;

3. To determine whether or not PMSC employees should be held responsible for participating in hostilities.[1]

The place and role of private military and security companies in contemporary armed conflict is omnipresent. The services and the percentage of their participation both in the preparation of hostilities and directly in them is different. Some authors consider that the status of PMSC employees under international humanitarian law depends on the relationship between PMSC and the employing State, the types of services they provide and their compliance with the criteria of the 1949 Geneva Third and Fourth Conventions.[2]

Due to the circumstances characteristic to contemporary armed conflicts and the continuous diversification of the types of services provided by the PMSC, it is not currently possible to make a classification that would be practical, the existing ones being of a formal and purely theoretical nature, as long as there is no difference in the applicable legal regime depending on these hypothetical categories of the proposed classifications. Much more important for the present research is the qualification of PMSC staff as civilians or as combatants, which would allow the identification and determination of their legal protection regime.[3]

We cannot deny that the majority opinion revolves around the intention to mark equality between the employees of private military and security companies and mercenaries. However, we consider necessary to define the legal status of employees in the light of the following

[1] Alexandr Cauia and Natalia Chirtoacă, *Statutul juridic al combatantului în conflictele armate contemporane*. (Chișinău: Notograf Prim, 2012), 84.

[2] Erika Calazans, *Private Military and Security Companies: The Implications Under International Law of Doing Business in War* (Cambridge: Cambridge Scholars Publishing, 2016), 116.

[3] Cauia and Chirtoacă. *Statutul juridic*, 84.

categories of participants in the conflict: combatants, mercenaries, civilians following the regular armed forces and civilians. That is why it is very important to establish the rights and obligations of PMSC employees both in international armed conflicts and in non-international armed conflicts, in order to establish the mechanisms and legal instruments to ensure their compliance with the rules of international humanitarian law.

According to the author Kotlyarova I. I., such companies may be incorporated into the armed forces, notwithstanding the private nature of their activities, if they have a license issued in accordance with the national law providing that opportunity.[1]

In the science of international humanitarian law, the term "combatant" has a special meaning and is not synonymous with the term "fighter". There are several categories of people who are granted combatant status in relation to the status of prisoner of war.[2] Two of these categories established by Article 4A paragraphs (1) and (2) of GC III are of particular importance for the purposes of this paragraph. Combatant status is intrinsically linked to a person's membership in the regular armed forces of a state involved in a military conflict or to a voluntary or insurgent movement belonging to a party to the conflict, subject to compliance with the cumulative criteria set out in applicable international law.

In the process of determining the legal status of PMSC employees, it is important to determine how fully they meet the conditions to be included in the concept of members of the regular armed forces or as members of other militias, organized resistance movements or volunteers within the meaning of article 4A (2) of the Third Geneva Convention.

Based on the provisions of article 4A (1), we are to determine whether the employees of PMSC have been enlisted or registered in the regular armed forces of the State, a procedure regulated by the national legislation of each State. At the international level, there is no single

[1] Котляров И. И. *Международно-правовое регулирование вооружённых конфликтов (основные теоретические проблемы и практика),* (Москва: Юрлитинформ, 2013), 176.

[2] Geneva Convention relative to the treatment of prisoners of war, august 12, 1949, art. 4A. [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf> .

regulation in this regard, nor can there be as long as the training and management of military forces is the exclusive sovereignty of each state in the world. Thus, the first method of determining the legal status of a PMSC employee is to determine whether or not he or she is a member of the regular armed forces of the state party to the conflict.[1]

The article 43 of Additional Protocol I provides: "2. Members of the armed forces of a Party to the conflict… are combatants, i.e. they have the right to take part directly in hostilities".[2]

The status of the government armed forces members is defined in AP I, which can be applied equally in situations of non-international armed conflict. A person's membership in the armed forces is determined in any case by the national law of the state. In order to determine whether a person belongs to an organized armed group, it is necessary to determine whether he or she holds permanent positions in the activities of that group. The members of an organized armed group are no longer considered civilians as long as they remain members of that group due to specific functions performed in hostilities. In addition, in the case of the sole participation of a person in such a group, when his/her actions are sporadic, this cannot be qualified as belonging to an organized armed group. This requires a long-term relationship with the military structure of the belligerent state. The criterion of maintaining ties with an organized armed group was also noted in the works of Russian authors.[3]

The second method of obtaining combatant and prisoner-of-war status by PMSC employees is stipulated in the article 4A (2) of the Third Geneva Convention, which provides: "Members of other militias and other volunteer corps, including those in organized resistance movements, belonging to a party to the conflict and acting outside or inside their own territory, even if that territory is occupied, provided that such militias or volunteer corps, including these organized resistance movements, carry out the following conditions:

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[1] Cauia and Chirtoacă, *Statutul juridic*, 85.

[2] Additional Protocol 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. 43 (2).* [on-line]. [accessed 26.10.2021]. Available on Internet: URL:https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf.

[3] В.Н. Русинова, *Классификация лиц в немеждународных вооруженных конфликтах: в поисках сбалансированного подхода.* В: Государство и право, № 3 (2012), 61–69.

a) to be headed by a person who is responsible for his/her subordinates;

b) have a fixed and remotely recognizable distinctive sign;

c) to carry weapons openly;

d) to comply with their operations, the laws and customs of war".[1]

The first part sets out the condition for the PMSC to belong to a party to the conflict. In the same vein, all employees of the company must meet the four cumulative criteria. We can conclude that there is a need to determine the status of each PMSC. This "individual" approach would create a number of difficulties, and the rules of international humanitarian law must offer the real possibility for the combatant to respect them. It would be extremely difficult for enemy combatants to determine which PMSC employee meets the four cumulative criteria and thus becomes a legal target, some of whom may qualify as mercenaries and who are generally protected persons within the meaning of the Fourth Geneva Convention.[2]

Most associations of private military and security companies, such as the British Association of Private Security Companies or the International Association for Peace Operations, are willing to commit to the rules of international humanitarian law.[3]

The problem lies more in the practical difficulties of such respect, due to the uncertain and changing nature of the status of PMSC employees, than in a real lack of will. PMSC employees who are not officially enlisted in the armed forces of a state but who fight alongside them could therefore theoretically be granted combatant status if they meet these conditions. The United States has already denied al-Qaeda prisoners-of-war status, in particular because the latter did not carry any distinctive signs, openly weapons, were not subject to a military hierarchy, disobeyed the laws and customs of war, and were not a state party to the Geneva Conventions.[4] The recognition of combatant status

[1] Geneva Convention relative to the treatment of prisoners of war, august 12, 1949, art. 4A (2).

[2] Cauia and Chirtoacă, *Statutul juridic*, 87.

[3] Rapport du Groupe de travail sur utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice du droit des peuples à l'autodétermination. A/75/259 [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://undocs.org/fr/A/75/259>.

[4] Eric David, *Principes de droit des conflits armés* (Bruxelles: Bruylant, 2008), 466.

for militiamen and volunteers who meet these five substantive and formal requirements is also a customary rule.[1]

If members of the private military and security company were enlisted in the regular forces of a party to the military conflict, they would automatically have combatant and prisoner-of-war status, respectively, as well as the other criteria imposed by the III Geneva Convention could be luxuriously made. This procedure, however, proves to be purely theoretical.[2]

Mercenary. The prevailing opinion is that PMSC employees are mercenaries.[3] This view is based on the fact that company employees receive financial remuneration, which significantly exceeds the salary of a soldier in the armed forces. As an argument, the reason for their participation in armed conflicts is also invoked in order to obtain a personal gain, and not to fulfill an official obligation. From the oldest times, the international community has had a negative attitude towards mercenaries. So N. Machiavelli warned the leaders about the dangerous experience of using mercenary troops. The power that will be based on such troops will be short-lived.[4]

The concepts of fairness and respect for sovereignty guide the first doctrines of international law on mercenaries.[5] Today, the concept of correct war has fallen into disuse, and the distinction made between jus ad bellum and jus in bello makes irrelevant the conflict's cause in order to ensure law enforcement, but the idea that the use of mercenaries is reprehensible has remained and even spread.[6]

Therefore, the law of neutrality, the prohibition to use the force, the principle of non-intervention, the right of people to self-determination

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[1] Jean Marie Henckaerts and Louis Doswald-Beck, *Customary International Humanitarian Law*. *Volume 1: Rules* (Cambridge: Cambridge University Press, 2005), 14-17.

[2] Cauia and Chirtoacă, *Statutul juridic*, 93.

[3] Н. Башкиров, *Международно-правовые аспекты использования частных военных компаний.* В: Зарубежное военное обозрение, № 8 (2013), 10–18.

[4] Н. Макиавелли, *Государь. Рассуждения о первой декаде Тита Ливия,* перевод Муравьевой Г. Д., Юсима М. А. (Москва: АСТ, 2008), 44.

[5] David, *Principes de droit*, 27.

[6] Sarah Percy, *Mercenaries: The History of a Norm in International Relations (*Oxford: Oxford University Press, 2007), 78-80.

and respect for the sovereignty of states are what underlie the standards of mercenary activity.[1]

To that end, the Additional Protocol I of 1977 defines the concept of mercenary in Article 47: "1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:
(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."[2]

This definition does not satisfy absolutely all the rigors because it generates a lot of interpretations in the case of realizing practically the normative provisions. For example, it results from the provisions of the article 47, p. 2, that a person who is remunerated for his services in an amount as high as that of a soldier of similar rank in the regular military forces of the State of whose side he/she is fighting or the promised remuneration is not higher than that received by the soldiers of this army, cannot be classified as a mercenary.

A contract concluded by a state or an international organization can serve as proof of the PMSC employees special recruitment.[3] Today, such contracts tend to be classified by governments for national security purposes. Procurement and consulting services are often the subject of contracts between states and international organizations with these

[1] David, *Principes de droit,* 26-120.
[2] Additional Protocol I to the Geneva Conventions, *art. 47.*
[3] В.Н. Кулебякин *Статус сотрудников частных военных и охранных компаний по международному гуманитарному праву.* В: Московский журнал международного права, № 4 (2015), 27-42.

companies, and the employees can become direct participants in hostilities.

The personal benefit of a PMSC employee is expressed in his or her attitude towards participating in an armed conflict, in the desire to receive material rewards and not in pursuing ideological interests. Studies have shown that for some PMSC employees, participating in an armed conflict is not at all associated with material benefits, but with the ability to "catch a dose of adrenaline",[1] to apply their professional skills. The amount paid for an employee of these companies must be substantially higher than that for a combatant performing similar tasks.
In fact, there are cases in which some people are willing to perform their services in favor of a belligerent party, being remunerated at the same level as its military, because the level of remuneration is quite high, and, in addition, the military still has some material facilities.[2]

Another international treaty governing the legal status of mercenaries is the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which sets out almost identical criteria for defining the legal status of mercenaries. Professor Bugnion F. argues that the convention is not against mercenaries, but against "private warfare".[3]

The rule in the article 47 of Protocol I, which states that mercenaries are not entitled to combatant or prisoner-of-war status, is also a customary rule.[4] What is certain is that the party that detains a person who can be qualified as a mercenary may decide to grant him/her the status of prisoner of war.[5]

Although the financial element is characteristic to PMSC's activities, the qualification of their employees as mercenaries is practically impossible as long as the definition of the legal status of the mercenary is established within the limits of Additional Protocol I and

[1] Jose Louis Gomez del Prado, "Impact on Human Rights of a New Non-State Actor: Private Military and Security Companies", *The Brown Journal Of World Affairs*, 18(1), (2011), 151-169.
[2] Alexandru Burian and Oleg Balan, Eduard Serbenco, *Drept Internaţional Public* (Chișinău: CEP-USM, 2005), 495.
[3] Ф.Бюньон, *Международный комитет Красного Креста и защита жертв войны* (Москва: Международный комитет Красного Креста, 2005), 842.
[4] Alexandre Behnsen, "The Status of Mercenaries and Other Illegal Combatants Under International Humanitarian Law", *German Yearbook of International Law* (2003), 494.
[5] Behnsen, *The Status of Mercenaries,* 515.

the 1989 Convention. These inconsistencies in the criteria for defining the legal status of the mercenary allow for the active and direct participation of PMSC employees in contemporary armed conflicts.

Civilians following the armed forces. According to the article 4A (4) of the III Geneva Convention, which results from the article 13 of the Hague Convention,[1] persons who follow the armed forces without being a direct part of them, such as civilian members of military aircraft crews, war correspondents, members of work units or services in charge of the armed forces welfare, provided that they have received the authorization of the armed forces they are accompanying, must receive an identity card similar to the attached model.[2] However, the absence of the identity card provided for in this article does not exclude the right of such persons to be granted the status of prisoner of war.[3]

PMSC employees who meet the criteria set out in the article 4 A (4) of the III Geneva Convention could therefore be granted the prisoner of war status. It is important to note that the list in this article is not exhaustive, and this article does not grant them combatant status.[4] The employees of these companies accompanying the armed forces of a party to the conflict must therefore refrain from participating directly in hostilities. For example, regulations for civilians accompanying the United States armed forces do not allow them to participate directly in hostilities.

Protected by the III Geneva Convention, civilians accompanying the armed forces will not be considered persons protected by the IV

[1] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land [on-line]. [accessed 25.10.2021]. Available on Internet: URL:https://www.refworld.org/docid/4374cae64.html.

[2] Geneva Convention relative to the treatment of prisoners of war, august 12, 1949, art. 4 A(4).

[3] Jean Pictet, *La Convention de Genève (III) relative au traitement des prisonniers de guerre (Commentaire)*, Genève, CICR, 1958, p. 73-74 [on-line]. [accessed 25.10.2021]. Available on Internet: <URL:https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf>.

[4] E.-Ch. Gillard, "Quand l'entreprise s'en va-t-en guerre : les sociétés militaires et sociétés de sécurité privées et le droit international humanitaire" *Revue Internationale de la Croix-Rouge*, vol 88 (2006), 185.

Geneva Convention.[1] On the other hand, they will be able to benefit from the protection afforded by Additional Protocol I.[2] Thus, they will be protected against attacks, provided that they do not participate directly in hostilities.[3] The fact that these people accompany the armed forces and are therefore likely to be in close proximity to the regular armed forces increases the risk of them suffering collateral damage during attacks on the armed forces, even if military operations must be restricted so that the civilian population to be spared.[4]

Following the research, we can conclude that PMSC employees can be included in this category provided that the employing state provides identity cards in a predetermined form, except in the case of their direct participation in hostilities. The provision of this status is to be decided on a case-by-case basis, depending on the type of activity performed by PMSC employees.[5]

In the context of contemporary armed conflicts, when civilians employed by the PMSC can assist military operations due to their specific skills in handling the latest types of weapons from great distances, they create difficulties in determining their legal status. In our opinion, this case is to be qualified as direct participation in hostilities, and PMSC employees become legal targets for the adversary and cannot be qualified as civilians following the regular armed forces of a warring party.

However, as long as the state or the international organization signs a contract through which it accesses the specific services provided by PMSC employees that meet exactly the criteria established by the article 4 A (4) of the Third Geneva Convention, in particular to refrain from direct participation in hostilities, they may enjoy the status of prisoner of war, but not that of combatant.

Civilians. The armed forces are increasingly relying on civilians, entrusting them with tasks that were once the sole responsibility of the army, and are turning to private military and security companies. These are some of the new features that call into question the categories of

[1] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 4 (4) [on-line]. [accessed 25.10.2021]. Available on Internet: <URL:https://ihl-databases.icrc.org/ihl/INTRO/380>.
[2] Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 50 (1).
[3] Additional Protocol I to the Geneva Conventions of 12 August 1949, art.51.
[4] Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 57(1).
[5] Cauia and Chirtoacă, *Statutul juridic*, 89.

actors accepted in armed conflict.[1] The international humanitarian law defines civilians by negation, meaning that civilians are all non-combatants.[2] Thus, civilians are protected by the rules of international humanitarian law, which prohibit attacks against them. In exchange for this protection against attacks, the convention prohibits not participating directly in hostilities, which would result in the loss of protection. In addition, unlike combatants, civilians who have taken part in hostilities may be prosecuted in connection with such participation and may not be a prisoner of war in the event of capture by an enemy party.

Given the various activities of companies, whose services can be performed by providing consulting, logistical support, their employees can be considered civilians. Given the specific nature of their activities, the adoption of an international convention is necessary "to create safeguards for the legal activities of the PMSC, to regulate their functions and to use their staff in the interests of subjects of international law".[3]

If the civilian is armed and poses a potential danger to combatants of the opposing army, he/she becomes a legal target and can be annihilated. PMSC employees who are not enlisted in the regular army of a party to the conflict may be qualified as civilians, who may become legal targets as long as they are armed, or even mercenaries, once the pecuniary purpose of his/her actions has been established. The contract concluded between the PMSC and the armed forces of a state is not a sufficient basis for the enlistment of their employees in the regular armed forces.[4]

Non-international armed conflicts. The rules under review are set out in the text of the Additional Protocol I and the Geneva Conventions and are applicable to international armed conflicts. Other difficult situations in which PMSC employees are actively involved are armed conflicts without an international character. Thus, in light of the above, all non-combatants are civilians.[5]

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[1] *International Humanitarian Law and the Challenges of Contemporary Armed Conflict.* In: Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003. In: International Review of the Red Cross, Volume 86, March 2004, p. 213 - 244.

[2] Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 50.

[3] И. И. Котляров, *Международно-правовое регулирование вооружённых конфликтов (основные теоретические проблемы и практика)* (Москва: Юрлитинформ, 2013), 183.

[4] Cauia and Chirtoacă, *Statutul juridic*, 90.

[5] Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 50.

However, it can be deduced from the wording of the common article 3 that this subject is a little more complex. Indeed, the article states that: "Persons not directly involved in hostilities, including members of the armed forces who have laid down their arms and persons who have been removed from action due to illness, injury, detention or any other cause shall, in all circumstances, be treated humanely without no unfavorable distinction based on race, color, religion or belief, sex, birth or wealth, or any other similar criteria".[1]

From the analysis of these provisions, we can deduce that members of the armed forces, state or non-state, will be considered not to taking part directly in hostilities only when they have laid down their arms or been taken out of active hostilities. The mere fact of not fighting seems insufficient. Therefore, the common article 3 seems to involve a concept of civilians, including those who do not fight for a party to the conflict.[2] For the ICTY, civilians are: "people who do not or no longer belong to the armed forces".[3]

PMSC employees who cannot be qualified as combatants or civilians accompanying the armed forces, especially those working for non-governmental entities, such as other companies, international or non-governmental organizations, will be considered civilians. As civilians, they will be protected from attack. On the other hand, if they take part directly in hostilities, they may be the object of attacks, but only during this participation and not at any time, as is the case with combatants. The notion of direct participation in hostilities is therefore an important component in determining the protection that civilians enjoy in armed conflict. However, the fact that a civilian is directly involved in hostilities is not, as such, a violation of the rules of international humanitarian law.
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[1] Geneva Convention relative to the treatment of prisoners of war, august 12, 1949, art. 3 (1).
[2] Nils Melzer, *Guide interprétatif sur la Notion de Participation directe aux Hostilités en Droit international humanitaire* (Geneve: CIRC, 2010), 13.
[3] ICTY, Prosecutor v. Blaskic, IT-95-14, Judgment, Trial Chamber, 3 March 2000, par. 180 [on-line]. [accessed 29.11.2021]. Available on Internet: URL:https://www.icty.org/en/case/blaskic.

directly in hostilities, they may be the object of attacks, but only during this participation and not at any time, as the case with combatants may be.[1] The notion of direct participation in hostilities is therefore an important component in determining the protection that civilians enjoy in armed conflict. However, the fact that a civilian is directly involved in hostilities is not, as such, a violation of the rules of international humanitarian law.[2]

In this sense, the local authors Cauia A. and Chirtoacă N. propose the definition of the legal status of the combatant as a person authorized by legal normative acts with the right to participate directly in hostilities or under the circumstances created to participate directly in them, provided that the norms of international humanitarian law are strictly observed, he/she may benefit from the status of combatant and that of prisoner of war.[3]

Protection against attacks is provided for civilians, both in international and non-international armed conflicts. According to the PA II comment, direct participation in hostilities constitutes "actions which, by their essence or purpose, are likely to cause actual damage to the staff and equipment of the enemy's armed forces".[4]

However, in most cases, PMSCs are involved in non-international armed conflicts. Their participation can take place both on the part of the government armed forces and on the part of organized armed groups.

As stated in the Comment on the Additional Protocols, "postulating equality where there is an annulled inequality would be (...) a deception".[5] Indeed, the application of many provisions of international humanitarian law requires the involvement of the state mechanism. As the article 44 is intended to cover combatants during guerrilla warfare, requiring all combatants to comply fully with the provisions of

[1] Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 51 (3).
[2] Melzer, *Guide interprétatif,* 9.
[3] Cauia and Chirtoacă, *Statutul juridic*, 197.
[4] Yves Sandoz and Christoph Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.* Geneva: ICRC, Martinus Nijhoff Publishers, 1987, [on-line]. [accessed 29.11.2021]. Available on Internet: URL:https://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.
[5] Sandoz and Swinarski, Zimmermann, *Commentary on the Additional Protocols,* par. 1688.

international humanitarian law would deprive the article of its effectiveness.

However, a minimum threshold must be observed. Thus, the militias and other fighting forces will have to comply with the provisions whose violation constitutes a serious violation of the Geneva Conventions or Additional Protocol I. Otherwise, the other armed forces involved in the conflict will not be obliged to grant them privileges provided by the rules of international humanitarian law.[1]

Finally, it should be noted that the intervention of the armed forces of an international organization in a non-international armed conflict and the confrontation between these forces and a party to the conflict internationalizes this conflict, thus giving it an international character with the consequence of applying all rules of international humanitarian law[2] and the recognition of combatant status for all participants who meet the criteria for defining that status. The same applies to United Nations peacekeeping forces when they are authorized to use force.[3]

With regard to United Nations forces, they may be considered parties to an international conflict when constituted under Chapter VII of the United Nations Charter. Although the application of IHL rules to the United Nations and the scope of the rules applicable to them are still the subject of debate,[4] the observance of the rules of international humanitarian law by United Nations forces is not in doubt.[5] Thus, in 1999, the Secretary-General of the United Nations issued a circular setting out the rules and fundamental principles of international humanitarian law applicable to United Nations forces conducting operations under the command and control of the United Nations.[6] In

[1] Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), 159-161.
[2] Provost, *International Human Rights and Humanitarian Law*, 184.
[3] David, *Principes de droit des conflits armés*, 176-177.
[4] Daphna Shraga, *The Blue Helmets: Legal Regulation of United Nations Military Operations*. By Hilaire McCoubrey and Nigel D. White. Aldershot, Brookfield VT, Singapore (Sydney: Dartmouth Publishing, 1996). American Journal of International Law, 92(1), 163-165.
[5]Daphna Shraga, "The United Nations as an actor bound by international humanitarian law", *International Peacekeeping* (1998), 64-81.
[6] UN, Circular of the Secretary-General, ST/SGB/1999/13, 6 August 1999 [on-line]. [accessed 29.11.2021]. Available on Internet: URL:https://undocs.org/ST/SGB/1999/13.

addition, in the same year, the Institute of International Law, in its resolution on the application of international law in conflicts involving non-state entities, stated that all parties to armed conflicts involving non-state entities, regardless of their legal status, as well as the United Nations and relevant regional and international organizations have an obligation to respect international humanitarian law, as well as fundamental human rights. The application of the relevant principles and rules shall not affect the legal status of the parties to the conflict and shall not depend on the mutual recognition of belligerents or insurgents.

Thus, PMSC employees may have combatant or civilian status during international armed conflicts. As this status is not predetermined, it will have to be analyzed on a case-by-case basis according to the various criteria already presented. Therefore, this status will vary and all PMSC employees working in the realities of an international armed conflict will not have the same status. Employees of the same company operating in the same conflict may even have different statuses. For example, if some are integrated into the armed forces of a party to the conflict, others are not. This situation makes it difficult to determine the status of these persons and therefore the protection to which they are entitled. Indeed, it is impossible to determine a priori the status of a PMSC employee in the context of an international armed conflict. A detailed and in-depth analysis of each case will be required.

The situation in non-international armed conflicts is somewhat different. Indeed, the rules of international humanitarian law applicable during non-international armed conflict do not recognize combatant status. Because these conflicts are of an internal nature in which a government fights against people in its territory or groups of people in the same state, national law plays a more important role.

CONCLUSIONS

The simplest method would be to enlist PMSC employees in the regular armed forces of the warring party. However, the method of enlisting PMSC employees proves to be practically inapplicable to the reports characteristic to contemporary armed conflicts between states and PMSC.

Qualifying PMSC employees as mercenaries is extremely difficult for the courts as long as finding and proving the cumulative

criteria set out in the article 47 of Additional Protocol I and the 1989 Convention is very difficult to achieve in the face of everyday realities.

The status of persons pursuing the armed forces is only a procedure to evade their responsibility for direct participation in hostilities and the intention to obtain the status of prisoner of war, the employing state having every opportunity to issue such permits, which would contribute to camouflage PMSC activities and their employees.

As long as the actions of PMSC employees cannot be qualified as direct participation in hostilities, a notion that does not have a definition or description formalized in the text of an international treaty, these persons may be qualified as civilians and protected in accordance with the requirements of the IV Geneva Convention.

If the PMSC employee cannot be qualified as a combatant, mercenary, person following the armed forces or a civilian, this person is to be qualified as an illegal participant in hostilities, a fact reprehensible both internationally and nationally in the case of non-international armed conflicts.

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THE RIGHT TO FREE MOVEMENT AND RESIDENCE WITHIN THE EU - BEYOND ITS LIMITS?

Mihaela-Adriana OPRESCU [1]

Abstract:

The heterogeneity of the national legal systems of the EU Member States creates the preconditions for a person to be considered married under the law of one Member State and unmarried in relation to the law of another Member State.

The exercise of the right of free movement and residence within the EU, which is the prerogative of European citizenship, therefore calls into question the way in which the national legal order is articulated with the European one, in the context in which the effectiveness of this right is affected, on the one hand. by the lack of unequivocal identifications of its beneficiaries and, on the other hand, by the differences in the Member States' approaches to conjugality models.

In the Coman judgment, the Court of Justice of the European Union, using the method of self-interpretation, provided a new definition, fully emancipated from the national law of the Member States, of the concept of "spouse" with which Member States must operate when acting in the sphere of application of the Treaties.

Similarly, in an attempt to find a solution to the harmonization of the legal systems of the Member States in this field, the Luxembourg court has opened Pandora's box which can be used to provide legal proceedings for same-sex couples residing in an EU Member State, grafted on the principle of non-discrimination.

Key words: *spouse; same-sex marriage; freedom of movement; right of residence; Directive 2004/38.*

INTRODUCTION

The shaping of the right to free movement and residence has become emancipated from the economic sphere with the introduction of the concept of European citizenship by the Maastricht Treaty (1992). In accordance with the provisions of art. 20 of the Treaty on the Functioning

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of the European Union[1], any person who is a national of a Member State shall be a citizen of the Union. Citizenship of the Union does not replace national citizenship, but adds to it.

It can therefore be observed that European citizenship is grafted onto the nationality of one of the Member States, without making any distinction as to whether the latter was acquired by applying the principle of *jus soli* or *jus sangvinis*, or by naturalization.

The architecture of the concept of European citizenship can be detected through the pieces that make it up, namely the rights and obligations of European citizens, as follows[2]:

a) the right to move and reside freely within the territory of the Member States;

b) the right to vote and to stand as candidates in elections for the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

c) the right to enjoy, on the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State under the same conditions as the nationals of that State;

d) the right to petition the European Parliament and the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages, as well as to obtain a reply in the same language.

As regards the right of free movement and residence of the European citizens on the territory of the Member States, the conditions for the exercise thereof are detailed in Directive no. 2004/38 / EC of the European Parliament and of the Council of 29 April 2004[3], which brought together in a single legal act many pre-existing legislative

[1] *Brevitatis causa*, in this study, references to the Treaty on the Functioning of the European Union will be made using the abbreviation "TFEU".

[2] See art. 20 para.2 TFEU.

[3] Directive 2004/38 / EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 2454/93 1612/68 and repealing Directives 64/221 / EEC, 68/360 / EEC, 72/194 / EEC, 73/148 / EEC, 75/34 / EEC, 75/35 / EEC, 90/364 / EEC, 90/365 / EEC and 93/96 / EEC, published in OJ L 158 of 30 April 2004. *Brevitatis causa*, for the avoidance of repetition, references to this instrument of European law will be made using the term "Directive ".

instruments in this field and defined the limits imposed on this right on grounds relating to public policy, public security or public health.

It should be noted that the Directive outlines this right from the perspective of beneficiaries other than European citizens, in particular their family members.

In the sense of the provisions of art. 2 (2) of the Directive, family members of the European citizen are:

(a) the spouse;

(b) the partner with whom the Union citizen has entered into a registered partnership, under the law of a Member State, if the host State recognizes this pattern of conjugality[1];

(c) direct descendants up to 21 years of age or dependent, as well as direct descendants of the spouse or partner;

(d) dependent direct ascendants and those of the spouse or partner.

Analysing in conjunction the provisions of art. 21 para. (1) TFEU and art. 3 para. (1) of the Directive[2], related to the provisions of art. 4-7 of the Directive, we can see that the right to free movement within the EU can be limited depending on the beneficiaries.

If in the case of the European citizens, their right to free movement and residence within the EU is an autonomous one, in the case of family members, the same right is a derived, accessory one. The legal texts mentioned above illustrate in this respect that the family member of the European citizen (whether he is a spouse, direct descendant, direct ascendant etc., and without making any distinction according to whether the European citizen is an adult or a minor) enjoys the right derived from free movement and residence, subject to restrictions on public policy, public security or public health, in so far as, on the one hand, the family

[1] Account shall be taken of the situation where, under the law of the host Member State, the registered partnerships are considered to be equivalent to marriage and in accordance with the conditions laid down by the relevant legislation of the host Member State.

[2] According to art. 3 para. (1) of the Directive, it applies to any citizen of the Union who travels to or resides in a Member State other than that of which he is a national, and to members of his family.

member is a third-country national and, on the other hand, the European citizen has exercised the right to free movement[1].

In other words, the right of the family member is grafted onto the exercise by the European citizen of the right to free movement and residence, by leaving the territory of the country of origin and staying on the territory of another EU Member State.

We consider that it is obvious that if the family member, for example the husband, already holds the European citizenship, he does not have to rely on his family connection with another European citizen who has exercised his right to free movement, in order to be able to move around the EU without restrictions.

In such a case, the right to free movement and residence has its source in the status of European citizen, and the fact that the right's owner simultaneously holds the quality of family member of another European citizen is irrelevant.

Similarly, if the European citizen has not exercised his or her right to free movement by moving within the territory of an EU Member State other than his or her country of origin, his or her family member shall not be entitled to such a right conferred by the European legal framework.

In such a case, the regulation of the right of residence of the family member -a third-country national- shall be made in accordance with the national immigration provisions of the host Member State, without prejudice to EU law.

I. THE EFFECTIVENESS OF THE RIGHT TO FREE MOVEMENT AND RESIDENCE-CONDITIONED BY THE EXISTENCE OF UNIFORM EUROPEAN LEGAL NOTIONS?

