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IN MEMORY OF PROFESSOR EUGEN CHELARU

Beata STĘPIEŃ-ZAŁUCKA[1]
Mariusz ZAŁUCKI[2]

Death is a phenomenon that accompanies us every day. Therefore, it seems that we should get used to it, after all, human fate is inevitably linked to death. Indeed, it is probably the case that, in general, the death of a person does not arouse our great emotion, because it is just another death. Well, it's sad, but unfortunately true. Sometimes, however, the death of a person moves us a lot, especially when that person was a warm and sensitive person when he was alive, full of ideas and passion, warm-hearted and open to different ideas. This is exactly what happened - and still happens - with the death of Prof Eugen Chelaru.

The news of his death reached us, in Poland, on the day he passed away, hopefully to that better world. It was very surprising for us, especially as only a few days earlier we had been planning whether we would go to Pitesti the following year for the annual international conference organised by Eugen. And now we know for sure that we will go, it's just a pity that he won't be there in person. Because the fact that he will be there in spirit is obvious to us.

We met Prof Eugen Chelaru, Eugen, in Pitesti, at one of the international scientific conferences he was organising. We were immediately struck by his unparalleled intellect and charisma, as well as his warmth and openness to the new. Even then, we did not know that he was an eminent Romanian lawyer, dealing mainly with civil law, with a

[1] Professor Ph.D., University of Rzeszów, Poland
[2] Professor Ph.D., AFM Kraków University, Supreme Court Justice, Poland

history as judge and president of the Arges Tribunal. Nor did we know that the current shape of the Faculty of Economic Sciences and Law at the University of Pitesti was largely due to him. We found this out quite quickly, observing the esteem that the Professor inspired among other academics, from many countries, who participated in the conferences held in Pistesti every year.

Mariusz got to know Eugen a little closer, during Eugen's stay in Krakow a few years ago. Endless conversations about the law, the transformation of Poland and Romania, scientific plans, stories about close colleagues, collaborators, concern for their scientific careers - this is how Eugen's week-long stay in Krakow was recalled at the time.

We also saw each other several times later in Pitesti. He was always cordial, always took care of his guests, or delighted us with interesting conference speeches. There was always something going on around the conference, with everyone finding something of interest. Whether it was wine or Dracula, Romanian hospitality knew no bounds.

For the time being, this will no longer happen. What will remain is the scientific work of Mr Professor. Civil law has the quality of being an everyday law, solving human problems. In his commentary on the Romanian Civil Code, Eugen pointed this out. This work, as well as his books (of which he wrote nine) and articles, will remain with us forever, and will be the reference of the scientific works of many generations. For some time to come, there will also remain his alumni, who will certainly continue Prof. Chelaru's legacy.

Pitesti is certainly different today without him, but the memory of his achievements will live on within the walls of the local university. We, too, will gladly come to Pitesti again, believing that Prof. Eugen Chelaru non omnis moriebatur est. His work must be continued.

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THE FUTURE ORIENTED DIMENSION OF THE CONSTITUTION – SOME REFLECTIONS

Rainer ARNOLD[1]

Abstract:

The Constitution is a document that comes into being at a particular historical moment. It is the basic order of a State or - in a broader sense - of an extra-state coherent system that exercises public power over individuals, such as the supranational European Union.

A Constitution is a normative entity that is intended to define the fundamental organizational structure of the State or the supranational community. It is intended to enable the fulfillment of its tasks organizationally, by creating an institutional system, and to determine its objectives. The latter is done through the recognition of the fundamental values of this order, which - in a true constitutional order - is anthropocentric, i.e. based on the three values of human dignity, freedom and equality.

The question arises: is the function of the Constitution to be considered only from the present or is the future also to be included? Are the normative definitions of the Constitution only related to the time of today or do they also apply to the time in the future?

Key words: *constitution; protection; guarantee; freedom.*

1. THE QUESTION

The Constitution is a document that comes into being at a particular historical moment. It is the basic order of a State or - in a

[1] **Professor Ph.D. Dres.h.c., University of Regensburg (Germany), jean.monnet@gmx.de**

broader sense - of an extra-state coherent system that exercises public power over individuals, such as the supranational European Union.[1]

A Constitution is a normative entity that is intended to define the fundamental organizational structure of the State or the supranational community. It is intended to enable the fulfillment of its tasks organizationally, by creating an institutional system, and to determine its objectives. The latter is done through the recognition of the fundamental values of this order, which - in a true constitutional order - is anthropocentric, i.e. based on the three values of human dignity, freedom and equality.