As it is well known, the notions of family law, such as marriage and the conditions of its validity, the concept of spouse, adoption and filiation, do not fall within the current language of the European Union, but under the umbrella of national rights. However, the application and interpretation of the right to free movement and residence within the EU reverberate beyond the limits set by the founding fathers, with the Court

[1] Mihaela-Adriana Oprescu, "The principle of the best interests of the child in the law of the European Union. From theoretical consecration to jurisprudential recognition in contexts with elements of foreignness", *Revista de dreptul familiei no. 1* (2021): 394.

of Justice of the European Union being called upon to rule on the interpretation of substantial institutions traditionally inherent in family law, subsequently uniformly configured at Union level, precisely in order to ensure the effectiveness of European norms.

This can be easily explained from the perspective of the fact that the right to free movement and residence is not one "on paper", but also applied effectively, so that it cannot be separated from its beneficiaries.

Given the heterogeneity of national legal systems, which may sometimes create premises for a person to be legally married under the law of one Member State and unmarried in relation to the law of another Member State, how can one talk about the uniform exercise of the right to free movement and residence -the prerogative of European citizenship- to the extent that the configuration of the concept of "spouse", exclusively when it comes to the application of the rules of EU law, would be left to the discretion of the national authorities?

How effective would the right to free movement and residence be, since it could only be exercised in fragments within the EU, as Member States recognize or not the various types of marital unions?

Last but not least, the concept of European citizenship departs from the ordinary meaning of the actual institution of citizenship defined as a political-legal link between the state and the citizen: European citizenship is linked to mobility.

The Coman case is an illustrative example of this. The ruling in Case C 673/16, having as its object a reference a preliminary ruling made by the Romanian Constitutional Court[1], offered the Court of Justice of the European Union the possibility to detect the meaning of the words "spouse" and "family member" in the sense of the provisions of art. 2 paragraph 2 letter a) of the Directive.

At the origin of the dispute was the approach of the couple formed by a Romanian citizen (Mr. Relu Adrian Coman) and an American citizen (Mr. Robert Clabourn Hamilton)[2] who addressed the

[1] CJEU, Judgment of June 5, 2018, Case C - 673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Accept vs. Inspectorate General for Immigration, Ministry of the Interior, ECLI: EU: C: 2018: 385, March, 23, 2022, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=CF070EBB603C3A406F072BBB4E497A68?text=&docid=202542&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1866946.

[2] The couple lived in the United States until 2009 and their marriage took place in 2010 in Brussels.

General Inspectorate for Immigration in Romania to be informed of the steps required so that Mr. Hamilton would be able to reside on the Romanian territory for more than three months, the request being based on the provisions of Directive no. 38/2004.

In response to their request, the Inspectorate General for Immigration informed the two that the American citizen enjoyed only a right of residence for a period of three months, since, on the one hand, according to the provisions of the Romanian Civil Code, the same-sex marriages concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania, and on the other hand, the extension of the right of temporary residence in Romania of Mr. Hamilton cannot be granted as family reunification.

Under those circumstances, the plaintiffs Relu Adrian Coman, Robert Clabourn Hamilton and the Accept Association, brought an action before the Bucharest District 5 Court against the General Inspectorate for Immigration and the Ministry of Internal Affairs, requesting a finding of discrimination on the grounds of sexual orientation regarding the exercise of the right of free movement within the Union, as well as the obligation of the Inspectorate to put an end to this discrimination and to pay them compensation for the non-material damage suffered.

Relying on the fact that the Romanian constitutional provisions protect the right to family and private life and enshrine the principle of equal rights, the applicants invoked the exception of the unconstitutionality of Article 277 paragraph 2 of the Civil Code.[1]

Having been notified by the court of first instance with the settlement of the exception of unconstitutionality, the Constitutional Court used the procedure of the preliminary question (art. 267 TFEU) wishing to find out if the term "spouse" regulated by the Directive in art. 2 paragraph 2 letter a) also includes the national of a third country, of the same sex as the citizen of the European Union with whom he is legally married, in accordance with the legislation of a Member State other than the State of origin. If so, the Court was asked whether the host Member State should grant the right of residence on its territory for more than three months to the same-sex spouse of a citizen of the European Union.

[1] According to art. 277 para. 2 of the Civil Code, the same-sex marriages concluded or contracted abroad by either Romanian citizens or foreign nationals are not recognized in Romania.

As the reality of the last decades shows, in Europe and beyond, we are witnessing the shaping and even consolidation of a new conception of marriage, perceived as a simple status of the couple, thus articulating marriage in the conjugal ways detached from the traditional Christian formula.

Detached from any procreative purpose, or filiation, marriage has been rebuilt in some states as a couple relationship, based on the feelings between two people, whether they are of the same sex or of the opposite sex. On the contrary, in other states, including Romania, the sexual differentiation of the spouses is a condition for the conclusion of marriage.[1]

The Romanian legislator imposes not only a clear prohibition on the conclusion of same-sex marriages on the Romanian territory (art. 293 para. 1 linked to art. 271 Civil Code), but also on the recognition on the Romanian territory of such models of conjugality concluded abroad, either by foreign citizens or by Romanian citizens (art. 277 paragraph 2 of the Civil Code).

It can be seen that in the context of the right to free movement and residence of the family member of the European citizen, the Directive refers to the "spouse" as a family member, without, however, providing an autonomous and uniform interpretation of this term. This premise has therefore created an opportunity for the European court to provide a jurisprudential definition of the concept of "spouse", which is "a person joined to another person by the bonds of marriage" (para. 34 of the judgment). Furthermore, the Court's reasoning emphasized that the notion of "spouse", "is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned" (para. 35 of the judgment).

It should be noted that the right to free movement and residence is not only a direct effect of the European citizenship, but also a fundamental right (Article 45 in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union) which must be respected by all EU Member States when acting in the fields of application of the Treaties.

Under the circumstances set out above, the judgment of the CJEU obliged the referring court to recognize same-sex marriage as an

[1] Mihaela Adriana Oprescu, "The notion of "spouse" within the meaning of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004", *Synergies Roumanie* no. 13 (2018): 132.

extraneous legal act - which legitimizes a derived right of residence - but which cannot be transformed into a nationally recognized legal act, with the state being obliged only to enshrine the necessary legal mechanisms to ensure the right of residence of the couple in question.[1]

As a result of this decision, the Romanian state must recognize Mr. Coman's husband's right to stay in Romania for a period of more than three months, as a family member of a European citizen who has previously exercised his freedom of movement and later wanted to return to his country of origin.

Consequently, according to the Luxembourg court, the recognition of same-sex marriages reverberates only in terms of free movement and right of residence, with the definition of marriage and the matrimonial legal regime enshrined in Romanian law being fully preserved.

However, even if the judgment in question does not oblige the Member States to recognize the effects of same-sex marriage as a whole, we cannot fail to note that we are witnessing the legal formation of a new legal institution - the husband of a European citizen.

In its judgment in the Coman Case, the European Court of Justice, using the method of self-interpretation, provided a new definition, fully emancipated from the national law of the Member States, of the concept of "spouse" with which Member States must operate when acting in the sphere of application of the Treaties.

Nor can it be overlooked that the CJEU, at least in appearance, seems to mistake the need for a uniform application of the right to free movement and residence within the EU for the need for a uniform definition of the term "spouse". Thus, the Court held in para. 39 of the

[1] Oprescu, "La notion...", 132. For extensive comments on the Coman case, see Alina Tryfonidou, "Free Movement of Same-Sex Spouses within the EU: The ECJ's Coman judgment", accessed March, 24, 2022, https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment/.; N.C. Aniței, "Decision in Case C-673/16 Relu Adrian Coman and others / General Inspectorate for Immigration", *Journal of Legal Studies*, Year XI, no. 1 -2 (Iași: Lumen, 2018):113-124; Dimitry Kochenov and Uladzislau Belavusau, "Same-Sex Spouses: More Free Movement, but What About Marriage?" in EUI Department of Law Research Paper No. 2019/03, University of Groningen Faculty of Law Research Paper No. 34(2019), March, 24, 2022, SSRN: https://ssrn.com/abstract=3468257 or http://dx.doi.org/10.2139/ssrn.3468257.
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judgment that allowing Member States to restrict the access to their territory of third-country nationals married to EU citizens of the same sex would have the effect that "the freedom of movement of Union citizens would vary from one Member State to another".

Therefore, according to the European court, the interpretation of the term "spouse" essentially depends on the consequences on the right to free movement and residence.

In this respect, it should be noted that the initial proposal of the European Commission contained the term "spouse", without further clarification[1], and the Parliament brought an amendment to art. 2 para. 2 letter a), adding that the spouse "irrespective of sex, according to the relevant national legislation" is a family member.[2] With regard to this amendment, the Council was reluctant to accept it, noting that at that time only two states had legal provisions for same-sex marriages. Therefore, in retrospect, behind art. 2 paragraph 2 letter a) of the Directive there was no intention of the European legislator to look at the concept of "spouse" from the perspective of same-sex marriage. On the other hand, with regard to the legal partners, the Council reiterated that the recognition of the right to free movement must be based exclusively on the legislation of the Member State concerned, which is also highlighted in the current form of Art. 2 para.2 lit. b) of the Directive. Interestingly, the Council did not object to states being granted the opportunity to give effect to the right to free movement of a registered partner of the same sex as a European citizen, only in so far as the law of that State recognizes such conjugality. Moreover, in the Council's view, "granting couples from other Member States rights which are not

[1] See art. 2 para.2 from the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM 2001/0257 final, OJ 270/2001), accessed on March, 23, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2001%3A0257%3AFIN.

[2] See: European Parliament legislative resolution on the proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM (2001) 0257 - C5 -0336/2001 - 2001/0111 (COD)), accessed on March, 23, 2022, https://www.europarl.europa.eu/doceo/document/A-5-2003-0009_EN.html?redirect.

recognized to their own nationals could, in fact, create reverse discrimination, which must be avoided".[1]

Under these circumstances, it can be seen first of all that the omission of the European law to refer explicitly to heterosexual or homosexual marriage, as the case may be, was intentional, related to the lack of political will at the time of the legislative process, with the court in Luxembourg replacing the European legislator by interpretation, precisely in order to give effect to a right whose beneficiary was not clearly established[2].

Secondly, the legitimate question that arises is: if, from the perspective of the registered partnership, the host State is not obliged to recognize the right of residence for the non-EU partner of the same sex as the European citizen, precisely in order to avoid discrimination against its own citizens who do not have the possibility to conclude a civil partnership, how is the situation different for same-sex couples married on the territory of a permissive state in this respect when they want to settle on the territory of a host Member State refractory to this type of marital union?

Thus, on closer inspection, we note that the principle of non-discrimination may feed into the legal process of same-sex couples residing on the territory of an EU Member State, as long as the same-sex spouse of the European citizen is a family member, with all the related rights deriving from the instruments of European law and, paradoxically,

[1] See Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221 / EEC, 68 / 360 / EEC, 72/194 / EEC, 73/148 / EEC, 75/34 / EEC, 75/35 / EEC, 90/364 / EEC, 90/365 / EEC and 93/96 / EEC (OJ C 54E, 2.3.2004), accessed on March, 23, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CE.2004.054.01.0012.01.ENG&toc=OJ%3AC%3A2004% 3A054E% 3ATOC.

[2] For an opinion stating that the Luxembourg court could be accused of judicial activism, given the divergent views between Member States on the parameters under which same-sex marriage is configured, see, Daron Tan, "Adrian Coman v. Romania: A Small Victory with Wasted Potential" (OxHRH Blog, June 19, 2018), accessed on March, 24, 2022, https://ohrh.law.ox.ac.uk/adrian-coman-v-romania-a-small-victory-with-wasted-potential/.

in the areas falling within the exclusive sphere of competence of the host state, he could be considered a person outside any conjugal relationship. In other words, a person will have a dual marital status on the territory of the same Member State: married and single.

II. DILEMMAS RELATED TO THE EFFECTS OF THE JUDGMENT IN THE COMAN CASE

The Luxembourg court has consistently held that the EU cannot force the Member States to change their perspective on marriage, in order to open it up to same-sex couples, and that harmonization of Member States' legislation in this regard is only possible on a voluntary basis.

However, despite the above assurances and although the scope of the judgment appears to be limited, its implications have exceeded the limits of the right to free movement, and there is a real possibility that the States will be required to recognize the effects of same-sex and other marriages in areas that may or may not be covered by EU law.

By way of illustration, we will dwell on the provisions of O.U.G. no. 102/2005 on the free movement in Romania of the citizens of the Member States of the European Union, of the European Economic Area and of the Swiss Confederation.[1]

According to the provisions of art. 3 para. 1 of the previously mentioned normative act, the citizens of the European Union and their family members who exercised their right of residence on the Romanian territory benefit from equal treatment with the Romanian citizens in the field of application of the European Union treaties, subject to the provisions of these Treaties and to those adopted in the application thereof.

Having as a premise Romania's membership as an EU member state on the single market, the provisions of European law regarding the free movement of workers, the free movement of capital and services are fully incidental.

In this context, the following questions can be outlined: can the spouse of the European citizen, beneficiary of the right to stay in Romania for a period longer than three months, carry out paid activity

[1] O.U.G. no. 102/2005 on the free movement on the Romanian territory of the citizens of the member states of the European Union, of the European Economic Area and of the Swiss Confederation, republished in Of. M. no. 774.02.11.2011.

based on an individual employment contract, respectively can they benefit from pension if they had a full contribution period? Does the non-EU spouse of the European citizen have the right to pursue university studies funded from the state budget, under the same conditions as the European citizen, on the territory of the host state that does not recognize same-sex marriage?

We appreciate that in relation to the provisions of art. 3 para. 1 of O.U.G. no. 102/2005, the answer can only be positive, which indicates that the Coman judgment does not refer to an abstract right of residence, but on the contrary, to a well-materialized right, with a strong instrumental character, opening other different rights.

Then, although the judgment in the Coman case did not call into question the situation of the spouses' names, it is clear that the non-pecuniary effects of the marriage, such as those on the name, would have been difficult to ignore in the context in which Mr. Hamilton would have changed the name acquired through marriage, a situation in which the regulation of the right of residence in Romania and the issuance of the residence permit could not have been done using his name before the conclusion of the marriage. In other words, the granting of the right of residence on the territory of a Member State and the issuance by the competent authorities of a residence permit for a third-country national married to a European citizen would imply tacit recognition of the non-property effects of marriage on the name.

Therefore, the family status legally acquired abroad by "same-sex couples" has a certain continuity on the territory of states that have not set up minimum legal models dedicated to same-sex couples. It is obvious that sometimes the social and legal reality is difficult to accept with certain units of measurement, such as "a little married". Consequently, by exercising the right of residence on the territory of a Member State, the spouse of the same sex as the European citizen will enjoy all the rights (provided for in the legal instruments of the European legal order) that the status of family member offers him.

Moreover, the same reality is difficult to ignore in terms of national legal order, when, under the principle of conferral, an EU Member State is exclusively competent to intervene legislatively or administratively, outside the scope of the Treaties.

It is easy to imagine the situation in which the Hamilton-Coman couple would establish their residence in Romania, an aspect that

European law allows, and would be put in the situation to be treated as an unmarried couple, as the national authorities would operate with the concept of "spouse" as it is configured by the national legislation (art. 258 par. 4 Civil Code), and not with the one constructed by way of jurisprudence by the European court. For example, in a scenario in which Mr. Coman is employed in Romania based on an individual employment contract and his husband is dependent on him, the natural question is to what extent the Romanian citizen employee will be able to benefit from the personal deduction provided by art. 77 para. 1 and 2 of Law no. 227/2015 on the Fiscal Code, applicable to the taxpayer with a certain gross monthly income and who has a person that is dependent on him? Or, conversely, in situation in which Mr Hamilton would reside in Romania as a family member of a European citizen, could he benefit from the above tax deduction in so far as his husband, Mr Coman, was dependent on him?

We therefore observe the domino effect that the granting of the right of residence may produce under the conditions set out above: the right of residence is the precondition for granting the status of worker to the third-country national; the latter, holding the status of family member of the European citizen, is entitled to be treated indiscriminately in relation to Romanian citizens in the scope of the treaties of the European Union, not only in terms of access to the labour market, but also in terms of remuneration, social and tax benefits etc.

One last point we would like to draw attention to is the possible discrimination between same-sex couples married in the EU and those whose marriage has been concluded in a third country. Thus, the European court, in the recitals of the Coman judgment, draws attention to the situation of the spouse of the same sex as the European citizen, only when their marriage has been concluded according to the law of one of the Member States. Thus, for example, paragraphs 33 and 35 of the judgment refer to "a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state".

The doors left open by the Court in this regard raise the natural question of whether such a right of residence may be used by the same-sex spouse of the European citizen, when the marriage was concluded on the territory of a non-EU state. Does the principle of non-discrimination enshrined in art. 1 of Protocol no. 12 to the Convention for the Protection

of Human Rights and Fundamental Freedoms allow for the establishment of a differentiated system of protection of same-sex couples, in terms of the right of residence, depending on the place of marriage?

The affirmative answer to this question is as obvious as can be. It is true that art. 14 of the Convention establishes a limited prohibition on discrimination[1], but Protocol no. 12 contains a general, absolute ban, so that all persons under the jurisdiction of the Contracting States may invoke before the European Court of Justice the violation of the right to non-discrimination by the national authorities not only in respect of the rights and freedoms guaranteed by the Convention, but also in respect of any right recognized in the national law concerned.

CONCLUSIONS

The judgment in the Coman Case is unequivocal. It imposes an obligation of recognition on a Member State (which ignores the institution of same-sex marriage, as well as a registered partnership) of same-sex marriage concluded in another Member State, solely for the purpose of granting a derived right of residence (for more than three months) to the spouse -a national of a non-EU state- married to a European citizen who initially exercised his right to free movement and wishes to return to his country of origin.

However, the unknowns raised by the recognition of such a right of residence are numerous, because the establishment in Romania of a same-sex couple married in another EU Member State may determine the paradoxical situation in which the same person is treated simultaneously as single and married, depending on the incidence of the applicable legal system.

[1] According to art. 14 of the European Convention on Human Rights, "the exercise of the rights and freedoms recognized by the Convention must be ensured without distinction based on, inter alia, sex, race, colour, language, religion, political opinion or any other opinion, national or social origin, belonging to a national minority, wealth, birth or any other situation".

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THE NEW OLD REGULATION ON THE SERVICE IN THE MEMBER STATES OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

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Abstract:

The new realities of technological development and the increasing procedural use of modern communication tools, in the context of demonstrating their usefulness in pandemics, have attracted the need to adapt and communicate judicial and extrajudicial documents in civil and commercial matters in the Member States. of the European Union.

Thus, the new Regulation no. 1784/2020, which, although it largely retained the procedural solutions of the current Regulation no. 1393/2007, gave important effects to the way of transmitting the procedural documents in the electronic environment and thus determined a real speed of the service procedures.

Key words: *EU regulation; the service of judicial and extrajudicial documents; civil procedure; electronic means.*

INTRODUCTION

As usual, the European legislator prefers not to settle all the amendments of a normative act under the same original law, permanently adapting the norm to the amendments brought out of necessity or to ensure the coherence of the normative act, but adopts a new law, even with a very similar content. the previous one, in order to imprint the idea of reform in the public consciousness, of new, of passing to another stage.

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This situation also includes the field of communication of judicial and extrajudicial documents in civil matters in the Member States of the European Union, in which the European legislator adopted a new Regulation replacing the Regulation (EU) no. 1373/2007[1], which has been repealed, in its place applying, as principle, from 20 July 2022 the Regulation No. 1784/2020 on the communication in the Member States of judicial and extrajudicial documents in civil matters[2].

Whether the latter Regulation is new or not, we will consider, but the European legislator's desire to adopt rules to simplify procedures and facilitate access to this communication procedure is certain, each step taken with each regulation revealing the capacity of the law to adapt to the evolution of technology, to the more and more frequent changes in today's world, to the need to be efficient and at the same time to ensure good relations between Member States.

1. ABOUT THE REGULATION (EU) NO. 1393/2007

Compared to the 2004 Commission report on the application of Regulation (EC) No. 1348/2000, which noted that although there has been an improvement and acceleration in the transmission and service of documents between Member States, the application of certain provisions is not entirely satisfactory, it was considered useful to ensure the efficiency and speed of judicial proceedings in civil matters, the transmission of judicial and extrajudicial documents directly and by express means between local authorities designated by the Member States, finding that the speed of transmission is related to the means used, which must ensure data security.

Thus, Regulation no. 1393/2007, which aimed at speeding up the communication procedure, limiting the reasons for refusing the notification, re-establishing the forms to ensure efficient correspondence between the agencies involved in the procedure, carefully regulating the procedural costs related to communication to ensure access to justice , the possibility for any person having an interest in a case to serve

[1] Published in the Official Journal of the European Union No L 324/10 December 2007, 79-120

[2] Published in the Official Journal of the European Union No L 405/2 December 2020, 40-78

documents directly through judicial officials, authorities or other competent persons in the host Member State.

However, in the light of the change in the rules on personal data[1] and the increase in the flow of electronic data[2], it has been found, however, that during the period of operation of this Regulation it is necessary to improve and expedite the transmission and service of communications between Member States of the judicial and extrajudicial documents in civil and commercial matters, while guaranteeing a high level of security and protection with regard to the transmission of documents, the protection of the rights of addressees and the protection of privacy and personal data. It was also found necessary to simplify and optimize the procedures for the service of judicial and extrajudicial documents at Union level, in order to reduce delays and costs for individuals and the business environment while increasing the degree of legal certainty in transactions to stimulate the functioning of the internal market.

2. THE NEW REGULATION (EU) NO. 1784/2020[3]

The new realities, the pandemic, the recent challenges have determined the European legislator to take a position and intervene in the analyzed field, regarding the communication of procedural documents between the judicial authorities of the Member States of the Union,

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data; Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, published in the Official Journal of the European Union No L 295/21 November 2018, 39-98

[2] Regulation (EU) no. 910 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, published in the Official Journal of the European Union No L 257/28 August 2014, 73-114

[3] On the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), published in the Official Journal of the European Union No L 405/2 December 2020, 40-78.

noting that the transfer from society can be beneficial in this sector as well.

Adopted in November 2020, the New Regulation no. 1784/2020, appeared after some experience in a pandemic context, in which the specific form of communication, both between ordinary people and between them and authorities, took place mainly in the electronic environment, being concretely observed the usefulness of this method of communication, which in addition to ensuring health security measures, it has also led to increased speed, especially in terms of the authority's response to the demands and needs of society.

In this context, the essential purpose of the mandatory regulation, the proper functioning of the internal market and the development of an area of civil justice[1] in the Union, justified the need for measures to improve and speed up the transmission and notification or communication between Member States of acts. judicial and extrajudicial proceedings in civil and commercial matters, in order to reduce delays and costs for individuals and the business environment.

It envisages the use of any appropriate modern communication technology that ensures the integrity and reliability of the act received, which can be achieved "through a decentralized, secure and reliable computer system that includes national computer systems that are interconnected and interoperable from a technical point of view"[2]. It is envisaged to develop a decentralized computer system for the exchange of data that will allow the exchange of data exclusively between Member States, without the involvement of the Union institutions.

However, the transfer to the electronic environment can be very beneficial for the security of the transmitted data, so that, given the existence of previous regulations that guarantee the protection of personal data, this transition cannot be achieved without taking security measures and designing a system that consistently supports the secure flow of data in the online environment. Therefore, in the preamble of Regulation no. 1784/2020 provides for the increase of legal certainty and the simplification, optimization and digitization of procedures, which will encourage individuals and businesses to engage in cross-border transactions, thus stimulating trade in the Union and the functioning of the internal market.

[1] Jurisprudence of the CJEU
[2] Para 10 of the Preamble

In view of the pre-existing rules, the new Regulation, which proposes the creation of an IT system for this purpose[1], clarified from the outset that the secure decentralized IT system and its components should not be seen as necessarily representing a qualified electronic distribution service within the meaning of Regulation (EU) no. 910/2014 of the European Parliament and of the Council (4)[2]. It is a reference implementation software, which Member States can use instead of a national computer system, in accordance with the principle of data protection and which must include the appropriate technical measures and allow the necessary organizational measures to ensure an appropriate security and interoperability for the exchange of information in the context of service of documents.

It is also conceivable that transmission through the decentralized computer system becomes impossible due to a system disruption, in which case other appropriate means of communication must be used (other secure electronic means or through a postal service). At the same time, the aim is to identify solutions in cases where, due to special circumstances regarding the transmission of data, major difficulties are

[1] Art 2 Pct 2 – "decentralized IT system" means a network of national IT systems and interoperable access points, operating under the individual responsibility and management of each Member State, that enables the secure and reliable cross-border exchange of information between the national IT systems.

[2] Art 3 Pct 36 of the Regulation (EU) no. 910/2014 – "qualified electronic registered delivery service" means a service that allows data to be transmitted between third parties by electronic means and provides evidence of the handling of transmitted data, including evidence of sending and receiving data, and protects transmitted data against the risk of loss, theft, damage or unauthorized alteration; Art 3 Pct 37 of the same Regulation – "qualified electronic registered delivery service" means an electronic registered delivery service which meets the requirements laid down in Article 44; Art 44 of the Regulation – qualified electronic registered delivery services shall meet the following requirements: (a) they are provided by one or more qualified trust service provider(s); (b) they ensure with a high level of confidence the identification of the sender; (c) they ensure the identification of the addressee before the delivery of the data; (d) the sending and receiving of data is secured by an advanced electronic signature or an advanced electronic seal of a qualified trust service provider in such a manner as to preclude the possibility of the data being changed undetectably; (e) any change of the data needed for the purpose of sending or receiving the data is clearly indicated to the sender and addressee of the data; (f) the date and time of sending, receiving and any change of data are indicated by a qualified electronic time stamp.

reached for the agencies involved[1] or the transmission would be inefficient compared to the necessary form of the transmitted act[2].

As a general rule, the new regulation does not change the view of the European legislator found in Regulation no. 1393/2007, as it similarly shows that judicial documents are transmitted directly and as soon as possible between the transmitting and receiving agencies, thus giving priority to this type of transmission and not through intermediaries or other services, postal, courier, diplomatic agencies, etc. What the new rule adds is the concrete way of direct transmission, which is achieved through a decentralized, secure and reliable computer system, the topic of the texts and the purpose of adopting the new regulation revealing the intention of the legislator to clearly give priority to this method, to any others, such as postal services, express courier, through diplomatic and consular agents, etc.

In order to increase the efficiency of this type of transmission and not to reach the non-application of Regulation no. 1784/2020, it requires Member States to indicate which are the alternative means that can ensure reliability and security, and which can be used in the event that transmission through the decentralized computer system is not possible due to its disruption or exceptional circumstances.

Another important aspect, which was taken into account by the European legislator when adopting the new regulation, was to carry out checks on the addresses of the addressees of the transmitted act, in the context in which both Regulation no. 1393/2007 and the new law show in the scope of the Regulation that it does not apply if the address of the addressee is unknown. If it were not possible for the receiving agencies to carry out checks at the request of the transmitting agencies, or for the latter to go directly to the competent authorities of the Member State of destination, it would be impossible to carry out the procedure in the context of that it does not apply in the event that the address of the person to whom the communication is made is unknown.

Compared to its previous counterpart, the new Regulation expressly refers to the assistance provided in the case of requests for letters rogatory in connection with the address of the addressee. In the context of the non-application of the Regulation in the event that the

[1] In situations where the conversion of large documentation into electronic format would impose a disproportionate administrative burden on the transmitting agency.
[2] When the original document is required on paper to assess its authenticity.

address of the person to whom the document is to be communicated is not known, Regulation no. 1784/2020 provides for the means by which Member States must assist each other in identifying the addressee.

To this end, there are three minimum ways in which States may provide assistance to transmitting agencies, namely: designating the appointed authorities to which transmitting agencies may make direct requests for the address of the recipient; giving interested parties in other Member States the opportunity to request information on the addresses of persons to whom documents are to be notified or communicated directly to registers of domicile records or other publicly accessible databases, including electronic requests, via a form available on the European e-justice portal; or providing detailed information, on the European e-Justice portal, on how to identify the addresses of persons to whom the document must be notified or communicated.

In order for the transmitting agency to know from the outset its possibilities in the State of destination regarding the identification of the address of the person to whom the document is to be communicated, the law requires each state to transmit to the Commission complete data on the authorities from whom such information may be requested, i.e. whether the receiving agencies will, on their own initiative, address requests for information on the addresses of addressees to the registers of personal records or other databases when it appears that the address mentioned in the letter of formal notice is incorrect.

The aim was also to ensure an efficient procedure by actively involving the receiving agencies of the Member State of destination when the communication failed, either because, despite the checks carried out, the identified information did not lead to the execution of the request for notification or communication, either because of the failure to comply with the formal requirements makes notification or communication impossible, or because the request has been transmitted to a receiving agency which has no territorial jurisdiction. In such cases, provision should be made for the receiving agency to take action without undue, unreasonable and unnecessary delay, depending on the specific circumstances.

The deadlines for carrying out the procedure are short, the Regulation referring to a few days from the receipt of the document by the receiving agency but not more than one month from this moment.

The supranational norm uses phrases such as "shortest term", "as soon as possible", "without delay", "immediately after receipt", to reveal the intention of the European legislator to streamline communication procedures, all the more so as it takes place in the electronic environment and allows the instantaneous transmission of data, requests, information, etc.

In addition to short deadlines, the rule also requires a special diligence on the part of the receiving agencies, which must take all necessary measures to carry out the notification or communication as soon as possible, with a maximum limit of one month from the receipt of the request.

Exceeding this time limit, regulated in Art 11 Para 2 of the Regulation, is not automatically excluded, but presupposes, on the one hand, the obligation to immediately inform the transmitting agency and to continue the measures in order to fulfill the request of the rogatory commission. To the extent that the communication can be made within a reasonable time, the receiving agency shall continue to do so unless it is notified by the applicant that the procedure is no longer necessary.

The reasonable time limit referred to in the Regulation must be a useful one for the procedure, otherwise the requesting authority will be interested in resuming the communication procedure, by rogatory commission, after a correct identification of the address of the addressee.

Therefore, even if the receiving agency is required to continue to take the necessary measures to ensure service of the document and beyond the time limit of one month[1], the Regulation does not allow the burden of communication to be transferred exclusively to the receiving agency, which may not have the obligation to take the necessary measures for notification, so it is advisable for the transmitting agency to indicate a period after which notification or communication is no longer required.

An essential issue is the language in which the procedure is conducted, as it is well known that the procedure of the rogatory commission involves more acts than an ordinary, internal communication. Thus, first of all, the request addressed to the receiving agency must in all cases relate to the official language of the State of destination, the communication document, the language which the

[1] Notification is not possible because the defendant was not at home, being on vacation or not at work, being on a business trip.

addressee understands or must understand, and the proof of communication must serve the transmitting authority.

When completing Form A provided for in the Regulation, the referring agency must relate to the official language of the Member State of destination or, if there are several official languages in that Member State, to one of the official languages of the place where that communication shall be sent. Provided that the Regulation obliges States to communicate to the Commission in addition to their own official language and another, which they accept, in the framework of communication procedures (Art 8 Para 2, second sentence of the Regulation), form A may be completed in the official language which the State of destination has indicated to the Commission that it accepts.

As regards the act of communication, as well as its predecessor Regulation no. 1393/2007, the said Regulation provides for the possibility for the addressee to refuse to receive the act, as it is not accompanied by a translation or written in a language he understands or who must understand it, being the official language of the Member State of destination.

An essential aspect of adversarial proceedings, the understanding of the act communicated, in close connection with the language in which it is drafted or translated, is given priority by the European legislator, which obliges the receiving agency to inform the addressee of the right to refuse the act from the above languages, information which, in turn, must be in the official language of the sending State and in one of the languages understood by the addressee.

Interesting is the option of the legislator to take into account the concrete situation of the addressee in terms of effective understanding of the language in which the document is communicated, having the possibility to refuse the receipt, with effects on the impossibility of communication at that time and the obligation to remedy the situation by translating into one of the languages that the recipient understands.

In this case, problems may arise as to the date on which the communication procedure is deemed to have been carried out, as it is certain that until the translation of the document into the language which the addressee understands, it could not become aware of its contents. However, the Regulation takes into account the specific rules in different Member States, according to which an act must be amended within a certain period, in which case it indicates that the date of communication

is considered the date of presentation of the original document to the addressee, even if he did not actually know the content of that act.

The date of the communication also raised some issues with the regulatory differences between the Member States as regards procedural rules, so it was mentioned in the Regulation that, in general, the law of the Member State of destination should determine the date of notification or communication. The justification is that the actual communication procedure by the receiving agency is usually carried out in accordance with the procedural rules of the Member State of destination, only by way of exception a special method is applied if requested by the transmitting agency and if it is not incompatible with the law of the State of destination.

In the particular case where the rules of procedure of the requesting State require that the document be served within a specified time limit, the date set by the law of the sending State shall be taken into account for the applicant, and not by the rules of the State of destination.

As regards the proof of communication drawn up by the receiving agency at the end of the procedure, the Regulation provides another form (K in Annex 1) which he fills in and sends to the referring agency in the official language of its State or in the language he has indicated that he will accept (Art 14).

With regard to expenditure, as with the previous Regulation, R (EU) no. 1784/2020, it provides that the procedure for the communication and notification of documents in the State of destination is at its own expense, the possibility of imposing expenses due to communication not being allowed.

However, the case where the enforcement of a bailiff or other official provided for in the rules of the Member State of destination is necessary in order to communicate the document or to use a special method of service, which could lead to certain costs, which the applicant must bear, either in the form of advances or by reimbursement.

In order to avoid blocking the procedure for financial reasons, by imposing costs that go beyond the idea of predictability for the applicant, the Regulation requires Member States to set, in these exceptional cases, single fees to be communicated to the Commission and which to comply with the principles of proportionality and non-discrimination (Art 15 Para 2 final sentence).

It is also provided the possibility to use other means of transmission, notification and communication of documents, besides those preferred by the Regulation, respectively the direct sending between the receiving and the transmitting agencies by using the decentralized computer system.

In the first case, the Regulation states that it is permitted to send judicial documents by diplomatic or consular means to the receiving agencies only in exceptional cases. With regard to the effective communication of documents by diplomatic agents or consular officers to the person residing in the Member State of destination, any coercive measures are prohibited, i.e. the possibility for Member States to communicate to the executive authority of the Union that they do not intend to accept such a method of communication. However, this cannot be ruled out if the addressee is a national of the issuing State.

With regard to the use of public or private postal services in order to effect service of documents or documents to persons resident in another Member State, they shall be sent by registered letter with acknowledgment of receipt or equivalent. In that case, having regard to the differences in rules between the States, except where the national law of the Member State of the court permits the service of that document only personally to the addressee, it shall be the domicile of an adult who resides at the same address as the addressee or who is employed by the addressee at that address and who has the capacity and willingness to accept the act.

It is also possible to send the communication directly by electronic means to a recipient who has a known address in another Member State, in which case it is necessary to show that there are adequate safeguards to protect the interests of the recipient, including high technical standards for data security and the obligation of the express consent of the recipient[1]. This method of communication concerns the hypothesis in which the addressee has the known address and has previously expressed the express consent for the use of electronic means for the purpose of service of documents, during legal proceedings.

[1] In the form of a general consent to be served on the course of legal proceedings by this method of service, the addressee agrees to the use of this system with regard to the service of documents before it has been served or communicated to the addressee documents through this system - Para 32 of the Preamble.

If registered, qualified electronic distribution services are used within the meaning of Regulation no. 910/2014, the consent of the recipient for the use of these means of communication is sufficient.

When only the use of an e-mail address, communicated by the addressee during the procedure, for its use for communication, in addition to the express consent given by the addressee and directly to the notified authority, is required to confirm receipt of the document by means of a confirmation showing the date of receipt.

Direct communication, which is left to the discretion of the person in a Member State who has an interest in a particular case to communicate a judicial act, can be achieved through the authorities regulated by the law of the Member State of destination, only when it provides for the possibility of such a method of direct communication.

If the law of the State of destination regulates the possibility of direct communication, it shall have to provide the Commission with data on the authorities or professions that are authorized in its territory to carry out the communication procedures, in turn making the data available on the European e-justice portal.

CONCLUSIONS

The new Regulation is not exactly new, as it appears at first sight, but it covers some shortages or shortcomings identified during the period of application of the previous Regulation, so it was considered useful to establish a procedure for carrying out checks on the address of the addressee, reduction of deadlines, and alternative provision of other means of transmission.

The most important innovation concerns the practical way of transmitting and communicating data, providing for the consolidation and use of a secure decentralized computer system to ensure rapid cooperation between the authorities involved in the EU Member States, which is an adaptation to the current reality and an essential step towards the normality that the electronic environment implies, in which the current world manifests itself.

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FREEDOM OF EXPRESSION OF THE MEDIA AND THE RIGHT TO PRIVACY. FROM THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract:

This article brings up the sensitive issue of the relationship between two human rights: freedom of expression and the right to privacy.

Do fundamental rights, guaranteed at national, European and international level, enter into a real conflict? How is this conflict resolved? To what extent is their interpretation possible in harmony?

Based on these questions, we propose in this study a debate on the existence of a conflict between these two rights and the possibilities for settlement by reference to the jurisprudence of the ECHR in this matter.

Key words: *freedom of expression; right to private life; conflict; limitations; ECHR jurisprudence.*

INTRODUCTION

The issue of the conflict between freedom of expression of the media and the right to privacy is not a new one, but one that is common and difficult to resolve. In the digital age, this conflict is taking on new dimensions, given the diversity of the media.

The conflict between these two rights has developed over the course of many debates at the doctrinal level, but above all it has shaped a rich jurisprudence of the European Court of Human Rights (ECHR).

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Given the complexity of the subject, we do not propose an exhaustive approach, but only to extract some criteria on the basis of which this conflict can be remedied.

To achieve this, we will refer to one of the most recent ECHR rulings in 2021 in the *Hájovský v. Slovakia* case, in which the Court reaffirms its position on the balance between the general interest and private and family life. of the individual.

1. ABOUT THE FREEDOM OF EXPRESSION OF THE PRESS

Freedom of expression is the foundation of a democratic society and a vital requirement for its development[1]. It represents the general framework and implies freedom of the press, but it should not be confused with it. Compared to other ways of public expression, press expression has certain peculiarities regarding the object, the headlines, the means of exercise and the finalities[2].

Any journalist who practices his profession with devotion and fairness will agree that his main obligation to the public is to respect the truth.

According to art. 2 of the Deontological Code of the journalist "*the journalist can only publish information whose veracity is certain*", and according to art. 3 of the same code "*the press release must be accurate, objective and not contain personal opinions*".

According to art. 4 of the Code of Ethics "*Press news should be broadcast in compliance with the truth only after the necessary checks have been performed*". The press is obliged to strike a balance between the public and private interest, between the public value of information and its private value.

However, rumors, information exchanges, information and images from the sphere of privacy, obtained without the permission of the data subject, are still practices used by some journalists and thus may

[1] Alina Ungureanu, "Când se termină libertatea de exprimare a presei și începe dreptul persoanelor la viață privată, onoare, demnitate, imagine și reputație?", https://www.juridice.ro/655450/cand-se-termina-libertatea-de-exprimare-a-presei-si-incepe-dreptul-persoanelor-la-viata-privata-onoare-demnitate-imagine-si-reputatie.html
[2] C. M. Cercelescu, *Regimul juridic al presei* (Bucharest: Teora, 2002), 18

lead to a collision between two fundamental rights: freedom of expression and the press. the right to privacy.

At the level of domestic legislation, these two rights enjoy regulation by art. 70 of the Civil Code regarding the right to free expression: by art. 71 and art. 74 of the Civil Code – the right to privacy, as well as by special provisions in this matter. For example, the Code of Audiovisual Content Regulation[1] provides, in general, that audiovisual media service providers have an obligation to respect fundamental human rights and freedoms, privacy, honor and reputation, and the right to their own image (art. 30).

These rights are also fundamental subjective rights, being enshrined in the Romanian Constitution by art. 26 (private life) and art. 30 (freedom of expression), and on the other hand, are guaranteed by the European Convention on Human Rights by art. 10 (freedom of expression) and art. 8 (privacy).

In applying these articles, the European Court has shown that their interpretation is necessarily bilateral, each of which can be considered, in turn, as a principle or an exception-limit[2], being in question two fundamental rights that deserve a priori equal respect"[3].

2. CASE *HÁJOVSKÝ V SLOVAKIA*

The case of Hájovský v. Slovakia concerns the "clash" between the right to private and family life and the freedom of expression of the press, as well as the way in which the public interest is linked to the private interest in a democratic society.

In the case, the applicant Miroslav Hájovský[4], a Slovak citizen, born in 1941 and living in Bratislava, appealed to the European Court of Human Rights, alleging a violation of the right to privacy enshrined in art. 8 of the Convention.

[1] Decision no. 220/2011 of the National Council of Audiovisual

[2] J.-C. Saint-Pau (coord.), *Droits de la personnalité. Traites* (Paris: LexisNexis, 2013), 806; C. Munteanu and R. Ștefania Lazăr, "Dreptul la libera exprimare – drept subiectiv şi limită a dreptului la viaţa private", in *Revista Romana de Drept Privat* 4 (2017): 129-153

[3] ECHR, Case *von Hannover v Germany*, Decision of 24 June 2004.

[4] CEDO, Case *Hájovský v Slovakia* – 7796/16, Decision of 01 July 2021, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-13325%22]}

The *de facto* situation of the case is based on the assessment of the legitimacy of the presentation in the press, without the applicant's consent, of the steps taken by him to obtain the services of a surrogate mother. The applicant became the subject of a television report by an investigative reporter after he advertised in a national newspaper seeking to find a surrogate mother[1].

The investigative reporter secretly recorded meetings with him, claiming to be a possible surrogate mother. Following the broadcast of the show, an article entitled "Trade in Unborn Children" was published in print and online in a widely circulated daily newspaper.

The respective journalistic material contained the applicant's story, as presented in the television report, and published information on aspects of his personal life, as well as photographs of him taken without his consent.

Following these facts, the applicant brought an action for protection of his private life against Slovak television, but also against the publisher of the newspaper. If the first action was successful, the latter was rejected.

The European Court examined whether the national courts had struck the right balance between the protection of the applicant's privacy and the journalist's right to freedom of expression. In particular, it examined the following criteria which have been established over time in its case law[2]: the notoriety of the data subject; the subject of the reportage; the previous behavior of the person concerned; the means of obtaining the information and its veracity; the content, form and consequences of the publication; contribution to a debate of general interest.

As regards the applicant's notoriety, the previous conduct of the person concerned and the subject-matter of the reportage, the Court held that the mere fact that, as an ordinary person, the applicant had called for the publication of an advertisement which was to be enjoyed under art. 8. He had not been a public figure within the meaning of the case-law of the Court, had not pursued any public exposure following the publication of

[1] Romanian Institute for Human Rights (IRDO), *Hájovský v Slovakia* – 7796/16. Comment, https://irdo.ro/articol-jurisprudenta-cedo.php?ideseu=22&tip=2

[2] ECHR, Case *Axel Springer v Germany*, 7 February 2012; Case *Von Hannover v Germany*, Decision 24 June 2004.

the notice, but had only expressed a desire to use the services of a surrogate mother.

With regard to the subject matter of the report, the Court accepted the view of the Slovak courts that, although the article revealed some aspects of the applicant's privacy, it was nevertheless intended to inform the public about a controversial topic of public interest. surrogacy. It was taken into account in outlining this opinion that there is no legislation allowing such a reproduction technique in Slovakia and that the journalistic material also included the disclosure of the involvement of doctors and the falsification of documents.

As regards the criterion of the content, form and consequences of the article, although the article presented the applicant in a negative means, that did not in itself infringe his right to privacy, given the circumstances and the existence of the previous television reportage.

The Court also noted with regard to the means in which the information was obtained and its veracity, that the television reportage indisputably showed that the reporter had contacted the applicant undercover and that the recordings were made with a hidden camera without the applicant's knowledge and without giving his consent. Furthermore, the applicant did not consent to the publication of the photographs.

The Court also stated that the national courts had not assessed whether the journalist had acted in good faith and that although the article addressed a topic of public interest, the method used to produce the article could not be considered deontological and fit to contribute to a debate of general interest on such a topic.

In view of these issues, the Court concluded that the Slovak courts did not balance competing rights in accordance with the criteria set out in its case law. In these circumstances, and despite the margin of discretion granted to national courts in this area, the Slovak state has failed to fulfill its positive obligations under art. 8 of the Convention[1].

CONCLUSIONS

The right to privacy and the freedom of expression of the press often conflict, and it is up to the judges to "balance" them. Achieving this

[1] Romanian Institute for Human Rights (IRDO), Hájovský v Slovakia – 7796/16. Summary https://irdo.ro/articol-jurisprudenta-cedo.php?ideseu=22&tip=1

balance is not an easy task, but on the contrary it involves a very careful analysis of all the circumstances of the case. In this regard, the European Court of Human Rights has established over time in its case law[1] some relevant criteria that national courts must take into account in their exercise of balancing the two rights. Among these criteria, we note: the public interest for the debated topic and the contribution to a debate of general interest; notoriety of the data subject; the previous behavior of the person aimed; the subject of the report; the means of obtaining the information and its veracity; the content, form and consequences of the publication; good faith of the journalist; the relationship between value judgments and factual situations; the dose of artistic language exaggeration; the proportionality of the sanction with the deed.

Consequently, in any democratic society, freedom of expression of the press and privacy are mutually reinforcing rights. Both are the foundations of any free and democratic society, as well as the preconditions for their development.

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THE INTERNATIONAL CONFERENCE
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TELEVISION SUBTITLING FOR DEAF AND HARD OF HEARING PEOPLE - LEGAL ASPECTS

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Abstract:

The ratification of the Convention on the Rights of Persons with Disabilities signed by Romania in 2007 has generated the necessity of elaboration of the National Strategy on the Rights of Persons with Disabilities 2021-2027. Among persons with disabilities, the deaf and hard of hearing people have often been the subject of legal provisions in what access to communication, information and culture is concerned. Access to television programmes is thus, regulated through a series of laws and regulations that ensure the rights of the deaf and hard of hearing people to fair acces to the content of films, documentaries, commercials, news, etc. through subtitling or other means of equivalent language. This article focuses on both linguistic aspects of rendering informational and cultural content through subtitling and legal provisions of Romanian laws on deaf and hard of hearings persons beginning with the Audiovisual Law up to present.

Key words*: accessibility; deaf and hard to hearing persons; subtitling; target programme.*

INTRODUCTION

Although subtitling generally refer to interlingual translation, in the past two decades a increasing interest has been shown to intralingual translation, mainly in the context of the legislative provisions concerning the deaf and hard of hearing people that have been adopted for the purpose of providing equal social and cultural chances for the persons with disabilities. The concepts that are to be brought into attention as they occur in the legal documents or are referred to within this article are related to:

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Deaf or hard of hearing people:

The term[1] "deaf" usually refers to a hearing loss so severe that there is very little or no functional hearing..

Nevertheless, a distinction can be made between deaf and Deaf[2]. The 'lowercase d' deaf simply refers to the physical condition of having hearing loss. People who identify as deaf with a lowercase 'd' don't always have a strong connection to the Deaf community and don't always use sign language. They may prefer to communicate with speech.

The 'uppercase D' Deaf is used to describe people who identify as culturally Deaf and are actively engaged with the Deaf community. Deaf with a capital D indicates a cultural identity for people with hearing loss who share a common culture and who usually have a shared sign language[3].

"Hard of hearing" refers to a hearing loss where there may be enough residual hearing that an auditory device, such as a hearing aid or FM system, provides adequate assistance to process speech.

"Hearing impaired" is another term that is sometimes used to describe a person with hearing loss, but many people in the d/Deaf and hard-of-hearing community find the term offensive. This is because of the implication it holds of being 'impaired'[4]. In such circumstances, media products "are tailor-made to the expectations and the needs of defined sub-groups."[5]

Accessibility:

The term is constantly used in relation with all types of disabilities enumerated in legal documents. Although a clear reference to the deaf and hard of hearing people is not to be found in all legal documents that are to be further presented, *accessibility* is generally defined as: "the set of adaptation works and measures of the physical environment as well as the adaptation measures of the information and communication environment, in accordance with the needs of the people

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1 https://www.washington.edu/doit/how-are-terms-deaf-deafened-hard-hearing-and-hearing-impaired-typically-used

2 https://www.ai-media.tv/ai-media-blog/the-difference-between-d-deaf-and-hard-of-hearing-2/.

3 The same distinction in Neves, 2008, 129, Nicolae, 2020, 55

4 https://www.ai-media.tv/ai-media-blog/the-difference-between-d-deaf-and-hard-of-hearing-2/

5 Neves, 2009, 151

with disabilities, which is essential for the people with disabilities to exert their rights and fulfil their obligations in the society"[1]. The reference to information and communication involves a connection with the idea of translation on the one hand and with the media, on the other. "Television sets, cinemas, computers, portable DVD players, and mobile phones are a common and recurrent feature of our social environment, heavily based on the omnipresence of the image"[2]. The consumption of audiovisual programmes generates the need for a fair access of all media consumers and therefore, accessibility becomes of paramount importance through translation.

Nowadays, as it is well known, screen translation has a much broader sense as it includes translations for any electronic appliance with a screen, however, the term is most often used to refer to translations for the cinema, TV, video, DVD and videogames[3].
In this context, deaf and hard of hearing persons can benefit from visual media through subtiling or sign language interpreting.

Díaz-Cintas and Remael (2007:13) underline the social function of accessibility and bring into the equation the process of translation, whose aim is, as they point out, also that of facilitating access to "an otherwise hermetic source of information and entertainment". Hence, accessibility is understood as "a common denominator" (13) mirrored in audiovisual practices that, despite addressing different audiences, further the very access to information: dubbing, subtitling, voice-over, SDH or AD[4].

Subtitling:

Subtitling for Diaz Cintas and Remael[5] (2007:8) represent "the translation practice during which translation appears in written form in the lower part of the screen". There are two main categories of subtiling that may be considered within the audiovisual translation[6]

[1]https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/Romania_National-Strategy-on-social-protection-integration-and-inclusion-of-people-with-disabilities-for-the-period-2006-%E2%80%93-2013.pdf, 7
[2] Diaz Cintas, 2008, 1
[3] Chiaro, 2009, 141
[4] *apud.*Nicolae, 2020, 55
[5] Diaz Cintas and Remael, 2007, 8
[6] Gambier, 2013, 49

- ***interlingual subtitling*** literally is the subtitling between two languages, the translation process between a SL and a TL but at the same time a switch from speech in one language to writing in another language[1]. Gottlieb calles this type of transfer *diagonal or oblique subtitling*.

- ***intralingual subtitling***[2], also called "same language subtitles". This is a shift from the spoken mode of a Tv programme to the written mode of the subtitles. It is often a teletext option and it is also called "closed captions" (as opposed to the "open captions" which cannot be turned off"). It is also called *vertical subtitling*[3], which means that only mode is changed, but not language. This type of subtitling is target at deaf and hard of hearing consumers, among other categories.

Considering the above definitions and categories of subtitling, Kostopoulou[4] tackles on the elements that have to be considered as components of the translation process that are complementary to the message itself, mainly if the deaf and hard of hearing people are targeted: "This practice renders not only the original dialogues, in a condensed way, but also other elements such as letters, signs, graffiti that are present on the screen. It also takes into consideration the soundtrack of the film or voices that are not seen on screen. From this definition it is evident that audiovisual works, such as films, have three important components: image, the dialogues of the original soundtrack and the subtitles".

Target programme:

It is important to notice that the Law No 504/2002 (the Audiovisual Law) includes among the beneficiaries of the provisions all the groups and sub-groups (ethnic minorities or disabled people) that could benefit from the audiovisual services. National Audiovisual Council issued the Decision No 14/1999 stating that the provisions of the Decision are related to the necessity of ensuring the unrestricted right to any type of public **to** information as stated in art. 31, par. 1 in Romania's Constitution and art. 25, par. 2 in the Law No.48/ 1992 replaced by the Law 504/2002 revised and modified. The content of this decision is

[1] Gottlieb, 1997, 71-72, Diaz Cintas, 2006, 199

[2]Diaz-Cintas, 2013, 279 "intralingual subtitles, also known as captions in American English, are done in the same language as the dialogue of the audiovisual programme".

[3] Gottlieb, 2005, 247

[4] Kostopoulou, 2015, 53-54

important as its five articles[1] display the actions stipulated with a view to the process of translation and the types of programmes involved: television programmes, feature-lenght films and series, documentaries (scientific, educational or art films), programs targeting children, interviews, talk-shows and other programs broadcast, news broadcast.

The Law No 103/2014[2] concerning the protection of deaf and hard-of-hearing persons includes provisions to programs broadcast on national and local televisions that must provide sign translation and sync subtitles for at least 30 minutes of programs (news, political debates, economic analysis). At the same time warning signs with the message ”Attention! This program is dedicated to deaf and hard-to-hearing persons.”

In this vein, Cristina Nicolae[3], *Subtitling for deaf and hard of hearing audience* highlights the fact that there are situations when tv programmes display warning signs targeting deaf or hard of hearing people. The most common situations occur during news broadcast, interviews, telephone testimonials. We could also add to these categories

[1] Art. 1 ”Television programs broadcast according to their authorised licence issued by the National Audiovisual Council, on air or satelite, throughout Romanian territory as well as programs broadcast in other languages except Romanian within the categories of the services stipulated in art. 21/ b-c in Law No. 48/1992 shall be subtitled or translated into Romanian language.
Art.2 Feature-length films and series shall be subtitled or dubbed into Romanain language.
Art. 3 Documentaries (scientific, educational or art films), programs targeting children and other programs recorded through various means may be translated entailing both subtitling and uttering the translated text by a speaker (voice off).
Art. 4 Interviews, talk-shows and other programs broadcast directly in another language, shall be translated into Romanian thoroughly, between sentences, paragraphs or speeches, as appropriate.
Art. 5 Exceptions to the provisions stipulated in Art. 3 are music videos and that parts in foreign languages courses, which through their learning concepts need not be translated.
Art. 6 Exceptions to the provisions stipulated in Art. 4 are the news broadcast within the programs targeting national minorities, written in the program grids as per task book and considered an integral part of the audiovisual licence.**”**

[2] Law No 103/2014 modifies and completes the Law No 408/2002 (with further modification and completitions) as follows: after Chapter IIÎ^3 an new chapter is introduced Chapter IIÎ^4 with the following title: *The Protection of the deaf and hard-to-hearing persons.* The provisions of Art. I in Law No 103/2014 are introduced as provisions in Law No408/2002 Chapter IIÎ^4 starting with Art. 42.

[3] Nicolae, 2020, 59-60

the separate category of adverisements subtitled (*Bake Rolls Cinema, 2017; Bake Rolls Most Wanted taste 2018/2022; Old Spice, 2022*, etc.)

LEGISLATION GUIDELINES ON SUBTITLING FOR DEAF AND HARD OF HEARING

The ratification of the Convention on the Rights of Persons with Disabilities and its Optional Protocol[1] was adopted on 13 December 2006 at the United Nations Headquarters in New York and signed by Romania on 26 September 2007 settles that persons with disabilities[2] must enjoy the same rights as any other persons and must receive the same opportunities in order to fully take part as equal partners in all social aspects.

According to Law No. 448/2006 concerning the protection and promotion of the rights of persons with disabilities, reprinted, with all further modifications and completitions, the following types of disabilities are included: physical, visual, auditive, deafblind, somatic, mental, psychical, HIV/AIDS, associated, rare disease impaiments.

The Law No.448/2006 reprinted, on the protection and rights of the persons with disabilities regulates the rights and obligations of the persons with disabilities granted by the law for the purpose of their social integration and inclusion. Art. 2, par.(1) of the Law defines the persons with disabilities : The persons with disabilities are those persons who are totally denied or given a limited access to equal chances in the social life by the social environment, unadapted to their physical, sensorial, psychical, mental and/or associated, requiring, thus, protection measures for the purpose of their social integration and inclusion.

For a correct understanding of the Law, Art. 5 states the following meanings attached to the terms used: 1. unrestricted access of the person with disability – the unlimited or unrestricted access to the physical, informational and communicational environment; 2. accessibility – total

[1] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[2] "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".Art 1 of the Convention on the Rights of Persons with Disabilities available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html

measures and adaptation works for the physical, as well as, informational and communicational environment according to the the needs of the persons with disabilities, an essential factor for exercising the rights and complying with the obligations in the society; 3. adaptation – the process of transformation of the physical and informational environment, of the products or systems in order to make them available to the persons with disabilities.

Although there is no clear reference on the *the deaf and hard of hearing people* in the article 2, sensorial impairment is supposed to include this disability. On the other hand, the idea of facilitating communication[1] is clearly stated in the above provisions.

The National Strategy on the social protection, integration and inclusion of people with disabilities for the period 2006 – 2013 called „Equal opportunities for people with disabilities – towards a non-discriminatory society"[2] states that " The goal of the Strategy is to ensure the full exertion by all people with disabilities of their rights and fundamental liberties, with a view to enhancing the quality of their life"[3]. One basic principle of this strategy is that of prevention and combating of discrimination (2) which includes the criteria of" [...] disability, noncontagious chronic disease, HIV infection or belonging to a disadvantaged category"[4]. In chapter I, section II.1 the document displays

[1] In Art.2 of the Convention on the Rights of Persons with Disabilities, the following definition is provided for communication: "Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology; "Language" includes spoken and signed languages and other forms of non spoken languages.

[2]https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/Romania_National-Strategy-on-social-protection-integration-and-inclusion-of-people-with-disabilities-for-the-period-2006-%E2%80%93-2013.pdf

[3]https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/Romania_National-Strategy-on-social-protection-integration-and-inclusion-of-people-with-disabilities-for-the-period-2006-%E2%80%93-2013.pdf, 2

[4]https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/Romania_National-Strategy-on-social-protection-integration-and-inclusion-of-people-with-disabilities-for-the-period-2006-%E2%80%93-2013.pdf, 2

among other terminological concepts the definition of people with disabilities[1] (b) which includes sensorial deficiencies and accessibility (p)[2] which refers to adaptation measures of the information and communication environment.

At the same time, the document acknowledges the existence of "a low number of gesture-mimic interpreters, Braille printing and audio recording techniques [...] ensuring the access to information and communication of people with sensorial disabilities (hearing and visual)"[3].

In chapter VI, *Action plan for the implementation of the national strategy*, under the 1.2. objective paragraph c) the provision mentions the creation of conditions for communication networks targeting disabled people[4]. Going further, 1.5 objective[5] refers to aspects related to the access to the physical and information environment (paragraphs a-q). What is worth mentioning is that, for the first time, there are underlying references to deaf and hard of hearing people in provisions f) specific means of communication with disabled students,g) ensuring the access of people with sensorial disabilities to the information broadcast by the mass media, by specific means k) training and providing authorised

[1] b) people with disabilities are those persons whose equal access to the life of the society is prevented integrally or is limited by the social environment, which is not adapted to their physical, sensorial, mental, psychological and/or associated deficiencies, requiring protection measures aimed at supporting social integration and inclusion *ibid.*6

[2] p) *accessibility* - the set of adaptation works and measures of the physical environment as well as the adaptation measures of the information and communication environment, in accordance with the needs of the people with disabilities, which is essential for the people with disabilities to exert their rights and fulfil their obligations in the society.*ibid.*7

[3]p) *accessibility* - the set of adaptation works and measures of the physical environment as well as the adaptation measures of the information and communication environment, in accordance with the needs of the people with disabilities, which is essential for the people with disabilities to exert their rights and fulfil their obligations in the society, *ibid*.8

[4] c) "creating the availability conditions related to transportation, infrastructure, communication networks, social services intended to meet the individual needs of the people with disabilities"*ibid.*,14

[5] [5] c) "creating the availability conditions related to transportation, infrastructure, communication networks, social services intended to meet the individual needs of the people with disabilities", 17-18

mimicgesture interpreters l) training and providing interpreters for deafmute persons.

The Law 21/2010 for the ratification of the Convention on the Rights of Persons with Disabilities states the definitions of communication, language and discrimination on disabilities criteria (art.2) and the adequate measures that have to be taken in order to secure the access to expression and information of the people with disabilities (art.21, par.d),e)).

An important step was taken when some of the above provisions were include in a new Law that settles the status of the language of signs in Romania. The Law 27/2020 adopted on 27 March 2020 is targeting the deaf and hard of hearing people's rights. The Langue of Signs in Romania (LSR) is defined in Art. 2, paragraphs c) ,e), g), h) as mother's tongue for deaf and hard of hearing persons and is used " [...] as an instrument of communication, an instrument of learning, as well as an instrument of building one's identity"[1]. The same article states in paragraph c) an important reference to the usage of LSR as means of interpretation and subtitling.[2]

As a consequence, "the elaboration of the new National Strategy on the rights of persons with disabilities 2021-2027 became a specific objective as it targets to the implementation of the provisions of the Convention"[3]. The specific objective 2 includes stipulations about access to communicational and informational environment as well as the television services for dead and hard of hearing people[4].

CONCLUSIONS

Although laws and regulations concerning deaf and hard of hearing persons in Romania are in accordance with many European provisions, their enforcement is still very slow. Some steps have been taken in order to ensure an equal access to information and

[1] Law No27/2020 available at https://legislatie.just.ro/Public/DetaliiDocument/224473
[2] *ibid.*,art.2, par.c)"*accessibility – the unrestricted access of the deaf or hard of hearing persons to information and public services, such as medical assistance, employment, social assistance or any other public services, through interpretation of LSR and subtitling"*.
[3] *Stategia națională privind drepturile persoanelor cu dizabilități* 2021-2027, 2 available at http://sgglegis.gov.ro/legislativ/docs/2021/04/wfqgkt8_6ncsv3ymp0rj.pdf
[4] *Stategia națională privind drepturile persoanelor cu dizabilități* 2021-2027, 10-11

communication of persons with auditory disabilities through subtitling and sign language for some of the TV programs as stipulated in the Audiovisual Law and other legal provisions. Nevertheless, it will take a longer period until a larger span of TV broadcasts will be covered by the appropriate type of AVT for deaf and hard of hearing persons.

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ADMINISTRATIVE CHANGE OF THE NAME. CASE LAW PERSPECTIVES

Oana Nicoleta RETEA[1]

Abstract:

It is a principle that an individual may not change his last name or first name arbitrarily, but only of his own free will. Precisely due to the fact that the name is an attribute whose purpose is to identify the individual in social relations, but also in family relationships, it is clear that the social interest requires that the name be as stable as possible. The legality of the name requires that the change in any way of the family name (as well as the first name) can be made only in the situations and conditions provided by law. The administrative replacement of the name takes place only on request, once again delimiting the change of the surname from the modification of the surname.