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In Germany, the decision of the Federal Constitutional Court in March 2021[2], which declared the Federal Climate Protection Act partially unconstitutional, has once again brought this question into the focus of interest. The quintessence of the decision is that the degree of restriction of freedom within a certain longer period of time, which is necessary for the reduction of greenhouse gases, must be appropriate over the entire period of exposure; the restriction of freedom must not be set too low in the present, but then necessarily set much higher, even excessively high, in the future. Too great a burden on freedom in the future violates the constitutionally protected right to freedom already in the present.

The so-called intertemporal validity[3] of fundamental rights in a Constitution gives rise to some reflections on the future dimension of the Constitution as a basic State (or supranational) order.

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[1] See R. Arnold, *Struttura ed interpretazione della Costituzione: alcune riflessioni, en: Scritti in onore di Fulco Lanchester*, vol. I (Napoli: Jovene Editore, 2022), 41 - 56.
[2] See German Federal Constitutional Court (FCC)
http://www.bverfg.de/e/rs20210324_1bvr265618en.html
(English translation of the decision of March 24, 2921 by the Court)
[3] FCC (note 2) paras. 122, 183.

2. THE NORMATIVE PROGRAM OF THE CONSTITUTION: THE TEMPORAL, FUNCTIONAL AND SUBSTANTIVE FINALITY OF THE CONSTITUTION.

a. *TEMPORAL FINALITY*

The Constitution has a fundamentally unlimited normative existence; it is legally valid in principle without an end date. This statement is correct under the reservation that due to the sovereignty of the people the valid Constitution can be replaced at any time by a later one, a *constitutio posterior*, completely or partly. Also, a Constitution is usually subject to the possibility of its amendment within the framework of the procedure established by the Constitution. If such a procedure does not exist, however, constitutional supplements, i.e. partial new constitutions, amendments, additional protocols with the same rank as the core document are possible, or - in systems that are not strictly codified - constitutional laws, which formally belong to the constitutional order and consequently also have the same rank[1].

Since the Constitution is the basic order of a system, its regulatory function is conceptually designed from the outset for the entire duration of the system's existence.

b. *FUNCTIONAL FINALITY*

The functional finality of the Constitution is to realize its regulatory purpose throughout the duration of its existence. The functional program of a Constitution is necessarily set for further development, which is realized by formal constitutional revision (or constitutional amendment) or by interpretation of the written constitutional text. This interpretative function is essentially in the hands of the courts and, in a binding form, in the hands of a Constitutional Court or Supreme Court, which is granted the power of authentic interpretation[2]. Further development means adaptation of the original

[1] See the example of Austria (Art. 44 B-VG).

[2] See as an example s. 32 of the German Act of the FCC.

normative program to factually changing norm-relevant circumstances, whether in the case of the norm giver (for example, through a changed understanding of traditional terms) or in the case of the norm addressee (changes in the situation, which also change the scope or definition of the original norm objective).

A Constitution uses principles or rules, open or closed concepts, program norms, which require implementation and concretization, or norms already determined in their core content (be they rules or principles), etc. as a regulatory technique.

These normative instruments are suitable in different degrees for the adaptation of the regulatory program of the Constitution to the further developing circumstances.

Constitutional interpretation is the constant way to adequately grasp the temporal dimensions of a constitutional order. Formal constitutional change, on the other hand, is often a politically difficult process that requires qualified majorities and, in some systems, popular consent. It therefore tends to be an exceptional process that can be delayed for a long time. The interpretation by the judge, on the other hand, may be more dangerous from the point of view of the separation of powers, but with appropriate judicial restraint, it is a process that constantly accompanies constitutional evolution.

The interpretation of the Constitution has the task to show its evolutionary development, as it exists at the time of interpretation, and also those normative impacts on the existing constitutional provisions that result from the future-related dimension of the Constitution. The future orientation of the Constitution captures two aspects: the aspect of the normative duration of the Constitution and the consideration of this duration, i.e. the impact of the future on the interpretation of the present constitutional law.

All this presupposes that the Constitution is not seen as a static instrument, but as a dynamic, evolving, a "living instrument"[1].

[1] This term is used for the characterization of the European Convention of Human Rights (ECHR) (see https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf) but is

Interpretation is therefore a process that is based on the respective point in time of the interpretation and that fully grasps the constitutional evolution up to that point.

The interpretation of the Constitution has various goals: the general goal is to determine the meaning of a constitutional norm, i.e. to reveal its teleology. This general objective falls into several detailed objectives: the actualization objective (to do respect to the evolutionary character of the Constitution), the completion objective (to reveal unwritten parts of the Constitution), the harmonization objective (or conflict resolution objective) (which balances different conflicting principles or concepts and which also balances between extra-state (international, supranational) and internal State law; in this respect, one could also speak of an internationalization objective of the interpretation.[1]

c. *SUBSTANTIAL FINALITY*

The substantial finality of a Constitution must first be measured by the basic concerns of the human organization in a State: these basic concerns are the preservation of the existence of the people in this community by ensuring external and internal security, the preservation of their freedom and the promotion of their well-being. These are the basic objectives that politics, good governance, must pursue and that also have their basis in the objective of the Constitution. These objectives are partly written in the text of the Constitution, partly they are implicit in it.