Key words: *first name; last name; administrative change; case law.*

INTRODUCTION

Precisely due to the fact that the name is an attribute whose purpose is to identify the individual in social relations, but also in family relationships, it is clear that the social interest requires that the name be as stable as possible and not necessarily immutable[2].

In addition, the legality of the name requires that the change in any way of the family name (as well as the first name) can be made only in the situations and conditions provided by law[3].

According to art. 85 of the Civil Code, "Romanian citizens may obtain, in accordance with the law, the administrative change of the

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[2] I. Dogaru and S. Cercel, *Drept civil. Persoanele* (Bucharest: C.H.Beck, 2007), 132.

[3] I. Dogaru and S. Cercel, D.C. Dănișor, N. Popa, *Bazele dreptului civil, Vol. I,. Teoria generală* (Bucharest: C.H.Beck, 2008), 625.

family name and the first name or only of one of them". The procedure for changing either the last name or the first name shall designate a replacement operation by an administrative decision of one of the two elements or even both with new ones following the request made by the person in question.

The regulation of the name change is included in the Government Ordinance no. 41/2003 containing provisions regarding the acquisition and change of the names belonging to natural persons through an administrative procedure. The right to request the change of name is attributed to the natural person through the provisions of art. 3 of O.G. no. 41/2003.

CASE LAW

In order to be able to request a name change, a person must have full exercise capacity. Persons who do not have the capacity to exercise or have a limited capacity to exercise may request a change of name through their legal representative or through the assistance of their legal guardian.

From the content of article 7 of the Ordinance no. 41/2003, it results that, in case a minor wishes to change his / her name, it is the responsibility of his / her parents to fulfill the request that must be submitted in this respect. It is also provided that where the request in question is made only by one of the parents, the other must necessarily express his consent in an authentic form. In the event that dissent arises between the parents and they fail to reach a consensus on the change of the minor's name, the court of guardianship is competent to rule in such a case.

We note that the consent of the other parent is not required for cases in which a ban is imposed on him, or he has been deprived of his parental rights, as well as when he has been declared missing.

In the civil sentence no. 6563 of 06.06.2019 of the Timișoara District Court[1], *the plaintiff requested that by the decision that will be pronounced to take place the agreement of the defendant for the change of the family name of the plaintiff's son, the minor was born in 2010.*

[1] Accessed on the platform www.lege5t.ro ;

In the statement of reasons, the applicant stated that the minor had resulted from a relationship outside the applicant's marriage to the defendant, which had ceased during her pregnancy.

The applicant stated that she had known her current husband since the minor was less than 2 years old and they soon decided to move in together, formalizing their relationship on 22.04.2014. From the beginning of the parties' relationship, the applicant's husband was involved with her in raising and educating her son. In fact, his son has no other masculine landmark in his life than the applicant's husband, because the defendant, his father or his biological father, did not keep in touch with him and never looked for him.

Moreover, the minor is at an age when his feelings of belonging to the applicant's family and her husband are formed, considering that it is in his interest or that this belonging should not be shaken in any way by doubts. Or as long as the applicant and her husband have a different family name than the minor, it is normal for the minor to want to have the same name. Moreover, the applicant's son is at the age when the development takes place through the school, where teachers and children, through questions about the differences between his family name and the applicant will not be long in coming.

The plaintiff also stated that she had tried to obtain the defendant's consent amicably, but was met with repeated delays and refusals, although she explained the reasons why the plaintiff wanted the name change and the fact that it was in the best interests of the minor. Following the repeated refusals, the plaintiff also notified, through a lawyer, the defendant to give his consent, in authentic form, at her expense, but he expressly refused to do so. Due to these considerations, he decided to apply to the court for a decision to take place in agreement, following the analysis of the competent guardianship authority. It was also shown that this agreement is mandatory in the procedure of changing the name by administrative means, in accordance with the provisions of Government Ordinance 41/2003. Moreover, this agreement is the only thing that prevents the fulfillment of the conditions required by the legislator to change the name administratively, and in the applicant's opinion the defendant's refusal to give his consent reflects ill-will, to the detriment of the best interests of the minor.

Moreover, in the present case, in accordance with the legal provisions which state that in the parent's relations with minor children

the best interests of the minor must be taken into account, the applicant stated that it was necessary to issue a court decision regarding the surname that her son may bear, based on the analysis of the competent guardianship authority. Through its legislative framework, the State protects the family, and as regards the applicant's family, it is represented by the applicant, the minor and the applicant's husband.

The legal provisions applicable in this case concern art. 4 para. 1 and 2, letter m) O.G. no. 41/2003 „(1) The Romanian citizens may obtain, for good reasons, the administrative change of the family name and the first name or only of one of them, under the conditions of the present ordinance. (2) Requests to change the name shall be considered justified in the following cases: m) other such duly justified cases. "

According to art. 7 of Government Ordinance no. 41/2003 "(1) For the minor, the request to change the name is made, as the case may be, by the parents or, with the approval of the guardianship authority, by the guardian. If the parents do not agree on the change of the child's name, the guardianship authority will decide. (2) When the request for a change of the minor's name is made by one of the parents, the consent of the other parent, given in authentic form, is required. The agreement is not necessary if the other parent is banned or is declared missing or deprived of parental rights. "

Also, according to art. 6 para. 2 of the same normative act "The request to change the name must be motivated by one of the cases provided in art. 4 para. (2) and (3) and be accompanied by the following documents: a) legalized copies of the civil status certificates of the person requesting the change of name; b) a copy of the Official Gazette of Romania, Part III, in which it was published, according to art. 10, the extract from the name change application, a copy of which has not been published for more than a year; c) the consent, given in authentic form, of the other spouse, in case of change of the common family name worn during the marriage; d) copy of the decision approving the guardianship authority, in the cases provided by art. 7; d ^ 1) the criminal record and the criminal record of the applicant; ".

Therefore, the court rejected as unfounded the applicant's request for a judgment in lieu of the defendant's consent to the administrative change of the minor's name for the following reasons.

Firstly, the name of the child out of wedlock is established under the conditions of art. 450 of the Civil Code, thus, if the child has

established his parentage at the same time with respect to both parents, the provisions of art. 449 para. (2) and (3) which provide that if the parents do not have a common name, the child takes the name of one of them or their reunited name, and without the consent of the parents, the guardianship court decides and immediately communicates the final decision to the public service local place of registration of the persons where the birth was registered.

Since the minor established his parentage at the same time as both parents and took his father's family name according to the birth certificate, after establishing the child's parentage, respectively the name he will bear, the parent no longer may request its modification in court, the only way to change the name being the one regulated by Government Ordinance no. 41/2003 regarding the acquisition and administrative change of the names of natural persons.

Furthermore, the applicant did not make a request to change the minor's name (which can only be done administratively), but to supplement the defendant's consent, but in the absence of legal provisions for the guardianship court to do so, his claim is unfounded. Ruling a judgment requiring the defendant to appear to give his consent, or, in this case, to supplement his consent, would entail circumvention of the legal provisions which provide that in case of disagreement between the parents he will decide the guardianship authority which will give a decision. Thus, we find that the guardianship authority does not solicit the consent of the other parent, but issues a decision based on the request of one of the parents, which can be approval or rejection. Under the conditions provided by art. 6 of Government Ordinance no. 41/2003 copy of the decision approving the guardianship authority, in the cases provided by art. 7, it is necessary for the Community Public Service for the Registration of Persons to rule on the application for a change of name by administrative means; and in the absence of a response from the guardianship authority or in the situation of issuing a rejection decision, the party will resort to other legal measures for the legal situation.

All in all, it dismisses the plaintiff's request for changing the minor's name, as unfounded.

CONCLUSIONS

As it results from the provisions of art. 6 of Government Ordinance no. 21/2003 the person requesting the name change by administrative means will submit an application to the community public service for the registration of persons, hereinafter referred to as public service, subordinated to the local council of the commune, city, municipality or sector of Bucharest, in which territorial radius has its domicile.

Therefore, a request for a change of name for the reasons given, such as the situation where, following the divorce, an ex-husband returns to the family name of the previous name and which comes from another marriage also dissolved by divorce and wishes to bear the name acquired at birth (civil sentence no. 7868 of 2011 of the Târgu Mureș District Court[1]) can be carried out only administratively, not being within the competence of the courts.

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Pitesti, 06 May 2022

THE MINOR'S CAPACITY TO EXERCISE AND TO CONTRACT

Noni-Emil IORDACHE[1]

Abstract:

The positioning of the natural person in various classes according to the exercise capacity has legal importance from the point of view of the categories of legal acts that can be validly concluded under certain conditions by these classes of persons. For the conclusion of legal acts, the lack of capacity to exercise requires the legal representation of the person, and the restrained capacity to exercise the legal assistance. Nothing precludes a person without capacity to exercise or who has a restrained capacity to exercise to enter personally and alone into civil relations.

In this study we analyze legal acts that can be concluded by the minor without legal capacity to exercise, legal acts that can be concluded by the minor with limited capacity to exercise, and legal acts that can be concluded by the minor with anticipated full capacity of exercise.

Key words: *capacity of exercise; limited capacity to exercise; anticipated full capacity of exercise; discernment; minor's capacity to contract.*

The intervention of the minor in legal and economic life is subordinated to the existence of discernment[2]. His autonomy is governed by the legal capacity of exercise, by the protection he enjoys, and by the existence of discernment[3]. The capacity of exercise allows him to commit civil legal acts, but the legislator presupposes minors as lacking the capacity of exercise. This incapacity is a natural one because it is related

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[2] The doctrine stated that "discernment is the ability of the natural person to correctly represent the legal consequences of the manifestation of his will, and his existence is determined by the age and state of mental health." (personal translation). Please see Eugen Chelaru, *Drept civil. Persoanele*, Ediția 5 (Bucharest: C.H. Beck, 2020), 82.

[3] Together with discernment, the capacity of use represents a legal condition to acquire the capacity of exercise.

to their physiological or mental state; it is absolute and it requires legal representation or assistance. However, it only makes sense in so far as it contributes to the protection of the minor and concerns only minors who are not legally emancipated.

The protection that the state guarantees to each child is likely to avoid someone or something harming the child, because he is not endowed with sufficient discernment. Discernment is the foundation of the civil deeds of the minor and depends, to a large extent, on the subjective assessment of the person who must determine it[1]. Minors are granted the ability to perform legal and judicial acts on their own that do not affect this wish of protection that the state proclaims.

1. THE CAPACITY OF EXERCISE

According to the Civil Code, Article 37, the capacity of exercise is understood as the ability of the person to conclude civil legal acts by themselves. Article 38 of the Civil Code states that the full capacity of exercise begins on the date when the person reaches the age of majority (the age at which full civil rights are accorded). Among the essential conditions for the validity of a contract is the ability to enter into said contract, an ability enjoyed by any person who is not declared incapable by the law or who is not prevented from entering into certain contracts (Article 1.179 para. (1) in conjunction with Article 1.180 Civ. C.]. Therefore, a contract may be entered into if and only if the parties have the capacity to contract. This rule is also enshrined in Article 1.652 of the Civil Code, which stipulates that the person who is not forbidden by the law to do so may buy or sell.

Taking into account the stage of development of a person's mental capacity to understand the significance of his actions and the consequences produced by them, the Civil Code distinguishes four situations: persons lacking the capacity of exercise (minors under 14 years old and the incapacitated minors), persons with limited capacity of

[1] Discernment knows no legal definition, nor is there any legal criterion that should be considered in order to assess it. However, it seems that it would be impossible to find a clear and equal definition for all persons. The notion of discernment is very subjective and varies from person to person. The child is characterized by a continuous development that a regulation cannot take into account. The rights are acquired only discontinuously.

exercise (minors between 14 and 18 years old), persons with an anticipated capacity of exercise (the minor who has reached the age of 16 years acquires full capacity of exercise, by the decision of the guardianship court, after hearing the minor's parents or guardian, taking, when the case may be, the opinion of the family council[1]) and persons with full capacity of exercise (adults and the legally emancipated minor[2]).

As regards the capacity to conclude civil acts, the following clarification is required: the capacity of exercise is a *de jure* state, which has its source in the law, while discernment is a *de facto* state, which belongs to the psychological nature of individuals and which is appreciated *in concreto*, since the law does not provide the conditions for the existence of discernment. Therefore, when it is seised, the court will have to determine this state depending on the circumstances of the case, the age of the child, his degree of development, etc.

2. LEGAL ACTS THAT MAY BE CONCLUDED BY THE MINOR WITHOUT LEGAL CAPACITY OF EXERCISE

For a minor under the age of 14, the lack of capacity of exercise is a form of protection, because his age and lack of experience do not contribute to the existence of the discernment necessary to conclude civil legal acts. The inability of the minor is not a punishment, but it falls within the field of protection incapacities and translates into his inability to assert his rights, all by himself, in legal life; the remedy is to «use» a legal representative[3]. The cessation of the legal situation concerning the lack of capacity of exercise takes place either at the age of 14 or by death.

The minor who lacks the capacity of exercise cannot conclude civil legal acts personally and all by himself (general incapacity that operates *ope legis*), although he has the capacity of use, namely the ability to acquire rights and to take obligations, by any manner, including by concluding legal documents. However, Article 43 para. (2) of the Civil Code establishes the rule according to which, for the persons who

[1] In this case, the emancipation of the minor signifies his transformation from *aliens iuris* to *sui iuris* and the cessation of the attributes of parental authority.
[2] By the effect of the marriage or by a court decision.
[3] Legal representation.

do not have the capacity to exercise the legal acts, these are concluded on their behalf by their legal representatives, under the conditions provided by the law.

The lack of exercise capacity is of a relative nature, as the minor under 14 years of age can also validly conclude certain acts without representation: legal acts regarding work, artistic or sports occupations or regarding his profession, with the consent of his parents or guardian, as well as in compliance with the provisions of the special law, if applicable, the specific acts provided by law, conservation acts[1], acts of disposition of low value[2], of current character[3] and which are executed at the time of their conclusion [Article 43 para. (2), second thesis, and para. (3) Civ. C.], as well as non-patrimonial legal acts (hearing of a minor who has reached the age of 10, in view of adoption, as shown by the provisions of Article 15 of Law no. 273/2004, republished, on adoption procedure, with the subsequent amendments and additions; in any judicial or administrative proceedings that concern him, the hearing of a minor who has reached the age of 10 or who has not reached the age of 10, if the competent authority finds his hearing necessary to settle the case – Article 29 of Law no. 272/2004, republished, on the protection and promotion of children's rights, with the subsequent amendments and additions).

The sanction for the failure to comply with the rules regarding the capacity of exercise is the relative nullity of the civil legal acts concluded by the minor lacking the capacity of exercise, other than those provided by the law. Therefore, the acts of the minor who lacks the capacity of exercise are annullable, even without proving a prejudice [Article 44 para. (1) Civ. C.]. The action for annulment of the legal act for the incapacity resulting from the minority may be exercised by the minor

[1] The reasoning of the legislator was based on the fact that such an act seeks to prevent the loss of a subjective civil right, and therefore it is an act that benefits the minor under 14 years, holder of that subjective right.

[2] These can be: the purchase of food or teaching materials necessary for the exercise of his right to education (sale-purchase contracts), the purchase of subway, bus, train tickets (transport contracts). The nature of these legal acts does not cause them to prejudice the interests of their author.

[3] The legal act may be seen as having a current character only *a posteriori* and as taking into account certain variables, such as the minor's age, his social environment, the venue where the deed was signed, etc., and, of course, as possessing a high degree of subjectivity.

only upon reaching the age of 14, when he acquires a limited capacity of exercise. However, according to the provisions of Article 2.579 of the Civil Code[1], the cause of invalidity cannot be claimed if the minor who lacks the capacity of exercise has concluded a valid legal act in another country[2], if the following conditions are met: according to national law, the minor is considered to lack the capacity of exercise (a), the minor is considered to be capable, according to *lex loci actus* (b), the legal act was concluded in the country of the forum (c), the concluded act must be an usual and current act of the profession of the extraneous element, which must have acted *bona fide*[3] d) and the annulment of the act must unjustifiably cause damage to the local contractor.

3. LEGAL ACTS THAT MAY BE CONCLUDED BY THE MINOR WITH LIMITED CAPACITY OF EXERCISE

The limited capacity of exercise represents the intermediate legal situation between the minority and the majority, with the maximum duration of 4 years, which aims at preparing the minor for the free exercise of his civil rights, while maintaining parental authority until the child comes of age, and while also maintaining the right of opposition of his legal guardian. The doctrine defines the limited capacity of exercise as the ability of a minor between the ages of 14 and 18 to acquire and exercise civil rights and to undertake and execute civil obligations by concluding, personally, certain civil legal acts[4]. During this period, we are no longer talking about legal representation, but about assistance. It must be pointed out that the termination of the limited capacity of exercise takes place, as the case may be, at the age of 18, by the legal emancipation of the minor (by marriage or by the decision of the court, in accordance with the law).

[1] These provisions were taken from Law no. 105/1992 on the regulation of private international law relations, with the subsequent amendments and additions.

[2] This exceptional hypothesis is known as the "theory of national interest", of French origin. Please see Dragoş-Alexandru Sitaru, *Drept internaţional privat* (Bucharest: C.H. Beck, 2013) 153 *et seq*.

[3] Namely, not to have known or not to have had the possibility to know the cause of invalidity of the legal act, due to the minor's lack of the capacity of exercise.

[4] Chelaru, *Drept civil. Persoanele*.

The contents of the legal provisions, which refer, *in terminis*, to the limited capacity of exercise[1], show that the civil legal acts that the minor may conclude personally and by himself, once reaching the age of 14, can be patrimonial, like the legal acts that he could validly conclude until the age of 14[2], legal acts of administration that do not cause him any prejudice, and certain acts specifically stipulated by the law, and non-patrimonial or belonging to other branches of the law, such as a hearing in view of approving the adoption, the conclusion of marriage by the minor who has reached the age of 16, the conclusion of an individual employment contract by a minor who has reached the age of 16[3], the prosecution of harmful acts committed by his guardian[4], acts resulting from the rights or for the fulfillment of parental duties regarding the person of his child[5] and so on. The law also provides other categories of civil acts that the minor may conclude, but, in order to be validly concluded, he needs, in principle, certain prior approvals or the authorization of the guardianship court (Article 41 para. (2) Civ. C.]. With regard to his property (*ut singuli* or patrimony)[6], the Civil Code orders that the minor exercises his rights and executes his obligations alone, in accordance with the law, but only with the consent of his parents and, as the case may be, of the guardianship court [Article 501 para. (2)].

4. LEGAL ACTS THAT MAY BE CONCLUDED BY THE MINOR WITH ANTICIPATED CAPACITY OF EXERCISE

The institution of the emancipation of the minor represents the legal means by which a minor who has reached the age of 16 is recognized the full capacity of exercise. The emancipated minor does not become a person of age, because a person becomes of age when reaching the age of 18[7]. The Civil Code stipulates two cases in which the minor can become emancipated. The first case results from the corroboration of

[1] Article 41 Civ. C.
[2] These acts are not part of the specific content of the limited capacity of exercise.
[3] Article 13 para. (1) Lab. C.
[4] Article 155 para. (1) Civ. C.
[5] Article 490 para. (1) Civ. C.
[6] These are acts of alienation, transaction, acts of renunciation, etc.
[7] Article 38 para. (2) Civil Code. Please see also the provisions of Article 4 of Law no. 272/2004.

the provisions of Article 39 para. (1) with those of Article 272 para. (2) and (3) of the Civil Code; the legal emancipation of the minor may take place only after the minor is 16 years old, by marriage[1], which may take place only for solid reasons, with the consent of his parents or, as the case may be, of the guardian or only of one of the parents, if one of them is deceased or is unable to express his will, and with the authorization of the guardianship court in whose constituency the minor has his home address[2]. The second case is stipulated in art.40, is the effect of a decision of the guardianship court, for well-justified reasons[3] and only after hearing the minor and the minor's parents or guardian, taking, where appropriate, the opinion of the family council as well; this represents a legal benefit granted to the minor.

The legally emancipated minor is released from under the parental authority or, as the case may be, from under the special protection measure that he enjoys, but the obligation of the parents to support the adult child, who is continuing his studies, will remain, as shown in Article 499 para. (3) of the Civil Code. The legally

[1] The legislator's vision took into account the principle of equal rights of the spouses. At the same time, it ensures the equal rights of spouses and entails the protection of parental rights and of other rights of the person who marries before reaching the age of 18.

[2] In this case, it is a solemn legal act.

[3] This regulation is incomplete, since the legislator left it to the court of guardianship to identify and establish these well-justified reasons. For example, by decision no. 4252/2015, District 2 Court of Bucharest ruled that the existence of an individual employment contract is one of the conditions for the emancipation of a minor; in case no. 67/2021, Odorheiul Secuiesc District Court established that "the birth of a child by the plaintiff is a valid reason for recognizing her full capacity of exercise (…), that it is in the minor's interest for her to be recognized the full capacity of exercise." "The fact that no person in the extended family of the petitioner has shown interest in delegating the exercise of parental authority are well-founded reasons that would justify the emancipation of the minor," stated Brasov Court in case no. 8.789/2021. Other courts stated that the birth of a child justifies the granting of full capacity of exercise in order to exercise parental rights, as the newborn child must be able to benefit from the protection of a parent with full capacity of exercise, who would also be able to exercise all the parental rights in favor of the newborn child; among these rights, there is also the one to receive the child allowances due according to the law. The researched reasoning makes us able to appreciate that the courts make an opportunity control of the emancipation of the minor who has reached the age of 16.

emancipated minor may conclude any civil legal act[1], with the exceptions provided by the law, and he becomes liable for the damages he causes to others and for the contracted debts.

In the case of the two types of legal emancipation, by decision of the guardianship court and by marriage, especially if the minor decides to keep his family name, there is a gap, of a legislative nature, regarding the lack of a publicity procedure, through which any third party could take note of the change occurring in the capacity of exercise of the legally emancipated minor. This lack of regulation creates difficulties to third party contractors, who are forced to ask the minor to submit a proof of his legal emancipation.

CONCLUSIONS

The constitutional principle of equal rights for all citizens, without privileges and without discrimination, must be viewed in conjunction with the constitutional principle which enshrines, for the minors, a special regime of protection and assistance in the realization of their rights. Even if the legislator has created those limits of the capacity of exercise, the minor may conclude certain civil legal acts, related to his level of development, acts that do not harm him and that do not contradict the wish proclaimed by the State to protect the minor[2]. The capacity of exercise recognized to persons has a relative character and cannot be equal for all, as is the case with the capacity of use, because it is in a close relationship of interdependence with the degree of discernment of individuals; discernment represents the manner by which a person can have the representation of all the consequences of his manifestation of will and it must be undiminished. Limiting or restricting the capacity of exercise should not be understood as a punishment, but as a form of special protection, as required by Article 49 of the Romanian Constitution, republished.

[1] However, there are limitations stipulated by the law: he cannot vote, he cannot obtain a driver's license, he cannot be a foster parent, etc.
[2] The legislator presumes that the minor has a certain degree of discernment.

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ASPECTS REGARDING THE CONCLUSION AND CONTENT OF THE HOTEL SERVICE CONTRACT WITHIN HORECA

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Abstract:

The hotel activity corresponding to the HoReCa tourism industry, which is also limited to the field of tourism, is a complex activity, which involves various contractual relationships and constantly changing legislation, determined by the evolution of technology and the dynamics of the economy in this sector. The contracting parties involved in the hotel business are: the hotel company providing the hotel services, the tourist / customer consuming hotel services, the state authorities responsible for complying with the applicable legislation in the field.

The contractual legal relations related to the tourism activity include: hotel services (accommodation and catering), relaxation and treatment activities, leisure and historical tourist circuits, sports activities, body maintenance and beauty activities, ways of extinguishing the obligations between the contracting parties, and so on.

Key words*: hotel services; consumer customer; consumer rights; complaints; alternative dispute resolution; compensation.*

INTRODUCTION. PRELIMINARY DETAILS

The term "HoReCa" consists of an abbreviation of 3 words, respectively: Hotels, Restaurants and Cafes / Catering, most used in Europe (Scandinavia, Benelux and France), taking into account the fact

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that spaces such as cafes and canteens/cafeterias, can be included in the category of restaurants[1].

HoReCa, is used in the hospitality industry[2], in the field of tourism, in order to describe an activity that simultaneously refers to accommodation services as well as public alimentation and catering services (food and drink)[3].

1. HOTEL ACTIVITY IN ROMANIA-REGULATION

With the growth of the HoReCa tourism industry in the tourism sector, through the hotel providers, the number of third-party customers benefiting from the products and services offered by them has also increased. Expectations have also risen customers (for example, requirements related to luxury, comfort, special services, etc.), which has led to improved quality of these hotel products and services[4].

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[1] https://www.gastroprofis.ro/ce-inseamna-horeca/ accessed on April 6, 2022, 11.33 a.m.

[2] Since 1ST of December 2009, the entry into force of the Treaty on the Functioning of the European Union (TFEU) 2012 / C 326/01 published in Official Journal C 326, 26/10/2012, according to art. 6 (letter D) and art. 195 Title XXII of the TFEU regulates tourism policy at EU level, thus benefiting from its own legal basis. In this regulatory context, HoReCa implicitly enjoys official recognition, provided that it also benefits from non-reimbursable funding programs (including post Covid 19). Article 6 (d) of the Treaty on the Functioning of the European Union provides: "The Union shall be competent to carry out actions to support, coordinate or supplement the action of the Member States. By their European purpose, these actions have the following areas: (a) the protection and improvement of human health; (b) industry, (c) culture, (*d) tourism*, (e) education, vocational training, youth and sport. ' 195 Title XXII on Tourism of the Treaty on the Functioning of the European Union provides: '1. The Union shall complement the action of the Member States *in the field of tourism*, in particular by promoting the competitiveness of Union undertakings in that sector. To this end, Union action shall: (a) encourage the creation of an environment conducive to the development of undertakings in this sector; (b) promote cooperation between Member States, in particular through the exchange of good practice. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down special measures to complement the action taken in the Member States to achieve the objectives set out in this Article, except for any harmonization of laws and regulations. administrative provisions of the Member States "

[3] For example: A 1-daisy boarding house offering accommodation services is part of the Horeca industry just like a 5-star hotel

[4] Valcu Elise Nicoleta, "Brief consideration of the impact of the regional develepment policy and tourism in Romania", in *The Annals of the Stefan cel Mare University of*

Thus, in the hotel industry (accommodation and public catering)[1] more and more hotels become 4 and 5 stars[2] (both in Romania and abroad)[3] able to offer quality hotel products and services from providers, for most natural person or legal person as customers / tourists, third party beneficiaries.

The hotel activity in Romania is regulated by the following normative documents:

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*Suceava. Fascicle of the Faculty of Economics and Public Administratio*n, volumul 9(2009), Issue Special: 60-65.

[1] According to Order no. 337 / 20.04.2007 regarding the updating of the Classification of activities in the national economy, published in the Official Gazette of Romania no. 293 of May 3, 2007 ("CAEN CODE"), the provision of predominant activities within the hotel industry, is found in the following caen codes: Hotels and other similar accommodation facilities - 5510; Restaurant- 5610; Event catering activities - 5621; Other food activities nec 5629; Bars and other beverage service activities - 5630.

[2] According to the Government Decision no. 709/2009 regarding the classification of tourist reception structures published in the Official Gazette of Romania no. 866 of 26.06.2009 with subsequent amendments and completions (GD 709/2009), as well as the Methodological Norms of 2013 on the issuance of certificates of classification of tourist reception structures with accommodation and catering functions, of licenses and tourism patents issued by Romanian Tourism Authority, published in the Official Gazette of Romania no. 353 bis of 14.06.2013

[3] According to the data of the National Institute of Statistics of Romania, according to the analysis of the data regarding the tourist accommodation capacity of the existing tourist reception structures as of July 31, 2021, there were 9146 tourist reception structures with accommodation functions, 536 more than on the same date of 2020, of which 3460 agritourism pensions, 1745 tourist pensions, 1606 hotels, 752 tourist villas, 503 bungalows, 332 hostels, 222 tourist chalets, 215 motels and 311 other types of tourist accommodation structures. 78.3% of hotels were rated with 3 and 4 stars Most hotels were categorized as 3 stars (53.3% of total hotels), 4 stars (25.0%) and 2 stars (17.3%) . There were 36 5-star hotels (2 more than on July 31, 2020). Of the total number of places in hotels, 44.3% were in 3-star hotels, 31.5% were in 4-star hotels, 18.9% in 2-star hotels, 3.9% in 5-star hotels stars, 1.3% in one-star hotels and 0.1% in non-star hotels. The tourist reception structures with tourist accommodation functions have expanded beyond the traditional destinations. Thus, 27.2% were in "mountain resorts", 16.9% in "Bucharest and county seat cities (excluding Tulcea)", 8.4% in "seaside resorts (excluding Constanta)) ", 6.9% in" spas ", 5.8% in the" Danube Delta (including the city of Tulcea) ", and 34.8% were in" other localities and tourist routes ", according to https: // insse .ro / cms / sites / default / files / field / publicatii / capacitatea_de_cazare_turistica_existenta_la_31_iul_2021.xlsx.pdf accessed on 23.02.2022 at 15.00 p.m.

-Government Decision no. 1267/2010 on the issuance of classification certificates, licenses and tourism patents[1],
-Methodological Standards of 2013 on the issuance of certificates of classification of tourist reception structures with accommodation and catering functions, of tourism licenses and patents[2],
-Government Ordinance no. 58/1998 on the organization and development of tourism in Romania[3].

2. TIME AND PLACE OF CONCLUSION OF THE HOTEL SERVICE CONTRACT

The hotel service provider, as an economic operator[4], professional, company (legal person)[5], carries out hotel activities (accommodation, public catering and other specific services), within a tourist reception structure with accommodation function[6] (Hotel), in favor of the various beneficiaries (customers), based on a service contract.

[1] Government Decision no. 1267/2010 on the issuance of classification certificates, licenses and tourism patents published in the Official Gazette no. 866 of 23.12.2010, with subsequent amendments and completions.
[2] The Methodological Norms of 2013 regarding the issuance of the classification certificates of the tourist reception structures with accommodation and catering functions, of the tourism licenses and patents, issued by the National Authority for Tourism, published in the Official Gazette of Romania no. 353 bis of 14.06.2013 with subsequent amendments and completions ("Rules").
[3] Government Ordinance no. 58/1998 on the organization and development of tourism activity in Romania, published in the Official Gazette of Romania no. 309 of 26.08.1998 (OG 58/1998).
[4] As its owner and / or administrator, in favor of third-party clients.
[5] The company is established and operates based on the provisions of Law no. 31/1990 on companies, republished in the Official Gazette of Romania no. 1066 of 17.11.2004, with subsequent amendments and completions (Companies Law).
[6] In accordance with the provisions of art. 2 b) and c) from Rules, tourist accommodation, camping houses, apartments and rooms for rent in family homes, river and sea vessels including floating pontoons, tourist pensions and agritourism pensions and other units with tourist accommodation functions, and tourist reception structure with public catering function means : catering establishments within the accommodation facilities with accommodation functions (including those serving them), catering establishments located in tourist resorts, as well as those managed by tourism companies, restaurants, bars, fast food establishments, confectioneries , confectioners and which are certified according to the law.

The hotel[1] is obliged, according to the law, to carry out its hotel activities, based on documents (licenses, classification certificates and travel certificates)[2] issued by the competent state institutions, which are visibly displayed at the reception or reception hall of the hotel. the hotel.

The contract for hotel services is concluded between a professional legal person (provider / hotel) and client / beneficiary - natural or legal person.

The hotel services contract, i.e. accommodation and / or catering, as well as other related services specific to them[3], sometimes also relaxation and treatment services - fitness and spa, spa treatment, massage services, etc.

Based on the hotel service contract, the hotel professional provides or undertakes to provide hotel services in favor of the customer / consumer beneficiary, and the latter pays or undertakes to pay the price related to these services.

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[1] According to art. 3 paragraph 2 of the Rules, the classification of tourist reception structures has as priority the protection of tourists, constituting a codified form of synthetic presentation of the comfort level and the offer of services.

[2] The provisions of art. 2 d), i), j) and k) from Rules, define these documents: d) the classification certificate is a document issued by the central public institution responsible in the field of tourism, which is a codified form of synthetic presentation of the level of comfort, quality of facilities and services provided within the tourist reception structures with accommodation and / or public catering functions. The classification certificate is accompanied by the form regarding the nominal classification of the accommodation spaces by categories or by the form regarding the classification and organization of the spaces in the tourist reception structures with public alimentation functions, constituting an integral part of it, i) the tourism license issued by the central public institution responsible in the field of tourism, which certifies the capacity of the economic operator, the licensee, to market packages of travel services and / or their components, in conditions of quality and safety for passengers / final consumers; j) annex of the tourism license - represents a document issued by the central public institution responsible in the field of tourism attesting the capacity of the economic operator, the licensee, to market services and / or packages of travel services in conditions of quality and safety for final passengers / consumers, through subsidiaries / secondary offices, with or without legal personality; k) tourism certificate is a document issued by the central public institution responsible in the field of tourism, which certifies the professional capacity in the field of tourism of individuals who ensure the management of travel agencies and / or tourist reception structures.

[3] According to Order no. 337/2007 on the classification of activities in the national economy published in the Romanian Official Gazette, Part I no. 293 of 03/05/2007 (CAEN CODE), Activities of fitness centers - 9313, Body care activities - 9604, Hairdressing and other beauty treatment activities – 9602.

3. PROVISIONS OF THE HOTEL SERVICES CONTRACT

The hotel service contract is a synallagmatic contract, with successive execution, for a fee and by consensus, which includes the following clauses:

1. the parties to the contract, namely the hotel - as a hotel service provider and the customer, a natural or legal person - as a beneficiary of hotel services,

2. clauses regarding the object of the contract and the place of conclusion of the contract.

a. The object of the contract consists in: the provision of hotel services (accommodation and / or public catering), a package of services[1] (consisting of: accommodation, transport, food, leisure, spa treatment, etc.[2]) to which are added other specific services .

The accommodation services provided within the hotel consist of: accommodation without breakfast, accommodation with breakfast included; half board accommodation[3], full board accommodation[4], *all inclusive* accommodation[5].

The catering services provided by the hotel are delimited according to the type of customers, natural or legal persons, as follows:

• for the beneficiary clients individuals, events such as weddings, baptisms, etc. can be arranged both in the provider's location (in a specially designed space within the hotel) and in another location expressly requested by the customer (in any other specially designed space outside the hotel location[6]),

• for the beneficiary clients, we distinguish between events such as conferences, symposia, sports competitions[7], etc. They can be arranged

[1] In accordance with the provisions of art. 2 n) of OG 58/1998.

[2] If they are sold at a global price and when these services exceed 24 hours.

[3] represents a combination of accommodation, breakfast and lunch / dinner services, sold at a total price.

[4] represents a combination of accommodation, breakfast, lunch and dinner services, sold at a total price.

[5] represents a combination of accommodation, breakfast, lunch, dinner, snacks and any other leisure activities offered by the Hotel's own facilities, sold at a total price.

[6] According to CAEN CODE 5621-Event catering activities.

[7] According to CAEN CODE 9311 - Activities of sports facilities, 9313 - Activities of fitness centers, 9319 - Other sports activities, etc.

both at the provider's location and at another location expressly requested by the customer.

The object of the contract details all the hotel services provided.

In the case of hotel services provided in favor of the beneficiary clients (tourists) individuals or groups of individuals, the number of accommodated tourists, the tourist identification data[1], the accommodation period (arrival-check-in / check-out date) are also mentioned. the number of rooms and nights of accommodation, the type of room booked (single, double, apartment, etc.), the official time for accommodation as well as the time of release of the room, the services offered to tourists, the methods of booking / canceling hotel services, and so on.

In the case of hotel services provided in favor of the beneficiary legal entities, details will be provided regarding: the number of people accommodated / participating in an event, details of the event (date and time of its start and end, location where the event will take place, dishes and drink to be served, the number of people participating in the event, etc.).

These mentions are the basis for the invoicing of the services as well as the related payment, due by the client to the hotel.

b. Place of conclusion of the contract. The Contracting Parties shall provide for the clause that the contract may be concluded at a distance[2] or at the registered office of the hotel provider.

The importance of the place of conclusion of the contract retains the aspects related to:

• private international law, provided that the contract contains an element of foreignness, determining the applicable law (contract), in the event of a conflict of laws in space,

• the interest of the parties in determining the competent court, in the event of a dispute in connection with the contract.

[1] In accordance with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC (GDPR Regulation).

[2] See Ioana-Nely Militaru, *Business Law, Introduction to Business Law. Legal business report. The contract* (Bucharest: Universul Juridic, 2013), 140 and following. In the same sense, see Crenguța Leaua, *Business Law, General Notions of Private Law* (Bucharest: Universul Juridic, 2012), 38 and following,

In the case of a distance or *on-line*[1] concluded contract, it is materialized through the computer means of communication, the Internet, respectively the electronic platforms.

The electronic platform usually belongs to the hotel as a bidder[2] through which it sells its hotel products and services.

In this context, the parties being at a distance from each other, the consent will also be externalized / manifested in this virtual space of the electronic platform.

The moment of concluding the distance contract represents the moment of the confirmation by the Hotel Provider as a professional, through a durable support, of the acceptance of the firm order sent by the consumer client, according to OUG 34/2014[3].

Thus, the express request sent by the beneficiary customer regarding the hotel services and products, will be immediately followed by its execution by the hotel.

In the case of the contract concluded at the hotel's registered office, the parties are present, so that the contract is considered signed in the locality where the hotel's registered office is located[4]. In this case, the place of conclusion of the contract is considered to be the place where the parties are located[5].

3. clauses regarding the contract price, respectively the payment conditions[6].

It will therefore be mentioned the total value of the hotel services as well as the method of their payment, respectively the following:

a. Date of payment, place of payment[7] as well as the method of payment.

[1] Idem and Gheorghe Piperea, *Contracts and commercial obligations* (Bucharest: C.H.Beck, 2019), 465-468.

[2] Especially if the hotel is the owner of a well-known international brand or is sponsored under an international hotel brand franchise agreement.

[3] Emergency Ordinance 34/2014 on consumer rights in contracts concluded with professionals, as well as for amending and supplementing normative acts, with subsequent amendments and completions (OUG 34/2014).

[4] Which usually coincides with the actual location of the hotel.

[5] See Constantin Stătescu and Corneliu Bîrsan, *Civil law. General Theory of Obligations, 8th Edition* (Bucharest: Allbeck, 2002), 58.

[6] See, Stătescu and Bîrsan, *Civil law. General Theory of Obligations*, 326-335.

[7] See Piperea, *Contracts and commercial obligations*, 785-788.

The beneficiary customer can make the full payment, of the entire contractual value (contract price) in advance, or of a part of the total value (advance and the rest of the payment in installments)[1], as well as the payment after the actual provision of hotel services.

The payment method is made by bank transfer / transfer, credit card or cash, in accordance with the applicable legal provisions[2].

The amounts paid by the beneficiary client vary depending on the number of rooms booked, the type of room (single, double, apartment, etc.), the number of nights of accommodation. Rates may be net without any commission[3] and include the following:

• in the case of accommodation services, the tariffs[4] include the related value added tax (VAT) calculated in accordance with the applicable legal provisions[5] as well as the special tax for tourist promotion (city tax)[6],

• in the case of the provision of public catering services, the amount includes the related value added tax (VAT), differentiated by types of food / non-food products[7], calculated in accordance with the special provisions in this field,

[1] See Piperea, *Contracts and commercial obligations*, 471-473.

[2] In accordance with the provisions of Law no. 70/2015 for strengthening the financial discipline regarding cash collection and payment operations and for amending and supplementing the Government Emergency Ordinance no. 193/2002 on the introduction of modern payment systems, published in the Official Gazette of Romania no. 242 of 09.04.2015.

[3] See Piperea, *Contracts and commercial obligations*, 523-532.

[4] These rates may include breakfast as well as access to other services provided by the hotel.

[5] In accordance with the provisions of Law no. 227/2015 on the Fiscal Code published in the Official Gazette of Romania no. 688 dated 10.09.2015 with subsequent amendments and completions (Romanian Fiscal Code), the VAT rate of 5% is applied for the following deliveries of goods and services: accommodation within the hotel sector.

[6] Certain cities (localities) in the world each set, each time, certain special taxes, including the tourist promotion tax of the locality (also called city tax). In Romania, in the case of the Municipality of Bucharest, according to the provisions of art. 484 of the Fiscal Code corroborated with those of the Decision of the General Council of the Municipality of Bucharest no. 417 / 26.11.2022, the city tax for the year 2022 represents a share of 0.5% of the accommodation rate for each day of the tourist's stay, value without VAT included.

[7] In accordance with the provisions of the Romanian Fiscal Code, the VAT rate of 9% is applied for the following deliveries of goods: food, including beverages, except alcoholic beverages and for the organization of event-type services (conferences, symposia, etc.) the rate of 19% VAT.

b. the person who reserves and / or pays for the hotel services, which may be: the third beneficiary (client) natural person / legal person, or another third party respectively a company (legal person)[1] for its employees and / or guests at the event,

c. the currency in which the payment will be made (in foreign currency[2] or in the national currency lei at the exchange rate[3]), the place of payment[4],

d. the date on which the fiscal invoice related to the services provided will be issued as well as the manner of its communication (by post, courier, electronic means of communication, etc.),

e. the amount of late payment penalties due in case of non-payment, the period from which they start to run,

f. the method of guaranteeing the payment of accommodation and / or public catering services, through the legal means of guarantee (promissory note[5], letter of bank guarantee[6], etc.) including all the details related to them, in accordance with the applicable legal provisions.

4. the clause regarding prices, tariffs[7].

Rates must be for a Hotel / Accommodation room, depending on the accommodation available within the Hotel.

[1] See, Piperea, *Contracts and commercial obligations*, 786.

[2] According to the provisions of art. 2 o) of Government Ordinance 58/1998, the Hotel may also make receipts in foreign currency: ".. the provision of tourist services to foreign tourists, in the country or abroad, whose equivalent value is collected in foreign currency, regardless of the method of collection. "

[3] For example, the exchange rate of the National Bank of Romania from the date of payment,

[4] See Piperea, *Contracts and commercial obligations*, 787.

[5] See, Piperea, *Contracts and commercial obligations*, 604-605, 750.

[6] According to the provisions of art. 2321 of Law 287/2009 on the Civil Code, republished, Official Gazette of Romania no. 505 of 15.07.2001 (Romanian Civil Code), the letter of bank guarantee is a document by which a Bank (guarantor of the Beneficiary) irrevocably undertakes that, in case the Beneficiary will not fulfill exactly and on time the obligations assumed under to pay the amount for the provision of hotel services, up to the amount mentioned in the letter.

[7] Tariff differentiation is a way to maximize the occupancy of the Hotel on the accommodation room or to reduce the negative effects caused by the production of tourist services.

The rates are differentiated for the same hotel service, depending on the tourist seasons and the person who orders and / or pays for the hotel products and services.

The mentioned person may be the travel agency[1], their third final beneficiary (the tourist), or another third party[2], respectively a company (legal entity) for its employees and / or guests.

5. volume and type of hotel services - group of tourists[3], long or short stay, individual tourist, package of services, separate services,

6. the conditions for canceling the reservation of accommodation, the organization of the event, the penal clause[4]. In this regard, the provider may cancel the booking of accommodation and/ or the organization of the event, if the beneficiary does not fulfill one of its contractual obligations[5], to which is added the payment of the related penalties charged by the hotel in such situations.

Also, if the beneficiary cancels, in whole or in part, the reservations of the individually paid accommodation rooms or in case of non-appearance of the beneficiary's guests, the latter will pay the hotel provider a sum of money representing a fixed percentage of the number of nights. agreed in accordance with the provisions of the contract.

7. duration of the contract; the contract is usually for a fixed period, at the end of which it may be extended by agreement of the parties.

The contract shall take effect from the date of its signing by both contracting parties until the date of the fulfillment of all their obligations.

CONCLUSIONS

The hotel activity corresponding to the HoReCa tourism industry is a complex activity, which involves the most diverse contractual

[1] In accordance with Art. 2072 paragraph 1 of the Civil Code "by the agency contract, the principal permanently empowers the agent either to negotiate or to negotiate and to conclude contracts, in the name and on behalf of the principal, in exchange for a remuneration, in a or in several specified regions ".

[2] See, Piperea, *Contracts and commercial obligations*, 786.

[3] It is usually considered to be a minimum of 15 people in a group.

[4] In accordance with Art. 1538 of the Romanian Civil Code. See for details, Stătescu and Bîrsan, *Civil law. General Theory of Obligations*, 357-360.

[5] for example, the obligation to pay in advance the value of the contract or the cancellation of the accommodation / event, before the date of the organization of the event / date of accommodation, in the hotel.

relations, which are customized starting with their conclusion, continuing with the development, throughout the production of the effects, until their cessation. The conclusion of the hotel service contract, a novelty in the field, consists in the electronic platform, owned and managed, mainly, by the hotel[1] bidder through which it sells its hotel products and services. Within this platform, the parties being at a distance from each other, the consent will be expressed / manifested also in this virtual space of the electronic platform.

Therefore, the hotel activity is digitized, the Romanian law (Emergency Ordinance 34/2014) regulating, among others, the notion of "sustainable support", which designates "any tool that allows the consumer or professional to store information that is addressed to him personally , in a manner accessible for future reference for an appropriate period of time, for information purposes, and which allows the stored information to be reproduced unchanged ".

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INDIRECT/FACTUAL EXPROPRIATION (ATYPICAL FORM OF EXPROPRIATION)

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Abstract:

This research examines the notion of indirect expropriation as an atypical form of expropriation as an atypical form of expropriation. Our approach is important, because the expropriation as a form of public utility is a frequently debated topic in the literature, but contemporary doctrine has not comprehensively addressed such a large and current topic for the courts of law. This subject was debated only on a one-off basis and this motivates us to study its issues in a systematic way, which aims is to overlook over the essential issues that could lead to an overall understanding of this phenomenon – expropriation, including the phenomenon of indirect expropriation.

Key words*: property; expropriation; expropriation for reasons of public utility; public utility; private property; indirect expropriation; atypical form.*

INTRODUCTION

Expropriation for cause of public utility is a frequently debated topic in the literature, but contemporary doctrine has not comprehensively addressed such a large and current topic for the courts of law. This subject was debated only on a one-off basis and this motivates us to study its issues in a systematic way, which aims is not to overlook over the essential issues that could lead to an overall understanding of this phenomenon – expropriation, including the phenomenon of indirect expropriation.

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The institution of expropriation has been known since ancient times. It's established that the first forms appears as early as in 1303, when Philippe la Bel ordered acquisitions *"nori as superfluitatem, sed ad convenientem necessitate et pro justo pretio"* [1] which is explainable by the historical conditions of development of the French where private property was already partially divided, unlike the Romanian country where state formations barely took shape.

Analysing the concept of expropriation, including indirect expropriation, it is important to start with the analysis of property rights. Thus, staring from the fundamental law of the Republic of Moldova, according to art. 9 of the Constitution of the Republic of Moldova and the acts regulating this right result in the rule of fullness of the right of private property, the exception being the right of public property. Thus, according to the constitutional provisions, the citizen are equal before the law and the public authorities without privileges and without any discrimination and the right to private property, as well as the claims on the state, are guaranteed. According to art. 46 of the Supreme Law, no one can be expropriated except for a cause of public utility, established by law, with fair and prior compensation. In other words, the state of the Republic of Moldova has the obligation to protect the property, regardless of its owner, as the protection of property is one of the major values of the rule of law.

According to the prolific scholar and professor of law U. Mattei[2], and cases of forced alienation of property must be viewed in terms of expropriation, which has many definitions: „the right of the state to compulsory alienation of private property (power of eminent domain)", „expropriation in the public utility" or simply „ taking". According to the author, the right of the state to the compulsory training of private property is as important, as dangerous, and naturally results from the primacy of the law policy, power over principles. Therefore, any constancy of this right, in terms of its effectiveness and proper functioning, requires a significant degree of maturity on the part of the legal system, the presence of a strong, independent and reliable judiciary capable of withstanding the needs of the suddenly found state authorities.

[1] J. Lemansurier, *Le droit de l'expropriation* (Paris: Ed. Economica, 2001), 26.
[2] У. Матеи and Е.А. Суханов. *Основные положения о праве собственности*. *(*Москва: Юристь, 1999), 384 с.

Deprivation of property is one of the most severe interferences of the state in the realization of the property right, because it deprives the person of the property that belongs to him – it „destroys the property right" by transferring the title from a person to the state or other public authority or to another – the third one. In this context, the authors [1] are concerned with the problem of the existence of a certain limit until where effective protection of private property rights against abusive expropriation can be ensured. This concern is a common one for the European continent, it was established in the Declaration of the Rights of Man and of the Citizen of August 26 1789, art. 17, that „ Property being an inviolable and holy right, no one can be deprived of it, unless the public need, established by law, clearly requires it and on condition of a just and prior compensation" and the American, where the limitation of abusive expropriation was introduced in 1791 by the Fifth Amendment to the US Constitution, which prohibited the government from expropriating private property for public interest without fair compensation. Today, the limitation of abusive expropriation is regulated at the constitutional level, for example, the Constitution of the Kingdom of Belgium, art. 16 „ No one shall be deprived of his possessions except of the case of expropriations performed in the public interest carried out in the cases and in the manner established by law, in exchange for fair and prior compensation". One of the challenges of constitutional expropriation is that it is difficult to list exhaustively those public utility cases which justify the intervention in the exercise of a fundamental right by imposing legislative restrictions or limitations on compensations in the event of expropriation.

Expropriation in the notion used in the legislation of the Republic of Moldova for cases of transfer of private property into public property, in the sense of lack of property according to article I of Protocol 1 of the ECHR Convention. At present, the importance and exceptional nature of the institution expropriation is found in the rules of principle, contained in article 46 paragraph 2 of the Constitution of the Republic of Moldova, which states that: „ No one can be expropriated only for a cause of public

[1] G. Bovey, *L'expropriation des droit de voisinage. Du droit prive au droit public* (Berne: Stæpfli, 2000); Lemansurier, Le droit de l'expropriation; J. Ferbos and A. Bernard, *Expropriation des biens. Procedure. Principe d'indemnisation, Compatibilité avec la convention européenne des droits de l'homme* (Paris: Editions Le Moniteur, 1998).

utility established according to the law, with right and prior compensation".

The idea that expropriation is a limitation of the property right specific to civil law relations is also found in par.1 art. 501 CC of the Republic of Moldova according to: „ No one may be forced to cede his property, except only for reasons of public utility and receiving a fair and prior compensation. Expropriation is carried out in accordance with the law". Likewise, the Civil Code stipulates that the right to property is guaranteed. The scope of this warranty applies to any property, real estate or furniture. The effects of the guarantee necessarily have repercussions on other real rights – the right of usufruct, the right of use, the right of habitation, the right of servitude, the right of surface, because their existence inevitably presupposes the existence of the property right.

In order to implement adopted the Law of the Republic of Moldova as the constitutional provisions on expropriation was the expropriation for the public utility[1]. This law sets out scope of the property which is the subject of expropriation and the framework within which this special procedure applies, from the act declaring public utility to the decision of the court having jurisdiction on the application. Art. 1 of the above mentioned law defines expropriation in art.1 „...expropriation means the transfer of property and property rights from private property to public property, the transfer to the State of public property belonging to an administrative territorial unit or, where appropriate, the transfer to the state or an administrative territorial unit of the property rights for the purpose of carrying out works for public interest reasons of national interest or of local interest, under the conditions laid down by law, after a right and prior compensation", the Law of the Republic of Moldova on the expropriation for public utility cause is supplemented by the Regulation on the method of prior investigation for declaring the public utility of the object of expropriation, approved by Government Decision[2] establishes the unique method of prior research for declaring the public utility of the object of

[1] Legea Republicii Moldova cu privire la exproprierea pentru cauză de utilitate publica: nr. 488 din 08.07.1999. În: Monitorul Oficial al Republicii Moldova, nr. 42-44/311 din 20.04.2000.

[2] Hotărârea Guvernului Republicii Moldova pentru aprobarea Regulamentul privind modul de cercetare prealabilă pentru declararea utilității publice a obiectului exproprierii: nr. 660 din 15.06.2006. În: Monitorul Oficial al Republicii Moldova, nr. 95-97 din 23.06.2006.

expropriation.

It is important to mention that transition of atypical expropriation to classical expropriation was a result of historical circumstances, both at national and European level, but it is important to know these historical stages, which are significant for our country.

Indirect (atypical) expropriation, for example, is not expressly defined by the Roman legislator, but is analyzed, staring with the interwar doctrine, by reference to the French case-law creation, and is topical in the same ways as it is at the time: permanent damages, actual incorporation, legal incorporation, etc.[1]

At the same time, according to the Civil Code of the Republic of Moldova there is atypical form of expropriation, regulated by art. 539 (1), by which the owner of a property is deprived of it, if under the law the person cannot own it. And we have the example of foreign nationals and legal persons from other states, who can acquire properties in the Republic of Moldova, except for the property on agricultural land and forest land [2]. The retention right is also expressly regulated in the Law of the Republic of Moldova on public expropriation, this being the reason, actually, for Romania to not regulate this in such a way.

The following author: A.M. Nicolcescu[3] mentions that should be regulated in the same manner because the procedure to which the legislation of the Republic of Moldova refers is strict in the structure and in the right of retention, as stipulated in the art. 2495-2499 of the Romanian Civil Code and is has a permissive nature, which can be interpreted by the generic form.

Moreover, there have even been cases of indirect expropriation regulated in the 19th century by French legislation on communications and roads, as well as in respect of mine roads or community interest, as well as in the regulatory acts for the establishment of telegraphic and telephone lines [4].

The European Court of Human Rights has used the notion of "de facto expropriation", for defining the effects of an action whereby the

[1] A.M. Nicolcescu, *Exproprierea pentru cauză de utilitate publică* (Bucharest: Universul Juridic, 2019), 47.
[2] S. Baieş et. al. *Drept civil. Drepturile reale. Teoria generală a obligaţiilor*. *Vol. II* (Chişinău: Cartier Juridic, 2005), 328
[3] Nicolcescu, *Exproprierea pentru cauză de utilitate publică*, 48.
[4] S.C. Burlacu, *Exproprierea pentru cauza publica* (Bucarest: LERAS, 2020), 23.

exercise of private property rights is limited in favor of the right of public property, without any legal act, but which is equivalent to a formal expropriation[1].

At the same time, it was established that "de facto expropriation", does not meet the requirement of "predictability", so that the interference was compatible with the principle of legality, without the applicant being able to be blamed for not initiating an action for damages.

In conclusion, the public authorities must not act at their discretion, avoiding a procedure which could end in its detriment, which is why we consider that, in such a situation, any compensation should include not only the equivalent of the damage caused, but also an amount to sanction non-compliance with the expropriation procedure itself, when the injured party does not agree to amicably assign his right, a kind of fine.

A classic case of indirect expropriation is represented by the situation in which public utility works are stared on the occupied land, in the absence of initiating the expropriation procedure and the owners prevented them from exercising the attributes of possessions and use. Consequently, compensation for non-use is fully justified.

Also, the repair of the damage can be done by forcing the one who is guilty of its production to restore the building in its initial state, through greening works return to the agricultural circuit of a land, through the action under obligation to do, also based on the principle of tortious civil liability, when the injured party does not want another location, its transfer being the essence of legal expropriation, not of fact.

However, in such a case the full repair of the damage may incur much higher costs than the value of the damaged or destroyed property, so the subsequent expropriation would be more equitable from this point of view, as this type of work is unlikely to take time and finally, causes an unavailability of the good, which can no longer be used according to the usual destination.

Another example that can be circumscribed to expropriation is in fact can be found in Swiss doctrine and legislation through the notion of "expropriation of neighborhood right" [2] and, although this notion is not expressly regulated by the Law in reality such effect can also occur as a result of the formal or informal expropriation of a private property, and

[1] Nicolcescu, *Exproprierea pentru cauză de utilitate publică*, 52.
[2] Bovey, *L'expropriation des droit de voisinage. Du droit prive au droit public*.

any damage to neighbor's (noise, dust, etc.) could not be repaired, in our opinion, except on the basis of tortious civil liability.

Compared to the Swiss doctrine, given that in some cases the exercise of the property right of the neighbor is limited excessively or totally, we can conclude that there are also cases of indirect expropriation of neighborhood rights or even the property of the neighbor.

In the Civil Code of the republic of Moldova the neighborhood relations are regulated by art. 587 regarding the admissible neighbouring influence, as well as by art. 588 regarding the infringement of inadmissibility. In view of the latter condition, the expropriation could be ordered, in our opinion, only for extreme cases, when it is inadmissibly attempted indirectly or through fault, but the damage is sufficiently serious in the sense shown by art. 588 CC to RM.

For the exposed situations, a distinction is made between de facto expropriation and indirect expropriation, but we would equate them in terms of effects, considering also that doctrine [1] concludes that the use of the name of expropriation "is improper, and the injured persons actually have other legal means of defenses, such as the action in the claim or in claims, related to the prejudicial action, respectively the claim, if the approach of the authority can be stopped, and the good may return to the undisturbed possession of the holder of the real right, or compensation when the good is no longer usable to previous standards, being practically impossible to be reused or even destroyed.

Even if this formula of expropriation has been criticized for its confusion, its use cannot be denied in the domestic jurisprudence of the European Court of Human Rights, given the reality of some of the situations it covers. In fact, it is a consequence of the legal approach of expropriation, but also in the opposite case, the evaluation criteria already established for this can be used, such as: nature and characteristics of the property, location, destination, its uses at the stage of the market, in relation to the supply-demand criterion, but also by concrete transactions having as similar or comparable real estate objectives.

At the same time, the assessment of the compensation must be reported at the time of the damage, respectively when the expropriation actually took place, but also here it is necessary to verify the moment

[1] O. Puie, *Regimul juridic al terenurilor. Cadastru și publicitatea imobiliară asupra terenurilor* (Bucharest: Universul Juridic, 2014), 98.

when the illicit action is exhausted or, more precisely, when we should effective expropriation [1].

The examples presented are common, as are the detailed situations in some of the following sub-points, which we have assimilated to actual expropriations, but there are also singular situations that raise issues in terms of effects assimilated to a de facto expropriation or hypothetical situations that may be whenever it materializes in the form of a de facto expropriation.

One such example might be the formation of islands in a publicly owned river, by the action of erosion of the bank of the private owner, as a result of the diversion of the course of this river by the basin administration, with the consequence of widening the minor riverbed. In these conditions, we are not in the presence of avulsion, because the eroded piece did not stick to the land of another riverside owner, but was in the space of public property. It can be concluded that the injured party has the right to compensation, but also to the action before claim, following the principles already set out above, given that public property was not acquired under the law to be considered inalienable.

CONCLUSIONS

Therefore, we conclude that the concept of differential law should be expressly regulated in the light of the complexities which, however, are highlighted in different fields, but also in the light of the fact that judges are using this expression more and more often in order to reinforce the argument they report to the ECtHR case-law on indirect expropriation, and although we have previously shown that the use of this phrase is inappropriate, it goes without saying to define an effect as strong as it is of the expropriation itself.

As we have shown before, the reparation of the damage in case of expropriation can in fact have several alternatives, that is why the intervention of the legislator would be necessary in order to regulate fair alternatives for all parties involved, not only to establish a factual situation as a source of law. In fact, some practitioners even use the „ notion of de facto expropriation" in arguing solution, which we consider to be avoided until express regulation, and characterize it by the concomitant lack of right of use, possession and right of material

[1] Nicolcescu, *Exproprierea pentru cauză de utilitate publică*, 51.

disposition.

At the same time, the express regulation of de facto expropriation is not only based on the principle of full reparation of damage in civil law, but is also based on the criterion of classifying administrative acts as lawful and unlawful, namely the production of administrative law effects in both forms, illicit or illicit, even if they have as authors private persons, an element that places the expropriation itself, as a material fact, in the sphere of public law [1].

The need for legislation in this area is also expressed by the European Court of Human Rights in order to comply with the requirement of the principle of legality when the jurisprudence is inconsistent, being generally known that the first requirement of an interference with private property force, and in the 2 we approached we do not have a predictable norm that would respond to the desideratum of the practice.

Therefore, the new legal institution is also based on the imperative to respect the forms of legal institutions already expressly regulated, which are given efficiency by diversion from the original purpose, without considering that they cannot evolve, but in the context shown not the old institutions need changes, but the evolution of expropriations requires changes in the special law.

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DOES ART 21 PARA 6 OF THE LAW NO 165/2013 STILL OFFER US SURPRISES?

Andrei SOARE[1]

Abstract:

The current version of Art 21 Para 6 of Law no 165/2013[2] *represents the wording by which the Romanian Parliament balanced the provisions of the Constitution with the concrete way of valuing real estate in order to grant remedial measures in equivalent, in the form of compensation points.*

The present study seeks to answer the question: whether the current wording, being the eighth intervention that the legislature has made on a single article, solves the problems that arise during its application, in this vital matter for the beneficiaries of the law represented by real estate valuation in in order to establish the number of compensation points.

The guide in the trip I propose will be the Decision no 9/2022[3] *pronounced by the High Court of Cassation and Justice – Panel for resolving legal issues on 21 February 2022.*

Key words: *resolving legal issues; effects; restitution of property; real estate evaluation; notarial grids.*

INTRODUCTION

Exactly one year ago we analysed certain effects of the Decision of the Romanian Constitutional Court no 189/2021, decision declaring unconstitutional the text of Art 21 Para 6 of Law no 165/2013. The effects of this Decision have placed the concrete situation of granting compensation for real estate that cannot be returned in kind in a real

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[2] Art 21 Para 6 of the Law no 165/2013 in the form adopted by the Law no 193/8 July 2021

[3] Decision no 9/2022 published in the Official Gazette of Romania, Part I, no 326/4 April 2022

legislative vacuum. This state ceased by the adoption by the Parliament of Law no 193/2021 in which we could find the current wording and producing legal effects of Art 21 Para 6 of the Law no 165/2013.