It is obvious that these objectives exist throughout the existence of the Constitution and must be pursued in the present as well as in the future. The present realization of these objectives does not allow to close the view into the future; rather, planning, prognosis of future threats,

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transferable to a national Constitution as a result of its nature as a long-term basic order document.

[1] See also R. Arnold, Juge constitutionnel et interprétation des normes, Allemagne, XXXIIIe Table ronde internationale des 8 et 9 Septembre 2017, Annuaire International de Justice Constitutionnelle 2017, Economica/Presses Universitaires d'Aix-Marseille, Paris, Aix-en-Provence 2018, S. 111 – 130

consideration of the effect of the present action on the future are constitutional obligations.

THE PROTECTION OF FREEDOM AS THE CONSTITUTION'S PRIMARY TASK

Traditionally, the primary task of the Constitution, apart from the installation of institutions, is the protection of human freedom, be it politically within the framework of democracy, be it individually within the framework of fundamental rights. Man is born free and must join with the other members of the community, organize themselves to the State through the social contract, currently expressed, through the Constitution, in order to protect this natural freedom. This fundamental idea of *Jean-Jacques Rousseau*[1], which recurs in central constitutional historical documents such as the French Declaration of 1789[2], highlights the freedom of man associated with his/her nature as essential, later anthropologically underpinned with the idea of human dignity and always linked to equality, which expresses the anchoring of freedom in being human. Freedom must be limited in favor of the freedom of all other members of the community, that is, in the sense of equality. However, these restrictions are legitimate and consistent with the social contract, the Constitution, only if they are considered exceptions that are necessary and do not violate the absolute human dignity. The restrictions of freedom in favor of the common good, that is, in favor of the interest of all, must be reasonable in the light of the principle of freedom: necessary and tolerable in their intensity of intervention. The nature, the essence of freedom, must not be touched in the process.

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[1] Du Contrat Social ou Principes Du Droit Politique, Livre premier, Chap. I et Chap.VI (re-edited by Flammarion, Paris 1966).

[2] See Articles 1 and 2 of the French Declaration of 1789 (https://www.elysee.fr/la-presidence/la-declaration-des-droits-de-l-homme-et-du-citoyen).

THE CONCEPT OF LIMITED FREEDOM

Some more thoughts about the concept of freedom. Freedom is always limited freedom, it is limited because of the principle of equality by the freedom of others. It is essential, as has already been emphasized, that freedom be recognized as a principle - a necessity flowing from the supreme value of human dignity - and that the restriction be legitimized as necessary and reasonable for the person concerned.

The protection of freedom must be effective, on the one hand, against the State, which must keep its interventions within the bounds of proportionality, but also against the manifold encroachments on freedom on the part of private individuals, as is the case primarily in the digital era.

THE DUTY TO PROTECT AND TO PROMOTE AS COMPONENTS OF THE GUARANTEE OF FREEDOM

The duty of the public authority to protect freedom is functionally linked to the individual's right of defense against illegitimate State interference; freedom is freedom from the State, but also freedom by the State. At the center is freedom as a value, which must be protected under constitutional law.

The protection of the individual and his or her central values is an explicit or implicit requirement of the constitutional order. The protection and promotion of the individual is the ultimate purpose of law and, in particular, of constitutional law. Protection of man means protection of his/her existence against external and internal enemies, his/her physical and mental existence, his/her identity, and his/her development.

Protection and the duty to promote man are not completely different, but are functionally linked.

The concept of fundamental and human rights does not only mean to defend against inadmissible interferences by the State, generally speaking by the public power (which can also be the supranational power), but also includes a protection against interferences by private power, which is becoming more and more important today (think of the

gigantic world of the Internet). Furthermore, this protection of the human being also includes the duty of the State to actively protect and promote these values that are at stake. Protection and promotion are two sides of the same coin, they belong together.

The duty to promote is essentially the task of politics, that is, of the ordinary legislator, who can determine the means, methods and degree of this promotion, but the normative basis lies in the Constitution. It is found in the fundamental rights, especially in the central value of human dignity, the right of personality and also in the other fundamental rights, moreover in the social obligation of the State to realize a socially just and efficient system of promotion (material and non-material); this is generally expressed in the State principle of the social (welfare) State or in the fundamental social rights in the Constitutions of some countries.