The text stipulates that: Art 21 Para 6 "The assessment of the buildings for which compensation is granted is expressed in points and is made by applying the notarial grid valid for the year preceding the decision by the National Commission, taking into account the technical characteristics of the building and the category of use. The date of its takeover. One point is worth one RON".

We can see, therefore, what is the current vision of the legislator after 8 successive amendments to Art 21 of Law no 165/2013, a vision designed to meet all social and legal requirements of the regulated issues. The fact that an article of a relatively recent law has been amended 8 times highlights on the one hand the increased attention paid by the legislator to adopt a wording to achieve the social objective and the degree of importance of the object of regulation of this legal text.

We find that the final option of the legislator was that the valuation of real estate, whose restitution in kind is no longer possible, be made by reference to the notarial grids valid for the year preceding the issuance of the decision by the National Commission for Real Estate Compensation. This way of evaluation is based on an evolution of the social reality with which the law no longer kept pace, to the deep detriment of its beneficiaries.

We find this evolution of the social reality mentioned for the first time in the explanatory memorandum occasioned by the adoption of the previous wording, found unconstitutional, but we also find it explicitly in the explanatory memorandum that generated the adoption of Law no 193/2021.

THE STATEMENT OF REASONS THAT WAS THE BASIS FOR THE ADOPTION OF LAW NO 193/2021[1] (EXCERPTS)

Pct. 2 Expected changes

"*This legislative solution may ensure a stability and predictability in the process of granting compensations. The use of the evaluation system by applying the notarial grid from the year preceding the issuance*

[1]http://www.anrp.gov.ro/uploads/expunere_de_motive_proiect__lege_Guv_pt_art._21_L.165.pdf

of the decision by the National Commission will ensure for the former owners or their heirs, a correct compensation, which is based on the current notarial grids. The reporting to the updated grids is an opportune approach, considering the fact that in the period prior to the declaration as unconstitutional of the amendments brought by Law no 219/2020 (November 2020 – March 2021), in the files that had as object real estate for which no transactions of the property right were carried out, the National Commission granted compensations by using the notarial grid valid for the year preceding the issuance of the decision (respectively 2019). This assessment determined the persons entitled to form expectations that the compensations will be granted in relation to the current grids, expectations that can be considered legitimate, given the long time elapsed from the moment of formulating the claims until the time of their settlement".

Section 4. The financial impact on the general consolidated budget, both in the short term, for the current year and in the long term (5 years)

"*The average compensation awarded by the National Authority for Property Restitution (ANRP) in the last 4 years is of 1.448.010.958 lei. Given the change in the valuation method, we estimate an increase this year of approximately 35% in the amount of compensation to be awarded. We note that the financial impact for the coming years cannot be determined, as the notarial grids that will be used have not yet been drawn up*".

As this last excerpt quoted from the Explanatory Memorandum shows, the impact is significant in favor of the beneficiaries of the law.

We have, as far as we can understand, a good text of law, clearly worded, applicable to all future and pending situations.

However, in this context, why would a thorough analysis of these legislative changes be of interest?

This analysis must be done even if there is only one motivation: considering the beneficiaries of the law!

The situation has the peculiarity that the beneficiaries of the law are those persons who have suffered, directly or through their perpetrators, the damages caused by the communist state through the abusive measures taken on private property and its owners. These people are the ones to whom the Romanian state, now constituted on a

democratic basis, promised them, starting with 1990, the reparation of the damages caused by the communist state. These people are the ones who formulated at the latest under Law no 10/2001, that is 21 years ago, the requests for restitution of real estate abusively taken over by the communist state.

The beneficiaries of Law no 165/2013, to which we refer in the present study, are those who, although they made requests for restitution in 2001 at the latest, are, unfortunately, in the situation of not being able to be restituted in kind the buildings taken over by the communist state and expects to receive equivalent repairs. These people are, therefore, among the beneficiaries of the reparation legislation, the most oppressed and I do not consider the quantification of everyone's rights, but I consider the time elapsed between the moment of injury and the moment of obtaining the concrete repair as well as exposure to legislative fluctuations.

Therefore, in view of the exposed situation of the beneficiaries of this rule, we must analyze the implications of its application in all possible hypotheses in order to identify and correct any anomalies. The legal world in today's society is obliged to make this effort of analysis towards the much-tried patience of the recipients of the text of Art 21 Para 6.

And behold, these analyzes have begun to appear!

I pointed out at the beginning of this study that the "guide" in this legal journey will be a court decision, but not an ordinary one, but the Decision No 9/2022 issued by the High Court of Cassation and Justice – Panel for settlement of legal issues on 21 February 2022. The legal world has noticed the appearance of some dysfunctions in the application of the mentioned text and the procedural approach[1] made available for this purpose has been followed, the High Court of Cassation and Justice already ruling, as we have shown.

Let's see what were the aspects that were the subject of the notification:

The High Court of Cassation and Justice has been invested with a preliminary ruling by means of two connected notifications.

[1] Art 519-521 of the Code of Civil Procedure

The complaint[1] from the Bucharest Court of Appeal concerned the following issue of law:

In the interpretation of Art 21 Para 6 of Law no 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of buildings abusively taken over during the communist regime in Romania, with subsequent amendments and completions (Law no 165/2013), in the event of an appeal against a decisions issued by the National Commission for Real Estate Compensation, the granting of compensations is made by applying the notarial grid valid for the year preceding the actual issuance of the decision by the National Commission for Real Estate Compensation or by applying the notarial grid valid for the year preceding its finality?

And the notification[2] from the Timișoara Court of Appeal concerned the following issue of law:

"*What is the notarial grid applicable for the valuation of real estate that cannot be returned in kind, in case of litigations in which the plaintiff requests the obligation of the National Real Estate Compensation Commission to settle the case by issuing a compensation decision stating the number of points established by the expertise, the hypothesis in question being that in which the Commission did not solve the file until the date of the introduction of the action by the plaintiff nor later, a situation that is not covered by the text of Art 21 Para 6 of Law no 165/2013, in the form in force after the amendment provided by Law no 193/2021 regarding the approval of the Government Emergency Ordinance no 72/2020 for the suspension of the application of the provisions of Art 21 Para 6 of Law no 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of buildings abusively taken over during the communist regime in Romania and the establishment of transitional measures (Law no 193/2021)*?"

In other words, keeping the essence of the questions but intervening in their plasticity, I point out that the High Court has been asked how the provisions of Art 21 Para 6 in the event that an appeal

[1] Bucharest Court of Appeal – 3rd Section for civil, juvenile and family cases has ordered in its conclusion of 2 November 2021 in the Application case 11553/3/2019 the notification of the High Court of Cassation and Justice based on Art 519 of the Code of Civil Procedure

[2] Timișoara Court of Appeal – 1st Civil Section ordered in its conclusion of 9 November 2021 in the Application case 877/108/2020 the notification of the High Court of Cassation and Justice, based on Art 519 of the Code of Civil Procedure

against a Point Compensation Decision would be admissible and the process took a fairly long period of time? To which notarial grid should the court refer: to the notarial grid from the year before the issuance of the CNCI Decision, or to the notarial grid from the year before the pronouncement of the decision, or to the notarial grid from the year before the finalization of the court decision?

The second complaint addresses the same question, to which notary grid we refer to establish the value of the property, but in the context of a lawsuit initiated in a situation in which CNCI did not even issue the Decision within the term provided by law.

In other words: who bears the effect of the passage of time in the case of a litigation – the beneficiary of the measure, in the strict application of the text of the law or the CNCI?

The High Court of Cassation and Justice shows from the beginning that it does not offer a solution, but it still offers a partial solution.

This paradoxical expression highlights the attitude of the High Court.

The High Court does not offer a solution because it considers that the conditions of admissibility of the two applications are not met, which is why it rejects them as inadmissible. However, it does provide an answer to one of the questions. This Decision does not, therefore, resolve the issues of law in the legal sense, because without pronouncing by the device on them, the effects of the provisions of Art 521 Para 3, but by considering the legal issues before it, the Decision may be used in a case-by-case manner and may influence the creation of case-law in the sense in which the dismissals were made.

How did the supreme court resolve the issue of the application of the provisions of Art 21 Para 6, who bears the effect of the long duration of a trial and especially, why?

The Supreme Court responds to the second complaint submitted, namely the situation in which no Point Compensation Decision had been issued: citing Para 126-129 of the Decision.

126. Or, the method of determining the compensatory measures by points is provided in Art 21 Para 6 of Law no 165/2013. As long as, in this case, there is no decision issued in the administrative procedure, and the court decision takes the place of this decision, Art 21 Para 6 must be

interpreted as meaning that the compensatory measures by points must be determined by reference to the notarial grids valid for the year preceding the pronouncement of the court decision.

127. This being a special provision, it removes from the application the common law provisions, according to which, in the opinion of the referring court, the assessment should be made by reference to the notarial grids valid at the date of the expertise.

128. The purpose pursued by the legislator was for the persons entitled to obtain compensatory measures to benefit from the establishment of compensatory compensations to be evaluated according to the grids closest to the moment of their actual receipt.

129. The fact that in practice specific problems may arise caused by the fact that the court decision is not always pronounced in the same year in which the expertise is elaborated, which would lead to the possible re-examination of the expertise, or other issues related to the need for a new expertise. The attack cannot be an argument in support of the difficulty of the issue of law before the High Court of Cassation and Justice, given that these situations are limited to law enforcement depending on the particular cases of certain disputes, appreciation that belongs to the court invested with the settlement of that dispute, taking into account the other principles applicable to the civil process, such as the speedy trial of cases, the limits of the trial given by the content of the lawsuit and the appeals.

Although Para 126 is a clear answer to the second referral and, as we have shown, the High Court does not even respond to the issues raised by the first referral, which are more important and more difficult, we note that in Para 128-129 the High Court makes some assessments concerning the first complaint.

We also ask ourselves, what will be the legal situation from this point of view, of a person benefiting from a Compensation Decision and who files an appeal against it being dissatisfied with the number of compensation points granted and criticizing one or more aspects of the CNCI Decision? The legal battle is going on, the administration of the evidence with the technical evaluation expertise is being reached and the problems are already starting to appear. Depending on which notarial grid, the expertise is performed? In practice, the courts adopt a Solomonic approach ordering that the expertise be done in several variants, respectively, both in the version corresponding to the notarial

grids of the year prior to issuing the decision and in the variant of the notarial grids corresponding to the year prior to the performance of the expertise and in the variant corresponding to the notarial grids from the moment of performing the expertise. The courts proceed correctly because the expertise rules on certain facts – possible assessments depending on different benchmarks. However, the difficulty arises when the court has to choose only one of these options. This is a legal solution achievable with the application of one or more legal norms.

As we have shown, the High Court extracts the will of the legislator manifested in Art 21 Para 6: "**128**. *The purpose pursued by the legislator was for the persons entitled to obtain compensatory measures to benefit from the establishment of compensatory compensations to be evaluated according to the grids closest to the moment of their actual receipt*".

The thesis of granting compensations assessed according to the grids closest to the moment of their actual receipt is also supported by the interpretation derived from the explanatory memorandum (previously cited) on the occasion of the adoption of this wording by the legislator. It is clear that this was the goal pursued by the legislator, to provide compensation according to the current reality.

However, it is equally true that the wording of the law is clearly stated: 21(6) "*The evaluation of the buildings for which compensations are granted is expressed in points and is done by applying the notarial grid valid for the year preceding the issuance of the decision by the National Commission…*"

The legislator binds the establishment of the value of the notarial grid valid in the year prior to the issuance of the decision by CNCI.

The legislator provides this only benchmark, the moment of issuing the CNCI decision, according to which we determine the year of the grid which is taken as a benchmark in the evaluation. The legislator does not add to this text the statement "...or, in the case of an admitted appeal, the assessment is made according to the notarial grid from the year preceding the expert report" or "...from the year before the judgment" or equivalent wording indicating such a vision of the legislator.

Also, Art 35 Para 3 of the law has not been modified: (1) *The decisions issued in compliance with the provisions of Art 33-34 can be challenged by the person who considers himself entitled to the civil*

section of the court in whose district the building is located, within 30 days from the date of communication; (3) *In the cases provided in Para 1-2, the court shall rule on the existence and extent of the property right and shall order the restitution in kind or, as the case may be, the granting of remedial measures under the conditions of this law*".

The court, depending on the elements it releases, orders, as the case may be, the granting of reparative measures "under the conditions of this law", i.e., under the conditions of the only text of the law regulating the evaluation, Art 21 Para 6 which sends us the valid notary in the year preceding the issuance of the decision.

In doctrine and jurisprudence, two legal arguments have been proposed regarding the choice by the court of another notarial grid than the one from the year prior to the issuance of the Decision by the Commission: an argument is based on the idea of extensive interpretation of the text of Art 21 Para 6, and the second argument is based on the indefinite nature of the right of claim acquired by the Compensation Decision. As long as the right to appeal has been exercised, the right of claim is not final, and we have a legal situation being set up on which the only entity invested to rule is the court.

Extensive interpretation is used when it is found that the intention of the legislator was to cover a wider range of situations than that covered by the literal expression he used.

It is true, as the High Court held, that the intention of the legislature was that the recipients of the text of the law should receive compensation close to the present reality, so from this point of view it can be argued that the intention of the legislature was broader than the expression used, which justifies the application of the legal mechanism of extensive interpretation.

Proponents of this interpretation do not answer the following question: we interpret the text of the law extensively in the sense that we no longer refer to the notarial grids of the year before issuing the decision, but as we establish through which legal mechanism, which is the moment according to which we choose the notarial grid applicable? We must refer to the will of the legislator, i.e., the grid valid in the year preceding a moment. This moment can be: the moment of the expertise in court, the moment of pronouncing the court decision in the first instance or the moment of pronouncing the solution in the appeal? I believe that we do not have a legal criterion for choosing between these three

moments, so that the theory of extensive interpretation encounters a barrier, that of the legal impossibility of choosing a moment in time.

Proponents of the current legal situation theory also encounter the same impediment in the impossibility of legally justifying the choice of the applicable grid: depending on the time of the judgment in the first instance or the time of the judgment on appeal (challenge)?

What remains to be done?

It is obvious that we have in mind the intention of the legislator, that the recipients of the rule benefit from the real estate valuation carried out as close as possible to the current reality, so the legislator wanted the date of compensation to be consistent with the reality of their proximity.

We propose the following mechanism for the implementation of this intention of the legislator embodied in an imperfect expression in the text of the incident law:

During the trial, the court invested with the appeal against the CNCI decision administers the evidence on the litigious aspects according to which it will pronounce the solution in question. These elements could be the existence of justification, the extension of the property right over the real estate abusively taken over by the communist state, the category of use of the real estate at the time of taking over. It is possible to administer a complex piece of evidence which, given the large number of cases and the relatively small number of experts, would lead to a departure in time from the reality existing in the year prior to the issuance of the CNCI decision. On the other hand, the evidence in dispute must be reported to a notarial grid and then the impediments presented above appear regarding the moment when we choose the respective notarial grid.

The proposed solution starts from the provisions of Art 35 Para 3 of the law: (3) *In the cases provided in Para 1-2, the court shall rule on the existence and extent of the property right and shall order the restitution in kind or, as the case may be, the granting of remedial measures under the conditions of this law*".

The court orders the granting of remedial measures "under the conditions of this law". This wording of the legislature leaves open two possibilities for application:

a) Either the court resolves the disputed issues and even determines the number of compensation points to be awarded and obliges the Commission to issue a point compensation decision for the established

number of points, in which case, as I have shown, there is no legal criterion to choose the moment according to which we determine the applicable notarial grid;

b) Either the court resolves the litigious aspects, for example, establishes the justification, establishes the extent of the building's surface as well as its category of use and orders the Commission to issue a new Compensation Decision, in accordance with the law, i.e., Art 21 Para 6, taking into account the dismissals made by the court. As a result of such a decision, the Commission will take over the unrelated elements – the justification, the extent of the surface of the building as well as the category of its use and will report them to the notarial grid from the year before its issuance.

Therefore, the Commission will issue a new decision, in compliance with the final court decision and by reference to the notarial grid from the year before the new decision, i.e., the evaluation will most faithfully comply with the purpose pursued by the legislator, that the recipient of the legal norm benefit a compensation determined according to the reality closest to the moment of its granting.

CONCLUSIONS

The situation of those who, being victims of the patrimonial damages produced by the communist state and who, being entitled to obtain reparative measures, reached today, 33 years after the 1989 revolution and 21 years after the adoption of Law no 10/2001, through a sad game of circumstances not yet benefiting from compensation, is a moral imperative of today's society.

Although well-intentioned, the legislator adopted a welcome text but which, due to its imperfect wording, does not protect its application of legal syncope, all to the detriment of those entitled to compensation. Judicial practice has not succeeded de facto, but as we have seen *de jure*, to adopt a solution that tends to be generalized. This study proposes to both the parties involved and the courts to adopt a way of pronouncing the judgments in this matter that fulfills at the same time the requirements of the principle of force of dismissals made by judgments, as well as the purpose pursued by the legislator, to establish damages accordingly with the reality close to the moment when the recipient will actually benefit from them.

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THE EFFECTS OF THE OPENING OF INSOLVENCY PROCEEDINGS

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Abstract:

The insolvency procedure, as regulated by Law no. 85/2014, produces major changes in the life of traders, changes determined by the takeover of business administration by the insolvency practitioner or by creating a procedure for supervising the activity in case the debtor enters the observation period.

Once the conditions for opening the procedure are met and if the court has ordered the admission of the application, the debtor changes his legal clothes by going through a period of analysis of the activity to be carried out in the previous period, an analysis that will be found in the reports. they are filed by the insolvency practitioner and on which the future of the debtor depends.

Key words**:** *debtor; insolvency; opening proceeding; effects.*

INTRODUCTION

The insolvency procedure, as regulated by Law no. 85/2014, produces major changes in the life of traders, changes caused by the takeover of business administration by the insolvency practitioner or by creating a procedure for supervising the activity in case the debtor enters the observation period.

REGARDING THE EFFECTS OF OPENING THE INSOLVENCY PROCEEDINGS

Unquestionably, the opening of the insolvency proceedings produces effects both upon the debtor, and upon its creditors, no matter whether they requested or not the opening of the procedure.

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According to a French legal writer[1] third parties would also be affected by the opening of the insolvency procedure, since its effects pass on them, as well. Therefore, it is shown that the decision of opening the insolvency procedure could change the rights and interests of various participants in the procedure, but also in relation to the concerned third parties. Moreover, the idea of a collective patrimony of the insolvency procedure is introduced, which should attempt to satisfy all joint interests present in conducting such procedure.

Nevertheless, the effects of opening the insolvency proceedings shall pass, traditionally, only upon two categories of persons: upon the debtor, mainly, and upon the creditors of the debtor which is insolvent.

Considering the complex nature of the insolvency proceedings in the current regulation of Law no. 85/2014, the effects which the opening of such procedure produces are various and may be classified depending on several criteria.

Thus, depending on how the general procedure or the simplified procedure is opened, various consequences may occur, as they could be distinct and depending on the initiation of the procedure of observation, judicial liquidation or bankruptcy.

Furthermore, it is considered[2] that the effects of opening the procedure may be patrimonial or non-patrimonial depending on the manner of their pecuniary quantification.

From the point of view of the patrimonial effects, we could distinguish in the case of opening the insolvency procedure, several categories: on the one hand, it is noticed the provision of law under which all judicial and extrajudicial actions relating to the satisfaction of claims over the debtor's estate shall be set aside de jure, which means that these effects produce consequences mainly regarding creditors. Moreover, all enforcement measures which have been initiated by creditors against the debtor before opening the insolvency proceedings shall be suspended. If the decision for opening the insolvency proceedings was quashed, all such judicial, extrajudicial actions or enforcement measures could be resumed when the cases of setting aside cease.

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[1] M. Jeantin and P.L. Canu, *Droit commercial. Entreprises en difficulté*, 7e édition (Paris: Dalloz, 2007), 209.

[2] R. Bufan coord., *Tratat practic de insolvență* (Bucharest: Hamangiu, 2014), 319; Gh. Piperea, *Insolvența: legea, regulile, realitatea* (Bucharest: Wolters Kluwer, 2008), 490.

By a decision of the High Court of Cassation and Justice rendered in the settlement of an appeal in the interest of the law, decision number 17/2020, the court indicated that the syndic judge could order, by way of a presiding judge's order, temporary measures regarding the lifting, suspension, and provisional suspension of the enforcement measures which the tax enforcement bodies would have taken if enforcement had been initiated by them in virtue of article 143 para. (1) the final sentence of Law no. 85/2014. The text of the article under question has recently been amended by law no. 113 of eight July 2020, and the likelihood of starting enforcement during the conduct of the insolvency proceedings has been removed, a correct solution which reconciles these provisions with those setting forth that such enforcement measures were suspended by operation of law.

Another patrimonial effect of opening the insolvency proceedings aims at the suspension of the course of the statute of limitations regarding the actions provided for in article 75 para. (1) of Law no. 85/2014, which actually refer to the judicial, extrajudicial actions and enforcement measures.

In interpreting such provisions, the High Court of Cassation and Justice decided that the suspension of the limitation period upon opening the insolvency proceedings occurs only in relation to creditors having claims over the debtor which is insolvent, and not for those claims which the insolvent debtor has toward its debtors. The High Court of Cassation and Justice indicated that the actions initiated by the debtor are subject to the general rules of calculating the limitation period, since the law distinguishes between the types of actions for which, once the bankruptcy procedure is initiated, the limitation periods are discontinued, and the statute of limitations runs its course for the other actions, according to the ubi lex non distinguit nec nos distinguere debemus principle[1].

Another patrimonial consequence of opening the proceedings is regulated under the Insolvency Code and refers to the suspension of the rates of interest, increases or penalties of any kind or any other cost being generically referred to as accessory and it cannot be added anymore to those claims arising prior to the date when the insolvency procedure was opened.

[1] High Court of Cassation and Justice, second civil section, decision no. 3299/28.10.2014.

Nevertheless, if a reorganization plan was confirmed for the insolvent debtor, all such accessories attached to the obligations arising subsequently to the date when the general procedure was opened, are certainly paid in compliance with the documents from which they originate or which determined their appearance according to the payment schedule established in the organization plan. If the plan fails, accessories calculated as such shall be due until the opening of the bankruptcy procedure and not after such time.

The patrimonial effects also include the measure of closure of the debtor's accounts which it used prior to the opening of the procedure and the opening of a sole account of the insolvency proceedings, and though, I consider that such measure is not justified to the extent to which there are grounds for a reorganization of the debtor and its return to the normal course of businesses. Nevertheless, it would be required to keep the debtor's accounts, however, to freeze them and use such sole account only for the period of the insolvency proceedings. Insofar as the simplified procedure is opened or the debtor becomes bankrupt for any reason, the closure of such accounts of the debtor is justified and is also required, and only the sole account shall be used, as the cessation of the debtor's activity is almost certain as a result of its dissolution and deregistration from the Public Register.

The transfer of the patrimonial rights to third parties following the debtor's liquidation is also included in the scope of the patrimonial effects and its applicability consists in their distribution to creditors depending on the nature of their creations, naturally, by covering the procedure expenses as a matter of priority. If following liquidation all liabilities of the debtor were covered, the remaining patrimonial rights shall be transferred to the debtor's shareholders or to other members thereof, and this should be one of the patrimonial effects which the insolvency proceedings generate.

The following could be included in the category of the non-patrimonial effects which the opening of the insolvency proceedings may produce: the dissolution of the legal entity in case of becoming bankrupt or in a simplified procedure, the obligation to publish the insolvency state, the denial of the right of administration of the debtor, the obligation to make available data and information relating to its activity, the obligation to mention on all documents arising from it, its current condition (insolvency, reorganization, bankruptcy).

Opening the insolvency proceedings generates also other categories of effects such as the provisional appointment by the syndic judge, of the judicial administrator or of the liquidator, the notification of the judgment of opening of the proceedings, the interdiction of the essential services suppliers to assist with their supply, the suspension from trading of the debtor's actions if they are traded on a regulated market, the possibility of annulment of the fraudulent actions, the limitation of the current activities being allowed only within certain limits governed by Article 87 of the law, the granting of the right of administration to the special administrator if the reorganization plan was approved, and the supervision was made by the judicial administrator.

The debtor's entering into bankruptcy or simplified procedure does not obviously constitute a success in carrying out the commercial activity, since both circumstances determine the cessation of the commercial activity due to the merchant's death. Bankruptcy produces itself a series of specific effects: impossibility of covering the liabilities and failure to pay the debts to its creditors, the debtor's dissolution and deregistration from the Public Register in which it was registered.

The simplified procedure represents, mainly, also a bankruptcy procedure generating the same categories of effects as bankruptcy.

Subsequently to opening the insolvency proceedings the law imposes the obligation to notify the opening of the procedure to all the creditors of the insolvent debtor together with any information relating to the conduct of the proceedings.

Such communication is made according to the provisions of the Code of Civil Procedure, however, subsequently during the conduct of the procedure, all communications, notifications or other documents shall be served by the Insolvency Proceedings Bulletin. And such exception to the common rules, provided for in the Code of Civil Procedure, represents specific effects which are generated by the opening of the insolvency proceedings, since creditors are forced to verify the Insolvency Proceedings Bulletin in a regularly, as all documents emerging from the insolvency proceedings shall be published therein, and perhaps, the most important, all deadlines to challenge or appeal various judgments or decisions shall run from the date when the respective documents are published in that bulletin.

I consider that such exception may generate certain difficulties for creditors as it involves some additional costs, respectively the

subscription to that bulletin, but also some considerable time which the creditor should take searching therein the documents which are of concern for it among many other documents which are communicated and published in the Insolvency Proceedings Bulletin.

Of course, the effects of opening the insolvency proceedings can be various, being nuanced depending on the features of each debtor or by the specific nature of its activity, those examined in this paper being, perhaps, the most common among the consequences which the opening of the insolvency proceedings generates, while also not being limited to these examples contained herein.

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THEORETICAL CONSIDERATIONS REGARDING THE RIGHT OF REGRESSION OF THE GUARANTOR

Nora Andreea DAGHIE [1]

Abstract:

Relationships arising between the main debtor and the guarantor usually represent the consequence of the payment made by the guarantor to the creditor. The guarantor which has paid the debt has a right of regression against the debtor, even when it committed itself without the debtor's consent.

In certain cases expressly provided for by law, the guarantor shall be recognized a right of regression as well, before making the payment. This is the case of expected regression.

Limits of the right of regression are sometimes determined by the main debtor's position in relation to the suretyship. To this end, the legislator regulates three situations: when the guarantor committed itself with the debtor's consent [Art. 2.306 para. (1) of the Civil Code]; when the guarantor committed itself without the consent of the debtor [Art. 2.306 para. (2) of the Civil Code]; when the guarantor committed itself against the debtor's will (Art. 2.309 of the Civil Code).

Key words: *guarantor; subrogation; right of regression; extent of the right of regression; loss of right of regression; expected regression.*

PRELIMINARY ASPECTS[2]. FORMS OF REGRESSION

The Romanian law of 2009 defines the suretyship in the Civil Code, in Art. 2280, as "the agreement whereby a party, the guarantor, undertakes towards the other party, who is the creditor in another obligational relation, to fulfil free of charge or in exchange for a remuneration the debtor's obligation should the latter fail to fulfill it".

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[2] See Nora Daghie, „Aspecte teoretice și practice cu privire la natura juridică și felurile fideiusiunii", *Dreptul* no. 9 (September 2020): 32-33.

Therefore, the suretyship gives rise to an obligation to perform and is a personal guarantee[1], ancillary to the main obligation undertaken by the debtor towards the creditor. Consequently, the parties to the suretyship agreement are only the creditor and the guarantor (the person who undertakes the obligation to secure the debtor's obligation; a third party to the relation between the creditor and the debtor[2]). The debtor of the secured obligation is not a party to the suretyship agreement. The direct result of the fact that the debtor is a third party to the suretyship agreement is that the suretyship can be contracted even without the knowledge and even against the will of the principal debtor (Art. 2283 of the Civil Code)[3].

Therefore, the relationships between the guarantor and the principal debtor are not generated by the suretyship agreement (these do not constitute effects of the suretyship agreement), they are, usually, the consequence of the payment made by the guarantor to the creditor: "The guarantor which paid the debt is subrogated de jure in all rights that the creditor has against the debtor" (Art. 2.305 of the Civil Code).

Article 2.305 of the Civil Code is an application in the matter of suretyship, of the legal personal subrogation[4]. By reference to the provisions of Art. 1.593 and Art. 1.597 of the Civil Code, as means of transmission of the obligations, as well as a manner of making the payment, subrogation consists in the replacement of the creditor from an

[1] The specific aspect of the personal guarantees consists in affecting a person's patrimony, other than the debtor's, to secure the fulfilment of the obligation, and the creditor may pursue said person (natural or legal – who becomes the personal guarantor) should the personal debtor fail to fulfill its obligation. The personal guarantor undertakes the capacity as guarantor debtor towards creditor, which affects its own patrimony next to the debtor's patrimony for the purpose of fulfilling the creditor's rights. The creditor will thus benefit from the joint guarantee over the debtor's patrimony and the joint guarantee over the personal guarantor's patrimony. Consequently, the mechanism of guarantee implies double or even multiple patrimonies for the general security of the loan. See Emod Veress, *Drept civil. Teoria generală a obligațiilor*, 2nd edition (Bucharest: C.H. Beck, 2016), 271.

[2] Călina Jugastru, *Drept civil. Teoria generală a obligațiilor* (Bucharest: Universul Juridic, 2017), 272.

[3] Emod Veress, *Drept civil. Teoria generală a obligațiilor*, 4th edition (Bucharest: C.H. Beck, 2019), 317.

[4] Cristina Irimia, „Articles 2305-2312 of the Civil Code" in *New Civil Code. Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2021), 2638.

obligational legal relationship with another person, which, paying the debtor's debt, becomes the creditor of the latter, acquiring all rights of the paid creditor.

Being based on the subrogation mechanism, the guarantor's regression is referred to as "subrogation regression". It is not about the guarantor's own remedy. This type of regression "only transfers *tale quale* all remedies to the creditor regarding the principal debtor from the creditor to the guarantor"[1].

Consequently, the doctrine[2] notices in a justified manner that, in case the guarantor pays the debt before the due date, it is subrogated in the creditor's rights, however, it can only pursue the debtor on the due date, the action being, otherwise, premature (the substantive right of action arises upon maturity), since the guarantor cannot have more rights than the creditor which it subrogates. It is about another facet of the effect of the accessory nature of the suretyship agreement compared to the main obligational relationship.

Moreover, when the main debt is secured, the paying guarantor shall benefit from all guarantees accompanying it, including from suretyship from other guarantors[3]. They may oppose to the "new creditor" (paying guarantor) the means of defence which they had against the primary creditor, including the benefit of excussion[4] and the benefit of division[5].

As law makes no distinction, subrogation automatically operates, without any formality and no matter whether the guarantor bound itself with the debtor's consent, without the knowledge or against its will[6].
In those cases in which the creditor had no remedy for the recovery of its debt from the debtor (for example, the right of action was time-barred), the guarantor did not receive either, by subrogation, any remedy[7],

[1] Radu Rizoiu, *Curs de garanții civile* (Bucharest: Hamangiu, 2020), 206.
[2] Emod Veress, *Contractul de fideiusiune* (Bucharest: C.H. Beck, 2015), 179, 176.
[3] Irimia, *Articles 2305-2312 of the Civil Code*, 2638.
[4] See Nora Daghie, „Succinte considerații pe marginea beneficiului de discuțiune", *Dreptul* no. 2 (February 2022): 23-29.
[5] See Nora Daghie, „Succinte considerații despre beneficiul de diviziune", *Pandectele Române* no. 4 (July-August 2021): 118-125.
[6] Irimia, *Articles 2305-2312 of the Civil Code*, 2638.
[7] According to the provisions of Art. 2.506 para. (4) of the Civil Code, the establishment of guarantees for the benefit of the holder of the right the action of which is subject to limitation, is valid.

however, the validity of the suretyship depends on the knowledge, by the guarantor, of the natural nature of the main obligation[1].

When the creditor loses the remedies after the conclusion of the suretyship agreement, by taking advantage from the provisions of Art. 2.315 of the Civil Code, the doctrine[2] considers that the question of limitation of the guarantor's liability is applicable, the guarantor being released up to the limit of the amount which it could not recover from the debtor.

In the event that, based on the creditor's consent (Art. 1.490 of the Civil Code), the guarantor makes a partial payment, the subrogation shall be partial as well, with the following consequences:

- the initial creditor, holder of a guarantee, may exercise its rights for the unpaid portion of the debt with preference to the new creditor [Art. 1.598 para. (1) of the Civil Code];
- nevertheless, if the initial creditor bound itself to the new creditor to guarantee the amount for which it operated the subrogation, the latter is preferred [Art. 1.598 para. (2) of the Civil Code].

According to the provisions of Art. 2.303 of the Civil Code, the guarantor cannot waive beforehand the benefit of the subrogation exception, that the payment of the debt gives to it. Referred to as well as "the benefit of the assignment of shares (*cedendarum actionum*)"[3], the mechanism is based on the idea that by payment, the guarantor shall acquire all shares and accessories of the debt paid.

Nevertheless, the doctrine expressed the opinion according to which "the anticipated waiver of the subrogation benefit may occur if this waiver is based on a liberal intention on the part of the guarantor to the principal debtor and the waiver takes the solemn form of donation agreement"[4].

After making the payment, the guarantor may also opt for a personal action based on mandate or business management, just as it has

[1] "*Per a contrario*, undertaking the guarantee obligation by the guarantor who did not know that the creditor's action was time-barred, might be annulled for error or, if this aspect had been concealed to it by fraudulent acts, for deceit" - Irimia, *Articles 2305-2312 of the Civil Code*, 2619.

[2] Rizoiu, *Curs de garanții civile*, 205; Irimia, *Articles 2305-2312 of the Civil Code*, 2638.

[3] Paul Vasilescu, *Civil Law (Drept civil). Obligations*, 2nd revised edition (Bucharest: Hamangiu, 2017), 136.

[4] Veress, *Contractul de fideiusiune*, 179.

undertaken the guarantee obligation having the consent of its debtor or without the latter's knowledge[1]. However, personal regression does not preserve the accessories of the debts paid to the guarantor. Instead, personal regression gives the guarantor the right to damages, and it can obtain more than it paid, and has the advantage that the limitation period starts to lapse from the moment in which the guarantor made the payment to the creditor[2].

In exceptional cases, the guarantor shall be recognized by law a right of regression before making the payment by the legislator as well (anticipated regression).

EXTENT OF THE RIGHT OF REGRESSION

The extent of the right of regression is at its maximum in the case of the suretyship being agreed upon by the debtor and shall be progressively decreased in case it is unknown to the guarantor, respectively in case of the suretyship contracted against the express will of the debtor[3].

Thus, when the guarantor binds itself to the suretyship with the debtor's consent, the action is based on a mandate and it is entitled to claim the restitution of the payment which it had made [Art. 2.306 para. (1) of the Civil Code]:

- capital, interest and expenses, as well as damages for repairing any loss that it suffered because of the suretyship;
- interest rates for any amount that it should have paid to creditor, even if the main debt did not produce any interest.

If the guarantor undertook the obligation of guarantee without the debtor's consent, legal relationships specific to the business management arise between them. The guarantor can only recover from the debtor what

[1] "The guarantor who paid without the debtor's knowledge, being only a business creditor, cannot appeal against the latter unless the expenses were useful to the guarantor (Art. 991 of the Civil Code of 1864). Once such expenses were useful to it, the guarantor's appeal would have the same extent as if it had paid by the order of the debtor, namely as proxy (Art. 1669)" - Dimitrie Alexandresco, *Explicațiunea teoretică și practică a Dreptului civil român, Tomul X Contractele (III). Garanțiile* (Bucharest: Universul Juridic, 2017), 154.

[2] Ion Dogaru and Pompil Drăghici, *Drept civil. General theory of obligations*, the 3rd edition (Bucharest: C.H. Beck, 2019), 744.

[3] Rizoiu, *Curs de garanții civile*, 207.

the latter would have been forced to pay, including damages, if suretyship had not occurred, except the expenses subsequent to the payment notification, which were the debtor's liability [Art. 2.306 para. (2) of the Civil Code].

Finally, in case of the suretyship against the will of the main debtor, the only remedy of that guarantor is to be subrogated in all rights that the creditor had against the debtor (Art. 2.309 of the Civil Code).

SPECIAL CASES

According to Art. 2.307 of the Civil Code, when the principal debtor releases itself from the obligation relying on its inability, the guarantor has a regression against the principal debtor only within the limit of its enrichment[1]. Consequently, the guarantor is not subrogated de jure in all rights that the creditor had against the principal debtor, its action should be based on the provisions of Art. 1345-1348 of the Civil Code, as well.

When the guarantor secured several joint debtors, it can request from any of them the entire amount paid to the creditor, which means that, by way of subrogation regression, the guarantor acquires also the benefit of solidarity (Art. 2.308 of the Civil Code)[2].

However, if the guarantor secured several debtors of the same creditor, which are not jointly and severally committed, it could not exercise regression against any of them for everything, as it did not secure a single obligation, but serval distinct obligations[3].

LOSS OF THE RIGHT OF REGRESSION

The right of regression of the guarantor is lost in the following cases:

[1] The text did not exist in the previous regulation, and the solution was inspired from Art. 2357 of the Civil Code of Québec. See Irimia, *Articles 2305-2312 of the Civil Code*, 2640.

[2] Liviu Pop and Ionuț-Florin Popa, Stelian Ioan Vidu, *Drept civil. Obligațiile*, 2nd revised and enlarged edition (Bucharest: Universul Juridic, 2020), 617.

[3] Anca Roxana Adam, *Drept civil. Teoria generală a obligațiilor* (Bucharest: C.H. Beck, 2017), 523.

a) the guarantor pays the debt without notifying the debtor, and it pays the second time [Art. 2.310 para. (1) of the Civil Code]. In this case, the guarantor is charged with the omission of notifying the debtor about the payment made. However, it preserves the right to request the creditor the restitution, in full or in part, of the payment made [Art. 2.310 para. (3) of the Civil Code].

b) the guarantor pays the debt without notifying the debtor, and the latter proves that upon payment, it had the necessary means to declare the debt settled (payment, compensation etc.). Per a contrario, the right of regression exists if the payment was made without notifying the principal debtor, and the latter had no means to declare the debt settled in full or in part[1].

Rightly, the doctrine[2] emphasized that by the *means* to declare the debt settled, we should consider both the material means, and the legal means of defense.

c) Insofar as the debtor may prove that upon payment, it had any means of defence by which it could have obtained the debt decrease, the guarantor has an action in regression only for those amounts which the debtor would have been called to pay [Art. 2.310 para. (2) of the Civil Code]. And in such situation, based on the undue payment, the guarantor preserves, however, the right to request the creditor the restitution, in full or in part, of the payment made [Art. 2.310 para. (3) of the Civil Code].

In order to avoid a double payment *the main debtor which knows about the existence of a suretyship is obliged to notify immediately the guarantor when it pays the debt to the creditor*. *If such a notice was not made, the guarantor paying the creditor without knowing that it was paid has an action for restitution both against the creditor and against the debtor* (Art. 2.311 of the Civil Code).

[1] Gabriel Boroi and Carla Alexandra Anghelescu, Ioana Nicolae, *Fișe de drept civil*, 5th revised and enlarged edition (Bucharest: Hamangiu, 2020), 163.

[2] "The existence of the legal means of the debtor to declare the action to be considered as such upon payment, since in relation to this time, it could be established, for example, a possible end of the limitation period" - Gabriel Boroi and Alexandru Ilie, *Comentariile Codului civil. Garantiile personale. Privilegiile și garanțiile reale* (Bucharest: Hamangiu, 2012), 27-28.

ANTICIPATED REGRESSION

As indicated above, the rule is that the guarantor has a right of regression against the debtor after making the payment. In exceptional cases, law recognizes the anticipated regression of the guarantor (before making the payment) if only it undertook the obligation of guarantee with the debtor's (tacit or express) consent, in the following situations (Art. 2.312 of the Civil Code)[1]:

- when guarantor is prosecuted for payment (no matter whether the debtor is solvent or not);
- when debtor is insolvent (no matter whether the guarantor is prosecuted or not);
- when debtor undertook to release from guarantee within a certain deadline which expired;
- when the debt reached the term, even if the creditor, without the consent of the guarantor, granted the debtor a new payment deadline;
- when, because of losses suffered by the debtor or any of its faults, the guarantor bears significant risks higher than at the time when it bound itself (the guarantor shall have a right of regression, even if the debtor has nor become insolvent because of losses or any of its faults).

Anticipated regression is justified by the fact that, in case it does not act with readiness, the guarantor takes the risk of missing the possibility of recovery its right of regression in the future[2], and for this reason the doctrine qualified it as a preventive action[3], intended to prevent the production of an immediate damage.

By anticipated regression, the guarantor intends to obtain a guarantee for its debt in regression against the debtor or the record of the amount due by the debtor[4].

[1] For the examination of the differences between the anticipated regression and the failure to meet deadline, see Boroi, Anghelescu, Nicolae*, Fișe de drept civil,* 164.
[2] Boroi and Ilie, *Comentariile Codului civil. Garanțiile personale. Privilegiile și garanțiile reale*, 29.
[3] Veress, *Contractul de fideiusiune*, 187.
[4] Pop and Popa, Vidu, *Drept civil. Obligațiile*, 618.

CONCLUSIONS

Paying the debtor's debt, without the intent to gratify it, the guarantor shall be subrogated in the rights of the paid creditor, becoming holder of the respective debt. Payment by subrogation has as effect to settle the debt to the initial creditor[1]. The debtor remains, however, bound to the *solvens* – guarantor, which becomes its new creditor, replacing the initial creditor in the obligational legal relationship.

In the situations specifically and restrictively provided in the provisions of Art. 2.312 para. (1) and (2) of the Civil Code, the guarantor faces circumstances which might prevent the exercise of its right of regression against the debtor, in the case in which it would be forced to pay[2]. Under such circumstances, without making any payment, the legislator allows the guarantor to act against the debtor. Such action is not a proper regression, but a "right to obtain the guarantee, in a different manner, for the restitution of the amount from the debtor"[3] if the guarantor should pay.

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THE VACANCY OF INHERITANCE, A TRADITIONAL INSTITUTION OF THE SUCCESSION LAW, SUBSTANTIALLY REPHRASED BY THE NEW CIVIL CODE

Dumitru VĂDUVA[1]

Abstract:

The Romanian state cannot be disinterested in the unclaimed estates and on which there is information that it could be disinherited because it has to protect the creditors of the inheritance and at the same time the public order which would be disturbed if such an inheritance was left to hunters of "found" ownerless goods. Therefore, the law organizes a procedure to protect the interests of the heirs who could prove that they are within the term of exercise of the succession option but also that of the creditors of the inheritance. The latter recover their claims from the persons to whom the law recognizes a succession vocation in the absence of legal or testamentary heirs, the territorial administrative units within whose radius the assets of the inheritance are located, respectively the state if the inheritance has foreign or immovable elements located on the territory of another state.

Key words*: vacant inheritance; disinherited; provisional administration; certificate of vacant inheritance.*

INTRODUCTION

The Civil Code states in Book V, Title IV, Chapter II „Vacant Inheritance".

Unlike the old Civil Code, which stated the vacancy of inheritance and disinheritance, the new Civil Code compresses in Chapter II (Art 1135-1140) both the vacancy and the period prior to the declaration of vacancy, the administration of unclaimed inheritance and the result of the vacancy of the succession, disinheritance.

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In the current conception, the vacancy of the inheritance designates the legal situation, ascertained by a legal act of a state service, at the end of a procedure, which verifies the existence of the factual situation provided for by law, the absence of heirs or their lack of interest in the inheritance.

1. THE NOTION OF VACANT INHERITANCE[1]

The Civil Code does not define what the vacancy of an inheritance is, but it follows from all the rules governing it that it is a legal situation, established by a legal act, after a prior procedure organized in order to verify the occurrence of the factual situations expressly provided for by law which characterizes the state of vacancy of the inheritance (Art 1335).

The atypical legal situation of the inheritance left by the *de cujus*, which is without an owner, is the consequence of certain factual situations provided for by law, consisting of the absence of legal heirs related to the deceased, the surviving spouse or testamentary heirs, or they exist but have not accepted the inheritance, are unworthy or they ignore it, behaving as strangers to the inheritance, usually when the liabilities of the inheritance exceed the assets.

The legislator cannot leave an inheritance which, during the period of the option to inherit, there are indications that there are no heirs, even if it is because the heirs show a lack of interest in the inheritance, by regulating the legal regime for unclaimed inheritances during the period of the option to inherit, which consists of the administration of the inheritance on behalf of the "possible heirs" by a State service, the notary public, a kind of limited administration known as provisional administration. The more so, the legislator may not abandon an inheritance which, after the expiry of a period of time considered reasonable by the legislator, and after a public procedure to verify the absence of heirs, is found to be without heirs.

1.1. TERMINOLOGY. The term "vacancy" of the mentioned legal text has the meaning used by the administrative or legal language: the function or position temporarily unoccupied. Like any such provisional

[1] Ilioara Genoiu and Olivian Mastacan, "Moștenirea vacantă în lumina Legii nr. 287/2009 privind Codul civil", *Dreptul Magazine* nr. 1(2010): 42-56.

situation, it ends with the establishment of an incumbent on the vacant post.

In matters of inheritance, vacancy is also a temporary legal situation, ending with the collection of the inheritance by the local territorial administrative unit or, as the case may be, by the State, if it has not been claimed by any legal or testamentary heir.

1.2. TOTAL OR PARTIAL VACANCY OF THE INHERITANCE. According to Art 1335 Para 1 of the Civil Code, the inheritance it totally vacant when the deceased has no legal heirs (relatives or the surviving spouse) and in the total absence of a will.

Also, the inheritance is partially vacant (Art 1135 Para 2 Civil Code) if part of the inheritance cannot be collected by the heirs because there are no legal heirs but testamentary heirs have been established but only for part of the inheritance or when the legal heirs have been partially disinherited, or when disinheritance has been ordered for the entire inheritance but the disinherited are reserved heirs and they collect only to the extent of the reserve[1].

2. ADMINISTRATION OF UNCLAIMED INHERITANCE WITHIN THE ACCEPTANCE PERIOD AND THE PROCEDURE FOR DECLARING THE INHERITANCE VACANT.

Vacancy of inheritance is the legal situation established by a legal act. It is preceded by a stage in which the law gives all heirs a period within which to express their choice of succession, which cannot therefore be ignored, but where there are indications that there are no heirs, the State administers, through its service, the estate left by the deceased on behalf of the estate (A). Expiry of the period for acceptance of the inheritance without being claimed by any legal or testamentary heir, even in part, is a prerequisite for vacating the inheritance. It must have an owner, firstly because in our law there is no estate without a subject and, secondly, because the owner must pay the claims of the

[1] For other hypotheses deduced from the interpretation of the law as cases of vacant inheritance totally or partially: Ilioara Genoiu, *Dreptul la moștenire în Noul Cod civil* (Bucharest: C.H. Beck, 2012), 122-123; Dan Ștefan Spânu and Alexandru Spânu, *Drept civil. Moștenirea* (Bucharst: C.H. Beck, 2015), 92-93.

estate and take over the property which would otherwise remain masterless (B).

A. ADMINISTRATION BY THE COMPETENT PUBLIC SERVICE OF THE INHERITANCE NOT CLAIMED BY THE LEGAL OR TESTAMENTARY HEIRS[1].

a. The reason for the provisional state administration, through the public service, of the unclaimed inheritance. In most cases, the inheritance is collected by successors, the cases of vacant inheritance being exceptional. Therefore, the inheritance cannot be declared vacant on the simple factual circumstance of the lack of claiming it during the term of succession option, term assigned by law to the heirs, which therefore cannot be ignored even by the state or its services. At the same time, in the absence of secular heirs in possession and administration, the inheritance in this situation cannot be abandoned at least for the reason that by the assets of the inheritance the payment of its creditors must be ensured, on the one hand and that in the eventuality of a vacant inheritance the state or the administrative-territorial units to acquire the goods that remained from *de cujus*.

b. The regime of inheritance in the stage of provisional administration. The inheritance is subject to provisional administration if it is not claimed by the heirs within the term of the succession option. The rules of unclaimed inheritance are conceived as constituting a waiting mechanism in which the successor assets are administered by the state, through the notary public, in the name of the inheritance and in the interest of the eventual heirs. At this stage, the right of the eventual heirs to accept the inheritance or of the renouncing heirs to return to their own renunciation is preserved.

i) The cases for provisional administration of the unclaimed inheritance. Not every inheritance is subject to the legal regime of the provisional administration but only the one that is in the situation of not being claimed by the heirs during the legal period of succession option.

From the interpretation of Art 1136 corroborated with Art 1105 of the Civil Code, it results that an inheritance is subjected to provisional administration if the legal term for exercising he right to succession

[1] Liviu Stănciulescu, *Moștenirea. Doctrină și jurisprudență* (Bucharest: Hamangiu, 2017), 165-166

option the inheritance has not been accepted or if the successive is unknown.

ii) The application of the provisional administration for an unclaimed inheritance. The appointment of special curators for the inheritance. The factual situation of the unclaimed inheritance can only be temporary, the known successors who are in the exercise of the succession option being able to accept the inheritance or the appearance of a successor who apparently was unknown to have the right to inheritance and to accept it. Until the acceptance of the succession of the indicated successors, any interested person, such as the creditors of the inheritance, can notify the notary so that he can take measures to manage the inheritance when he invokes the lack of interest of the successors for inheritance or the lack of a known successor to take measures.

At the request of the interested persons, if there are cases of unclaimed inheritance, the competent notary public may appoint a special guardian of the inheritance to defend the rights of the eventual heir (Art 1136 Para 1 of the Civil Code), and if there are actions against the inheritance the notary public competent appoints, at the request of the plaintiff, a special curator (Art 1136 Para 2 of the Civil Code).

The competent public notary cannot be other than the one from the place of opening the inheritance.

iii) The formalities for opening the trusteeship of the unclaimed inheritance. The trustee appointed to defend the rights of the heir may be placed in possession of the assets of the inheritance by the notary public. On the occasion of taking over the inheritance, the special curator for the protection of the heir's rights eventually draws up the inventory of the goods. If the delivery of the assets of the inheritance takes place simultaneously with their inventory, the express mention is made about this circumstance (Art 1136 corroborated with Art 1117 Para 3 of the Civil Code).

iv) Trustees' powers. As above shown, the competent public notary may appoint a special curator of the inheritance as well as a special curator representing the inheritance in justice when the interested party performs an action against the inheritance.

The Civil Code does not regulate the powers of the special curator but specifies that he is appointed to defend the rights of the eventual heir, referring to the duties of the custodian appointed, according to Art 1117

Para 1 of the Civil Code, to preserve the assets of the inheritance when there is danger of alienation, loss, replacement or destruction.

From the interpretation of Art 1136 Para 1 corroborated with Art 1117 Para 3-5 of the Civil Code, the curator of the unclaimed inheritance has the task of taking measures to preserve the assets of the inheritance, including by recovering those in the custody of third parties, and sell any perishable goods, and any expenses necessary for this purpose will be approved by the public notary.

We also consider that he collects the payments made to the inheritance by its debtors and deposits them in the inheritance account, and if there is an enterprise within the inheritance, the trustee supervises its management by the statutory administrators or, as the case may be, he manages a possible individual enterprise and so on.

The interim administration of the inheritance does not include the task of the special trustee to pay the creditors and sell the assets to obtain the necessary liquidity for these payments, the liquidation of the debts of the inheritance returning to the eventual successor who accepted the inheritance or, as the case may be, the territorial administrative unit that succeeds in case of vacancy of the inheritance.

The trusteeship ceases by declaring the vacancy of the inheritance. At the end of the trusteeship, the special curator hands over the goods received from the public notary through the minutes and gives an account of the way in which he administered the inherited goods (Art 1117 Para 5 Civil Code).

The special trustee appointed by the competent public notary upon the plaintiff's request against the inheritance – this special trustee is special in the meaning of the civil procedural law, having the mission of representing the inheritance in justice defending it in the litigation initiated by the interested third party.

B. DECLARING THE VACANCY OF INHERITANCE[1].

If the inheritance has not been accepted by any legal or testamentary heir, the public notary declares the inheritance vacant. In advance, he publicly summons the heirs to accept the inheritance, in case they are still in a position to accept it or give it up.

[1] Dan Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, 2nd Edition (Bucharest: Hamangiu, 2017), 66-68.

i) *The public summons of the heirs.* Given that the period of one year for the exercise of the right of option runs from a fixed time, that of the death of the *de cujus*, or from a variable time in certain cases, for example, the discovery of the will after a certain period from the date of death *de cujus*, the text of Art 1137 Para 1 of the Civil Code, provides for the term of one year and six months from the opening of the inheritance as the deadline for the presentation of the successors for the exercise of the inheritance option.

If no successor has appeared, at the request of the persons concerned, the notary public shall initiate the procedure for declaring the succession vacancy. It begins with the public summons of the heirs, through a publication made at the place of opening of the inheritance, at the place where the buildings from the succession patrimony are located, as well as in a widely circulated newspaper that within 2 months from the publication to appear at his office to exercise the right of succession option (Art 1137 Para 1 Civil Code), if they are within the exercise period, taking into account the possible situations of invocation of cases of application of the rules of suspension (Art 2532 of the Civil Code) or of reinstatement within the term of exercising the right of option (Art 2522 of the Civil Code).

ii) *The legal act of declaring the vacancy of the inheritance*. If no successor is presented within the term set in the publication, the public notary finds the inheritance as vacant (Art 1137 Para 2 Civil Code).

The act of declaring the inheritance vacation is the certificate of succession vacation, issued by the notary public at the place of opening the inheritance (Art 553 Para 2 of the Civil Code).

3. THE VOCATION ON VACANT INHERITANCE[1]

Unclaimed inheritances cannot be left masterless, all the more so as they must be intended primarily for the payment of inheritance claims. The new Civil Code did not follow the solution of the old Civil Code which enshrined the right of the state to collect vacant inheritances but recognized the administrative-territorial units, on whose territory the goods were at the date of opening the inheritance, the succession vocation to collect those goods, except the county (Art 1138 corroborated

[1] Veronica Stoica and Laurențiu Dragu, *Moștenirea legală* (Bucharest: Universul Juridic, 2012), 190-193.

with art. 553 Para 2 of the Civil Code), and for the goods of the vacant inheritance, located abroad, the Romanian state has the succession vocation (Art 553 Para 3 of the Civil Code).

A. THE VOCATION TO INHERIT THE COMMUNE, THE CITY OR THE MUNICIPALITY.

The vacant inheritance belongs to the commune, the city or the municipality in whose territorial area the goods were located at the date of opening the inheritance. These goods enter the private property of the administrative-territorial units shown.

i) Sending in possession. Payment of the liability of the vacant inheritance. The administrative-territorial units shown are put in possession of the inheritance by the public notary, after declaring the vacancy of the inheritance by issuing the succession vacation certificate.

If all the known heirs have given up the inheritance, the administrative-territorial units that have a vocation for the vacant inheritance are put in the actual possession of the inheritance before even the succession vacancy is ascertained (Art1139 Para 1 Civil Code).

ii) *The administrative-territorial units that have acquired the vacant inheritance have the obligation to pay the creditors of the inheritance and its debts.* Payment is made only within the limit of the assets of the inheritance (Art 1139 Para 2 of the Civil Code).

B. THE VOCATION TO THE VACANT LEGACY OF THE ROMANIAN STATE.

Vacant inheritances and real estate abroad are collected by the Romanian state. Like the territorial administrative units with a vocation for vacant inheritance, the Romanian state is put in possession of vacant inheritance and real estate abroad.

CONCLUSIONS

The inheritance about which there are indications that it could be declared in disinheritance, is organized by the legislator in such a way as to defend the interests of the eventual heirs who would arise and collect the inheritance apparently in a situation of unclaimed inheritance, but also the interests of creditors inheritance by obliging the competent

notary public to take measures for its provisional administration. The unclaimed state of inheritance ends with the issuance by the competent notary public of the succession holiday certificate to the local territorial administrative unit within which the assets of the inheritance or the state are located if the inheritance has an element of foreignness, in order to collect the inheritance. In this capacity, the subjects shown pay the claims of the inheritance, within the limit of the asset and acquire the eventual balance.

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THE INTERNATIONAL CONFERENCE
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Pitesti, 06 May 2022

ORGANIZATIONAL CULTURE IN A PANDEMIC CONTEXT

Alin DINCĂ [1]
Mihaela (MUȘETOIU) GEORGESCU [2]

Abstract:

Looking back on the recession and previous crisis, it can be seen that the pandemic witch humanity is still going through will greatly transform our personal and professional lives in many ways - trust in others, satisfaction and not the last, by the behavior of the leaders of the organization.

Recent studies have shown that, in the context of the SARS-CoV pandemic, both organization leaders and employees are placing increasing emphasis on the importance of organizational communication. There was also a growing need for individuals to be informed as promptly and correctly as possible by the higher forums - governmental and local authorities, managers, etc.

Beyond the communication aspects, the general behavior of managers will probably not be forgotten by employees, as human nature is directed, in such situations, towards a return to basic instincts. Throughout the pandemic, the most diverse reactions of organizational leaders were observed, often extreme, but also balanced, ethical, full of empathy, behaviors that will be seen at some point in life, in the culture of the organization, especially in the future, when new employees are recruited.

Key words: *SARS-CoV-2; pandemic; organizational culture; management; organizational communication.*

INTRODUCTION

The culture of an organization is defined as the set of written or unwritten rules by which each of the employees of a company develops, in order to achieve the common goal of the organization. Organizational

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culture is what provides a motivational context for employees, as well as a common sense of all the actions they take.

The organizational culture of an institution starts from the management of the respective institutions, it being transmitted the property between the employees, both at the beginning of their career and during their professional evolution within the company.

Looking back at the recession and previous crises, it can be estimated that the pandemic we are still going through will change our professional lives - the attitude to the job we do, the confidence we have in those with whom we work and, last but not least, the behavior of those who lead will be affected.

The pandemic context has put unprecedented pressure on the culture of organizations, regardless of their nature. However, certain common goals, values, practices, and attitudes that define a particular organization are essential to the survival and development of companies, especially when employees work from home, remotely.

Contrary to popular belief, homework did not seem to affect much of the company's internal culture or the relationships between its members. When we talk about the relationship between employees and the work they do, it seems that the pandemic has rather played a role in clarifying or strengthening pre-existing attitudes and faith.

A study conducted by Quartz and Qualtrics in an organization that helps employers improve their employee experience indicated that 37% of the 2.100 respondents felt positive changes in organizational culture. Only 15% of respondents indicated the opposite. Respondents came from a variety of cultural backgrounds - Hong Kong, the United Kingdom, Germany, France, Canada, Australia, France, South Africa, Kenya, Nigeria, and the United States. They also reported an increase in positive attitudes such as willingness to offer help or goodwill.

Also, a very interesting element highlighted by that research is a certain degree of closeness between employees. Even though we rarely see our colleagues, the pandemic situation offered a new and interesting, somewhat more intimate perspective on the life of each of us. Thus, children and pets make their presence more and more in home meetings and conferences.

However, not all employees feel similarly to these changes, so the number of women who have noticed a positive change in organizational culture is 40% lower than the number of men who have reported this.

Also, more than half of the men who responded said that they felt a little more connected to the company in which they work, compared to only 28% of women who said the same thing.

Other studies also seem to indicate the same trends - the fact that women have taken on more childcare responsibilities, which has led to increased stress and fatigue, coupled with a decrease in efficiency, in some cases even mental imbalances.

Therefore, through the organizational culture, the stability of a company is ensured, both in the favorable and in the critical moments, also contributing to the retention of the employees. And the key elements that need to be considered in terms of organizational culture in the context of the pandemic are: communication, employee well-being, transparency and authenticity.

1. COMUNICATION AS THE BASIS OF HUMAN INTERACTIONS

It is unanimously accepted that an organizational culture is all the more effective as it is discussed and debated more openly. And working from a distance can make the communication process more difficult, but it is often not known to what extent.

Against the backdrop of working from home, open discussions about what employees appreciate are extremely important. We usually don't trust something we don't understand, so both the communication of the organizational culture at a given time and the expectations that flow from it should be clear and in a language accessible to all employees.

Moments like the pandemic are when all means of communication need to be used to the fullest. Many experts in the field believe that frequent communication with employees leads to significant improvements in their level of involvement. It has been scientifically proven that employees become more involved if they receive ongoing feedback from the organization's top forums, at least a few times a month.

2. THE WELL-BEING OF EMPLOYEES

This should be a zero priority to ensure a pleasant, relaxed work environment. A happy employee will offer the best quality services in

conditions of high productivity, being able to ensure the satisfaction of customer needs. In such a difficult time as the pandemic, it is imperative to prioritize the needs of employees, to listen to their wishes and grievances, to adapt the way they work and how they communicate according to their expectations.

Until the pandemic, employees could meet and have a series of activities together, even relaxing over coffee and talking to colleagues. Remote work requires more attention, as colleagues no longer have the opportunity to have direct contact with each other.

Both the benefits and costs, as well as the involvement in as many activities of the organization as possible, give employees a sense of security, but also a sense of belonging to the team, aspects that improve the culture of the organization, and through which its values are shared by all employees.

3. TRANSPARENCY, ONE OF THE BASIC RULE FOR A HEALTHY JOB

The transparency of the management team towards the employees is the key to obtaining the best possible organizational culture. During the pandemic, more than ever, employees need information about their activities and the strategies that the company adopts, and especially information about the news that appear in the company's activity.

It is very important for employees to be informed about the changes that are taking place within the company and the way in which the activities are carried out, especially in periods such as the pandemic, in which the degree of uncertainty is very high and in which information flows are quite scattered. Remote work, pandemic restrictions, a change in work style, can create problems of trust between employees and management, and therefore, the transparency of actions within organizations determines a sense of trust of employees.

4. AUTHENTICITY, AS AN ELEMENT OF DIFFERENTIATION

Recurring the recall of a company's goals, objectives, and values is usually an effective approach, but in a pandemic a revival was needed, especially through non-reactive methods and with a higher degree of

attractiveness. have a greater visual and mental impact, which is more than just an email.

The presentation of the defining elements, characteristic of an organization, such as rules, values, common goal or objectives in a less formal form, facilitates adherence to them, they are real guides for employees in their activities.

Even if at first sight we would have expected physical distance or lack of direct interactions, layoffs, etc., what caused the pandemic to have disastrous effects on companies' internal cultures, but the reality turns out to be different. An analysis of more than 1.4 million comments left by employees in the United States on the well-known website glassdoor.com showed that they positively assessed the internal cultures of organizations during the pandemic. The analysis of the content of these comments revealed that many of them referred to an improvement in communication at the leadership level. In other words, the leaders communicated more and better with the employees and they appreciated the change in a positive way - especially the honesty and transparency of those in charge.

Also related to this idea, another study conducted in April 2021 indicated that more than half of the 400 leaders in the human resources area who answered the questions especially appreciated the efficiency in communication as an absolutely essential skill for a healthy internal culture. This is in the context in which, as another study shows, employees have more confidence in employers than in government authorities, traditional media or social media, in the Covid-19 pandemic.

Beyond communication, the general behavior of managers is not forgotten by employees. During periods of intense stress, people usually return to their basic instincts. Over the course of the pandemic, we have seen extreme reactions from leaders - some have behaved ethically, sacrificing their own income and making efforts to protect and retain their employees, while others have chosen less honorable and unscrupulous ones, devoid of empathy.

And the consequences of these behaviors will certainly be seen when these companies need to attract employees again. Leaders who have shown empathy, who have managed to maintain a high level of energy among employees, who have encouraged open communication at the expense of a rigid one, will be able to maintain and continue to attract a motivated and well-trained workforce.

It is also very important to constantly evaluate the perception that employees have about homework, what they feel and think about it, as each experience is unique and can be capitalized on.

Even if most of the fears related to a possible collapse of organizational cultures have not been fulfilled, the main challenge of this period is to maintain the positive phenomena for as long as possible.

Even though HR professionals believe that their organizations have the capacity to persevere and cope with the current crisis, one question remains unanswered - to what "normalcy" will we return? Will organizations still be able or not to maintain the positive changes recorded during the crisis? Many experts do not believe that their organizations will undergo a cultural or strategic transformation caused by the SARS-CoV crisis. Although this period has shown that change is possible, few believe that this change is profound and sustainable enough.

The essence of organizational culture can be considered as a psychosocial, informal product that includes elements of the behavior of members of the organization such as models, values, norms. Obviously, access to these products is done indirectly, with the help of indicators, descriptors, which can be assimilated to organizational behaviors, phenomena and processes, which the organization develops, controls and influences. Furthermore, strong or constructive organizational cultures, in turn, have an effect on employees, on the behavior of members of the organization and, of course, on the performance of the organization.

Changes in organizational cultures have strong meanings that lead to immediate and remote consequences, which usually affect most members of any organization.

CONCLUSIONS

Therefore, the organizational culture in a pandemic context is of overwhelming importance for the proper functioning of a company, for the fulfillment of tasks, for obtaining the best possible results and good services for customers.

Also, the most important thing is that everyone should not lose sight of the joy of building an organization. Joy, laughter, fun in the team create strong connections, especially in difficult times, connections that will take the organization to a higher level.

It is important to turn the challenges of this difficult time into mechanisms for building trust within the company because trust stimulates loyalty. In this pandemic context, it becomes a challenge that, through the effects it has on the members of the organization, the organizational culture brings the changes that the organization needs, to adapt to the new present.

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THE VALENCES OF WORK WITHIN THE CONTEMPORARY SOCIETY

Cătălin-Andrei MATEI [1]

Abstract:

In the current socio-cultural context there is a need for a formative education of work with a divine, social and personal approach. On the labor market there is a social and moral crisis. I believe it is necessary correlating the resources of the school with the requirements of the labor market for outlining the social aspirations of professional training students, a career and find a job. Moreover, work is a factor of moral progress and cultivation of virtue in a secularized world.

Key words: *valences of work; career; vocation; labor market; workahol; professional deformation.*

INTRODUCTION

In the context of the transformations that have taken place in our society, I believe that there is a need for a formative work education, with a divine, social and personal approach. On the labor market we find a moral, social and personal crisis.

I think it is necessary correlating the resources of the school with the requirements of the labor market for outlining the social aspirations of professional training students, a career and find a job.

The transition from school to work was a topic very often discussed in the past few years, this refers to the period between the completion of studies and employment stable, with a full-time basis. Therefore, the transition from school to work means the process of insertion and integration of the graduates on the labor market.

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Optimizing the professional interests in the educational environment is a process of duration, following the induction training process in which the future employee gradually known and getting acquainted with the specifics of the labor market and the requirements of the organizational culture.

People spend most of their life doing one or more working activities. If analysing the content involved by the notion of work, owing to the statute of primordial condition of the human existence, there are worth considering few important aspects that address its approach from the psycho-sociological and spiritual point of view. Work is indissolubly correlated to the life of the man, and can be understood as an activity that helps creating material and spiritual values, and represents a social aspect.

Among all the types of activities, work occupies the most important place in the life of the man, a brief calculation showing that, if we consider the active life of the individual of 40 years, each with 48 working weeks of 40 hours, it results 76,800 hours of labour (from the total of 349,440 hours of the same years), that is 21.9%.

One of the first aspects that is specific for work is the fact that, through it, it is accomplished a relation, an exchange, between man and nature.

Karl Marx defined work as "a process between man and nature, a process in which man mediates, regulates and controls by his own activity the exchange of substances between himself and nature. The natural forces that belong to his body, his arms and legs, his head and hands he moves them to take control in a useful form of his life properties the substances in nature. By thus acting on the external nature and transforming it, he also transforms his own nature. He develops her latent forces and subordinates his game to her forces"[1].

[1] K. Marx, *Capitalul*, vol. I, în Karl Marx and F. Engels, *Opere*, vol. 23 (Bucharest: Edit. Politică, 1996), 190, *apud* Gheorghe Berescu, *Etica muncii şi modul de viaţă* (Bucharest: Editura Academiei Republicii Socialiste România, 1969), 11.

A SOCIAL, PERSONAL AND SPIRITUAL APPROACH TO WORK IN A POSTMODERN WORLD

Work represents the specific human activity – manual and/or intellectual – in which people use their skills (physical or intellectual) for producing the goods demanded by the satisfaction of their needs. Moreover, work represents a social relation. It is a collective activity, determines the relationship with other people, therefore it generates inter-human connections. In other words, work represents a social dimensions and cannot be taken from the human context in which it is exercised.

As a human specific activity, work is subordinated to an objective. It signifies the finishing of a project, the reaching of a closer or farther goal (for example, the starting of a business).

On the other side, any type of work is a behaviour that we learn, the abilities and the habits being techniques or proceedings of work that are transmitted through education, from the anterior generations. When dealing with a task in working, the man needs to adapt the requests of precision, rapidity, economy, and to answer through an adequate behaviour (mental activities, movements, sequences of movements etc.), whose pattern represents the object of the educative transfer, which is taken from the instructor, from the experienced workers etc.

Only humans, through their working force are able to work with, to render valuable the other factors of production, respectively the natural resources and the capital. Work has an essential role among the primary factors of production, because the economic and juridical thinking, in the centuries of theoretical accumulations, did not cease appreciating work in another way, than a determinant source of the national richness.

Besides the vocation of creating new values, work has a formative role, important for the human personality.

The forming of our personality starts with the first day of our life, it continues along with the education from school, and outside it too, in childhood and teenage years, but it does not stop once with the beginning of the professional activity. The choice of our profession and the adapting to its requests imply the continuation of a direction of personality development that would allow the improvement of the aptitudes, the expressing of values and attitudes, the assuming of enjoyable roles, the professional success representing, finally, a result of

the interaction between the structure of our personality and the occupational environment.

The personality and the self-identity of the adult are tightly connected with its main activity-work. The becoming of the personality, as a continuous process, depends on a series of factors that can be grouped in three categories: life cycles, choices that we make more or less randomly, and self-modelling. These choices, among which the one of our profession, exercise a changing influence: a higher position, challenging from the intellectual point of view, leaves its mark not only on the development of the aptitudes and capacities, but also on the field of interests, motivation, level of aspiration, manifestations of the Self (self image, self respect); a monotonous and under-soliciting work can become the way towards self alienation.

We must have all asked constantly the question: "Do we live to work, or do we work to live". We usually avoid answering this question, fearing that the answer might be "we live to work", which might send us directly in the category of the so-called "workaholic", or "work dependent".

In the quotidian life, the syntagm "professional deformation", which has the signification of distortion of personality caused by work, either positive, of improvement and development of personality, or negative, or narrowing the preoccupations through excessive specialisation, evolution towards the "unidimensional man".

The performance in work depends both on the internal variables of a person (age, sex, skills, interests and motivations, system of values, personality traits, experience), and external variables, of physical and ambient nature (the character and the policy of the organisation, the social ambience).

The role of work in the contemporary society is appreciated according to the increasingly stronger affirmation of creativity, intellectual effort, as compared to the manual one, regarded through the reduction of the working time, and the substituting of work through capital. Undoubtedly, the requests themselves of the development, the progress of science and technique, of knowledge in general, increase the role of the work factor, in the economic and social processes.

The experience of Romania after 1989 demonstrates that highly qualified, creative, but also responsible work, represents an indispensable component in the process of the market social economy.

If, at the beginning, the man started work with the animal breeding and farming, in time, people have increased their number, and needed to face new challenges, reaching a situation when we work on a computer, or in different services, for the people's benefit.

As a matter of fact, intellectual work is considered more difficult than the physical one, because it implies the solicitation, which most of the times, in case of exaggeration, causes headaches, stress and illnesses, and it should not come to represent a substitute for life, a medicine for anaesthetising the senses and forget about the void inside, and the lack of living.

The work should represent an instrument that confers the occasion to experiment life according to your feelings and wiliness. It is just a means at our disposal for showing our potential, and for bringing our positive contribution to the society.

Work can also function as a drug, and the same as in the case of any substance, one does not acknowledge that they are under its influence, there are dominated by it. Nonetheless, there are people for which work represents life, and the 100% dedication for it brings them total satisfaction. Thus, nobody has the supreme solution when it comes to fulfilment, and success is an extremely subjective notion. But if you have the slightest doubt that you are not happy when you spend all the evenings at the office, working, and the files invade even your personal space, well, you should think it is time to consider a change of direction, which is based exactly on the Christian belief about work, valid since the apparition of the first man created by God, and the necessity of producing the goods that are essential for life: work to live.

The Bible presents a balanced point of view on addressing work. It praises diligence and condemns laziness (Proverbs 6, 6-11; 13-4). Yet, it does not encourage the work dependency. Nonetheless, it advises us to enjoy, as reasonably as possible, moments of relaxation. In the Ecclesiastes 4,6 "Better is a handful tranquillity, than both the hands full with toil and chasing after the wind".

Thus, we must not become that work obsessed to neglect or family and health. There is no use in working to exhaustion! "There is nothing better for a man, than that he should eat and drink, and that he should make his soul enjoy good in his labour" (Ecclesiastes 2, 24)

Saint Gregory of Nazianzus "considers work in itself beautiful, a chosen satisfaction and reward being the very fact of working to the point of fatigue."[1]

From the beginning of creation, God reveals the dynamic aspect of work, through the words "Grow and multiply, fill the earth and subdue it and rule over all living things on earth" (Genesis 1, 28), showing the spiritual dimension. of this, which consists in the ennobling of the human being, as a pedagogical activity, "through which man mastering and transforming nature produces material and spiritual goods for the satisfaction of his needs and aspirations or for the perfection of his life."[2]

By virtue of his free nature, endowed with reason and will, man must always advance in his work. Work disciplines man, makes him better, and elevates him to dignity, to the "likeness of God" (Genesis 1, 26).[3]

As model of work we have God Himself, Who, during the six days of the creation he laboured, and on the seventh day "He rested from all His work which He had done" (Genesis 2, 2).

Work serves a noble purpose, that of supporting our family, and its main role is not that of making us feel satisfied. Although it is not wrong to enjoy the work we do, it nonetheless should constitute a means to gain our existence, not the existence, or life itself.

Due to the lack of occupation, many become ill with depression, but they are the ones to blame, because they did not approach the situation from the religious point of view, and the praying, the reading, the cleaning of the house and such other activities, constitute an occupation.

Children are also in danger when they do not have an educative occupation. The video games and the disturbing cartoons that they see today, lead to them becoming walking catastrophes. Parents have the duty to make them enjoy religious music, like animals and stimulate them to learn crafts that would move them away from the TV and computer.

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[1] IPS Nestor, „Învăţătura Sfântului Vasile cel Mare despre muncă", in *Mitropolia Olteniei*, no. 1-3(1979): 15.

[2] Nicolae Mladin, „Problema muncii în Creştinism", in *Studii Teologice*, no. 3-4(1949): 176.

[3] N. Mladin and O. Bucevschi, C. Pavel and I. Zăgrean, *Teologia morală ortodoxă,* II, Reîntregirea (Alba Iulia, 2003), 156.

We live in a world that tends to become impossible, yet for not harming ourselves, we should follow the way of Christ.

Saint Gregory the Theologian presents work as a continual effort of man, which has a much higher purpose in the light of the gospel of Christ, for he becomes a new creature through Christ in the Holy Spirit.[1]

From the etymological perspective, "work is identical in all peoples: Hebrew iabag, Latin labor, Greek ponos."[2] In Romanian we have the Slavonic "moca"[3]. All these names highlight "originally this nuance of suffering and contempt,"[4] which we find in the ancient world.

In the *Monastic Rules*, Saint Basil the Great highlights the high value of work for the community, removing pagan ideologies. The supreme telos of work is rendered by a Vasilian thought: "By working we obey the command of God, and by obeying His command we honor Him" [5]. It also aims to remove social selfishness, to cultivate virtues, by promoting the Latin saying ora et labora.

The personal meaning of work reveals the fact that work represents value for the individual too. Its social inclusion does not mean the denial of the person, but it is nevertheless carried out through that person.

By developing this idea, a Christian can gain much more: as long as they position God on the first place in their life, "the highest duty of a Christian is to seek first God's Kingdom and His righteousness" (Matthew 6, 33); as long as people do not neglect their family: if somebody is firstly preoccupied with the earning of money, they usually have less time for the wife and children. Even the most expensive gifts, the most luxurious ones, are not compensation for the family, but they lead to poverty in their souls (Timothy 5, 8); as long as people work constructively; as long as they act honestly, meaning that the earnings come from honest work (Proverbs 10, 16); as long as they care about their health: to work as much as work would not harm their body

[1] Nicolae V. Stănescu, „Teologie şi viaţa la Sfântul Grigore de Nazianz", in *Mitropolia Olteniei*, no. 1-2(1962): 9.
[2] Gh. Popescu-Ţînţăreni, „*Concepţia creştină despre muncă*", in *Mitropolia Olteniei*, no. 5-6(1967): 394.
[3] Mihail Moldovan, *Dinamica muncii (Bucureşti*, 1930), 30.
[4] N. Chiţescu, „Atitudinea principalelor religii ale lumii faţă de problemele vieţii pământeşti", in *Ortodoxia*, no. 2(1952): 252-253.
[5] *Sfântul Vasile cel Mare, Regulile morale, Precuvântare*, 28 *apud* IPS Nestor, „Învăţătura Sfântului Vasile cel Mare despre muncă", 26.

"because your bodies are temples of the Holy Spirit" (Corinthians 6, 19). Jesus presents his mission as a work that is completed by imitating His Father: "My Father is always at his work to this very day, and I too am working" (John 5, 17)

The fundamental right of the human to work is acknowledged and observed by both the United Nations Organisation (UNO, 1964), and the social teaching of Christianity.

The labouring man, while working the matter, modelling it for its needs and transforming it into means of development and progress, for himself and the society he lives in, also progresses and improves himself, and this is the most important aspect of work, which should never be ignored, being the essential feature of human labour. Thus, the right to work needs to be defended and observed, with responsibility, for all the people who are able to work, because this is the most significant manner for the fulfilment of the working man, both now, in the temporary existential mundane reality, and in the future, in the perspective of their transcendent Christian development.

The final most important and valuable product is the working man himself, who discovers his own self during the labour, makes constant progress, from the human and physical point of view. There are also developed the intellectual capacities, owing to the fact that, during the process of working, people continue to think and they improve the knowledge and abilities. Through hard and perseverate work, understood as instrument, necessary and efficient for the proper development and improvement, as much as for the progress and the well-being of human society, man can gain different virtues, noble soul dispositions, and intellectual and physical abilities. Through such work, the man grows, develops, becomes mature, gains qualities, and contributes efficiently to the material progress, and the betterment of the entire humanity. The patience grows and transforms the working person, who would resist during the working hours, and would endure the effort and the exhaustion that work implies; the perseverance to look for new modalities for better quality results; the wisdom for the judicious organisation of the work, by using the time properly and dosing correctly the energy for carrying out the labour.

Moreover, the capacity of concentration and the attention increase with the work; there are developed the self-control and the cautious trust in the proper abilities and talents; it is stimulated the strengthening of the

physical forces, and the increase of the abilities for the easier and more qualitative realisation of the final product; friendship, and the collaboration with the other colleagues, becomes stronger; the joy of fulfilled duty and accomplishment of goods useful for the fellow people is more intense; the satisfaction of making the persons in the family happy become more gratifying, due to the result of the work, the joy of being useful for the society and sustaining from their own work the poor and marginalised people is in itself a reward.

The satisfaction of the fulfilled duty and the joy of being useful for the others leads to a more responsible involvement into the economic development, through the increase of quality and material welfare, for the satisfaction of personal, family and community needs.

The divine meaning of our work results from the Christian conception of the relation between God and the man. By revealing a fundamental dimension of the divine face in ourselves, the creative work reveals, in the same time, the meaning of the good, and the distinction between good and evil. Because in the constructive deed, which produces values, we unequivocally recognise the human essence, through which we attempt to create ourselves, in God's resemblance; by serving God, we follow the supreme Model, and become, in our turn, an example for the next generations, it is certain that: the good is any type of work, the deed that creates, serves the lives, saves the lives and builds meaningful examples for the next generations; the bad is anything which is uncreative, and destroys the life or the values it they produces. And the consequence is that, once with the creative work comes the reward in itself: the preserving of the spirit in an endless state of joy, of youth; as medicine has many times proved, it prevents early age, and its specific disease – the sclerosis; indeed, the true gaiety, worth for the man, the joy of creation, of fruits, the joy that makes us similar to the Creator (Matthew 25, 21).

Saint Basil the Great reinforces in the Great Rules the purpose of Christian love, especially since man was created in the image of God, a dialogical and conscious being, where "nothing is more proper to our nature than to be sociable among ourselves. , and to use one another and to love our fellow man"[1]. Looking at contemporaneity, we see how sin is promoted to the rank of virtue, emphasizing social and personal

[1] *Sfântul Vasile cel Mare, Regulile mari,* Întrebarea 3, I, trad. Iorgu Ivan, after the Greek text published in *Patrologia Greacă*, vol 31 (Bucureşti: Ed. I.B.M.O, 2009), 28.

disharmony through this inverted relationship. The Holy Fathers of the first ages point out that "vice is a disease of the soul, and virtue is its health."[1]

CONCLUSIONS

The power to work is an ontological (essential) gift that man has received from God, through which he can transcend himself and reach his ultimate goal, eternal happiness or perfection. This is possible only when man, as a communion and conscious being, has as his prototype in his life, the work of the Holy Trinity as the foundation and source of all creation. From this circumscription of the work in the divine plan, by cultivating virtue and removing sin from our lives, we will be able to be more responsible and devoted to the learning process, fulfilling the proposed objectives. I believe that the educational and professional interests of students, viewed from a divine, social and personal perspective, can be a career launching pad today, ensuring a smoother transition of school graduates to a stable job, through their integration on the labor market.

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CONDITIONS FOR ACCESS TO ROAD TRANSPORT ACTIVITY IN THE LIGHT OF RECENT LEGISLATIVE CHANGES

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Abstract:

National and European legislation have recently been amended as regards the conditions of access to the occupation of road transport operator. To the additions brought by the legislator to each of the access conditions, it is essential that they must be fulfilled by the operators exercising the transport with motor vehicles exceeding 2.5 tons.

Key words: *acces to transport; legislative changes; conditions.*

GENERAL CONDITIONS FOR ACCES TO ACTIVITY

In order to gain access to the occupation of road transport operator, entreprises must meet the requirements set out in Art. 3 par. (1) of Regulation (EC) No. 1.071 / 2009[2], OG No. 12/2022[3], EU Regulation no 1055/2020[4] amending Regulations (EC) No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments in the road transport sector. The companies engaged in the occupation of road transport operator must:

(a) have a real and stable headquarters in the territory of a Member State;
(b) have a good reputation;
(c) have a proper financial capacity; and

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[2] JO L 300 14.11.2009, 51, http://data.europa.eu/eli/reg/2009/1071/2013-07-01 accesed at April 12, 2022

[3] Official Gazette no. 98 of January 31, 2022

[4] Official Journal of the European Union July 31, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R1055, accesed at April 12, 2022

(d) have the necessary professional competence.
Member States may decide to impose additional requirements, which must be proportionate and non-discriminatory, which the companies must fulfill in order to carry out the occupation of road transport operator.

(A) THE HEADQUARTERS

The competent authority shall establish through norms the way of accomplishment conditions relating to the headquarters requirement[1].
In order to meet the requirement set out in the General Conditions, the transport company must:
(a) have a headquarter in that Member State where they keep the principal working documents, in particular the accounting documents, the personnel management documents, documents containing data on driving times and rest periods; and any other documents to which the competent authority must have access in order to verify the conditions laid down in this Regulation. Member States may require that undertakings established in their territory have other documents available at their premises at any time.
(b) once the authorization is granted, to have one or more vehicles which are registered or put into circulation in accordance with the law of that Member State, no matter if such vehicles are owned or held by, for example, a fixed-rate selling agreement, rental or leasing services;
(c) carry out operations relating to the vehicles referred to in point (b) permanently and effectively, with the necessary administrative equipment and appropriate equipment and installations, in an operating center situated in that Member State.

(B) GOOD REPUTATION OF THE CARRIER[2]

The requirement of good repute must be fulfilled by the company and by the transport manager of the company. The competent authority shall establish by rules:
(a) the manner in which the conditions relating to the requirement of good repute are met;

[1] OG no. 12/2022 Article 13 lit. a)
[2] OG no. 12/2022 Article 14

(b) the administrative procedure whereby the good reputation of the transport company / transport manager is lost;
(c) measures having equivalent effect to the rehabilitation measure to meet the requirement of good repute.

In order to determine whether a company has satisfied that requirement, Member States shall take into account the conduct of the company, its transport managers and any other relevant person as may be determined by the Member State.

The above conditions shall include at least the following requirements:
(a) there is no serious reason to doubt the good reputation of the transport manager or transport company, such as convictions or sanctions resulting from any serious violation of national rules in force in the following areas: commercial law; insolvency law; the remuneration and employment conditions of the profession; road traffic; professional liability; trafficking in human beings or drug trafficking; and
(b) the transport manager or transport company has not been convicted or punished in one or more Member States for grave infractions of Community rules, in particular with regard to: driving times and rest periods of drivers, working time[1] and installation and use of recording equipment; the mass and maximum dimensions of commercial vehicles used in international traffic; initial qualification and continuous training of drivers; the technical control of commercial vehicles, including mandatory technical tests of the vehicles; access to the international road goods market or, where appropriate, access to the road passenger transport market; the safety of the transport of dangerous goods by road; the installation and use of speed limitation devices on certain categories of vehicles; the driving license; access to the occupation; animal transport.

Where a transport manager or a transport company has been subject to a conviction or sanction in one or more Member States for one of the most serious infringements of the Community rules, the Member State of establishment shall apply in appropriate manner an in a good time an administrative procedure, including, where appropriate, a check at the headquarter of the company concerned.

If the competent authority finds that loss of good repute would be a disproportionate reaction, it may decide that good repute is not affected.

[1] C-102/16, sentence of EUCJ

In this case, the reasons shall be recorded in the national register. The number of such decisions will be indicated in the specific report.

When a transport manager loses good repute, the competent authority declares the transport manager to be inapt to drive the business of transporting of a company. Until a rehabilitation measure is taken in accordance with the relevant national provisions, the certificate of professional competence of manager's declared inappropriate, loose his validity in all Member States.

The Commission must:

- determine the categories and types of infractions most frequently met;
- defines the degree of severity of the infractions as a function of their potential to cause death or serious injury;
- and provides the reiteration of frequency starting from repeated infringements are considered to be more serious, taking into account the number of drivers used in the transport activities conducted by the transport manager.

The established requirement of good repute remains unfulfilled until a rehabilitation measure or any other measure having equivalent effect is applied in accordance with the relevant national provisions.

(C) THE FINANCIAR CAPACITY[1]

In order to meet the requirement of financial capacity, a company must be able at all times to meet its financial obligations during the annual financial year. To that end, the company must demonstrate, on the basis of annual accounts certified by an auditor or an accredited person, that it has capital and reserves each year of at least EUR 9000 for a single vehicle used and EUR 5 000 for each additional vehicle used of 3.5 tones and EUR 900 for each additional vehicle or additional combination of vehicles used, with a maximum authorized mass exceeding 2.5 tones but not exceeding 3.5 tones. The company must demonstrate, on the basis of annual accounts certified by an independent financial auditor/expert, that each year it has capital and reserves totaling at least EUR 1,800 for the first vehicle used and EUR 900 for each additional vehicle used, in the case of businesses who exercises the occupation of road freight transport operator only with the help of motor vehicles or combinations of vehicles

[1] OG no. 12/2022 Article 15

whose maximum authorized weight exceeds 2.5 tons, but does not exceed 3.5 tons[1]. For the purposes of this Regulation, the value in the national currencies of the Member States not participating in the third stage of the economic and monetary union shall be established each year. The courses applied are those obtained on the first working day in October and published in the Official Journal of the European Union. These courses shall take effect on 1 January of the following calendar year.

By way of derogation from the above, the competent authority may accept or require a company to demonstrate its financial standing by a certificate, such as a bank guarantee or insurance, including professional liability insurance, issued by one or more banks or other financial institutions, including insurance companies, which guarantee for the company, by a personal and joint payment, the amounts set out above.

The annual accounts and the bank guarantee, which have to be verified, are those of the economic entity established in the territory of the Member State in which the authorization was requested and not those of any other entity established in another Member State.

(D) THE PROFESSIONAL COMPETENCE[2]

The company which carries out the occupation of road transport operator shall nominate a transport manager, in compliance with the provisions of Regulation (EC) No. 1071/2009, No. 1055/2020 and OG no. 12/2022.

A company performing the occupation of road transport operator shall nominate at least one natural person, the transport manager, who satisfies the requirements of good repute and professional competence and who:

(a) permanently and effectively drive the transport activities of the company;

(b) has an authentic relation with the company, such as being an employee, director, owner or shareholder of the company, or managing the company or, in the case of the sole trader, is that person himself;

and

[1] Introduced by dispositions of art 9 of OG no. 12/2022

[2] OG no. 12/2022 Article 14

(c) is a resident of the Community.

Where a company does not meet the requirement of established professional competence, the competent authority may grant authorization to pursue the occupation of transport operator without nominate a transport manager provided that:

(a) the company nominates a natural person resident in the Community who satisfies the requirements established down and who is entitled on a contractual basis to perform the duties of transport manager on behalf of the company;

(b) the contract between the company and that person specifies the tasks which the latter must perform permanent and effectively and to indicate the responsibilities incumbent on that person as a transport manager.

The tasks to be specified include, in particular, the coordination of vehicle maintenance, the checking of contracts and transport documents, the basic accounting, the allocation of loads or services to each driver and vehicle and the verification of safety procedures;

(c) as a transport manager, the said person may drive the transport activities of up to four different companies, carried out with the assistance of a fleet with a combined maximum of 50 vehicles. Member States may decide to reduce the number of enterprises and / or the total number of vehicles in the park managed by the person concerned;

and

(d) that person carries out the duties specified in the sole interest of the company and his responsibilities are exercised independently of any company for which this concerned carries out transport operations.

Member States may decide that a nominated transport manager may work for several companies according to a number of undertakings or a fleet of vehicles not exceeding the established limits. The undertaking shall inform the competent authority of the nominated transport manager(s). Any change in the nominate transport manager shall be communicated by the transport operator to the competent authority within 15 days of the date of it.

The certificate of professional competence of the transport manager is obtained on the basis of the initial professional training, followed by an examination, under the conditions established by the competent authority by norms.

Holders of certificates of professional competence are required to attend courses for regular professional training at intervals of no more

than 10 years, which shall be finalized by an evaluation of the updating knowledge, under the conditions established by the competent authority by the rules[1].

Holders of professional competence certificates who have not previously run a road transport goods company or a road passenger transport company over the last 5 years[2] are required to undertake periodic vocational training courses which are completed by an evaluation of the updating knowledge, under the conditions established by the competent authority by the rules.

In order to update their knowledge, transport managers are required to attend continuous training courses, which are completed by an evaluation of the updating of knowledge, under the conditions set by the competent authority by the rules.

In addition to these conditions, in order to carry out activity, it is necessary for the companies to be registered in the Electronic Register of road transport operators[3]. According to the changes provided by the European regulation, our country is obliged to enter in this register also information about the registration numbers of the vehicles and the number of employees that a transport company has. Also, the number of drivers and owned cars will have to be proportional to the volume of the transport company's activity[4]. Basically, this requirement assumes that there will be an adequate number of cars that can be used, depending on the volume of transport. Likewise in the case of drivers, and in their situation, it is also specified that they must be stationed at an operational center in Romania (when their number is taken into account).

Another provision introduced by the current regulations refers to the fact that the vehicles used for transport will have to return to Romania

[1] OG no. 12/2022 Article 12 alin 4
[2] OG no. 12/2022 Article 12 alin 5
[3] In this regard, it was punished the Grand Duchy of Luxembourg has failed to fulfill its obligations Case C-152/16, sentence of EUCJ v Commission / Luxembourg - By failing to establish a national electronic register of road transport companies fully in line with and interconnected with the national electronic registers of the other Member States, the Grand Duchy of Luxembourg has failed to fulfill its obligations pursuant to Article 16 (1) and (5) of Regulation (EC) No. 1071/2009 on common rules for the conditions to be complied with to pursue the occupation of road transport operator and abatement of Directive 96/26 / EC.
[4] OG no. 12/2022 Article 12 alin.3

within eight weeks at most from departure[1]. Thus, Romanian companies based in Romania will be obliged to ensure that the vehicles used for transport will return, within eight weeks at most from departure, to one of the carrier's operational centers in the country.

The reasons for the introduction of this obligation are multiple, including the need to prevent harm to drivers, who end up driving for a long period of time without returning home (according to EU Regulation no. 1054/2020 aimed at granting additional rights to drivers employed for transport companies, including in terms of getting them home within a reasonable time).

CONCLUSIONS

The legislative bodies of the European Union (EU) have recently adopted a series of important changes regarding European transport legislation, which will have a significant impact on freight and passenger carriers, in terms of their activity. The principles changes are: the vehicles used for transport will have to return to Romania no later than eight weeks after departure; the Community license will also be required for transports made with vehicles that will exceed 2.5 t; serious violations of tax legislation will affect the company's transport activity, the good reputation will also be affected if there are serious violations of tax legislation, by the company or by the transport manager.

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3. OG No. 12/2022.

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1. C-102/16, sentence of EUCJ.
2. Case C-152/16, sentence of EUCJ.

[1] OG no. 12/2022 Article 13 lit. b)