The duty to promote exists throughout the existence of the Constitution, and is therefore also and especially directed to the present and the future.

3. **CONSTITUTIONAL DYNAMISM AS A FUTURE-ORIENTED UNDERSTANDING OF THE CONSTITUTION.**

Throughout the existence of the Constitution, the interpretation and application of the Constitution must be done in a way that recognizes the continuing development of the Constitution, its future dimension. This is particularly evident in the interpretation, which must not look back to the time of the creation of the Constitution, nor to other earlier times, except this is expressly provided for in the Constitution for partial areas so[1]. The Constitution is not cemented at the time of its creation, but is a living instrument. Therefore, only an evolutionary, dynamic interpretation is adequate to grasp the will of the constitution in an objective sense. Only this approach corresponds to the nature of a

[1] Art. 6 (1) German BL safeguarding matrimony in a traditional sense (but not excluding partnership as based on equality, Art. 3 BL) might be an example for a intentionally "closed concept" of the Constitution which is not undergoing, in its core, an evolutionary process.

Constitution as an instrument of regulation that is designed for the long term and open to the future.

4. RESPONSIBILITY FOR THE FUTURE AS A REACTION IN THE PRESENT

SAFEGUARDING VALUES

In the previous point, the constantly updating openness of the Constitution, which is developing towards the future, was shown. However, the future responsibility of the Constitution also becomes relevant when burdens for the individual and society (which can be clearly or approximately determined) are already emerging, threatening dangers arise, new developments, which make reforms necessary, become apparent, and numerous other processes of this type occur.

All this may already have constitutional effects on the present. It may lead to unconstitutional acts or omissions in the present for reasons that lie in the future. Examples are the already mentioned disproportionate restriction of freedom in the future, resulting from the fact that the degree of restriction of freedom in the present (in this case the restriction of action and thus of freedom which is necessary within a certain period of time in order to achieve the needed total reduction of CO2 gas) is too small. The reduction in present is too small and places too great a burden on people in the next CO2 reduction steps and thus too great a restriction on their freedom in the future.[1]

This case referred to a clearly defined period of restriction of freedom established by the legislator (in accordance with the Constitution, art. 20a BL, which in turn has taken into account the international requirements of the Paris Climate Agreement). However,

[1] See German Federal Constitutional Court (FCC) (note 2)
http://www.bverfg.de/e/rs20210324_1bvr265618en.html
(English translation of the decision of March 24, 2021 by the Court)

the legislator had done this only partially, which has caused the criticism of the FCC.[1]

The obligation to implement restrictions on freedom sparingly over time, so that they are proportionate throughout the period of their relevance, goes quite generally also independently of fixed determined periods. Certainly, in such cases, the prediction of the intensity of the restriction of freedom is fraught with uncertainties. Nevertheless, this basic idea must be the guideline for restrictions of freedom over time.

Consequently, this must also apply to special restrictions on freedom, i.e. to the area of other fundamental rights.

Also, it is not only about onerous restrictions, but also about the duty of the State to protect. This duty is a permanent obligation, which intervenes all the more intensively, the danger for freedom is. This also presupposes a view to future and obliges already in the present to make precautions, in order to avoid such dangers and to arrange also the conditions for the protection duty in such a way that it can intervene efficiently in the future.

All this presupposes forecasting and assessing the dangers and the possibility of countering them. The orientation of the Constitution towards the future cannot, it must be understood without further explanation, do without prognosis. General principles apply: if the prognosis is made seriously and with exhaustion of all means of knowledge, a nevertheless erroneous prognosis is not unconstitutional; however, the correction must be made without delay in order to avoid the verdict of unconstitutionality.

The same considerations apply to the basic structures of the constitutional order outside of fundamental rights: political freedom, democracy, is an extremely important constitutional good that not only has significance for the present, but also as one of the central values for the future. Securing democracy and warding off present and future dangers, which are threatened in particular by populist tendencies, is an essential task of the Constitution with a view to the future. To take the example of the German Constitution: Article 20 of the Basic Law, which

[1] FCC (notes 2 and 11), paras. 253 et seq.

lists the structural provisions of the State, including democracy, not only establishes the basic constitutional structure as democratic, but also obligates the State to preserve this structure for the future. The omission of sufficient safeguards of democracy in the present, for example, to take adequate precautions against populist tendencies, would be a constitutional violation of Article 20 BL also in the present.

In the context of the principle of democracy, the so-called debt brake should also be mentioned. This was introduced into the Constitution by the European Union to limit the amount of debt that the State can take on in order to protect future generations from an excessive debt burden. The State should not contribute to providing the current generation with social benefits of a large nature on the basis of debt, the financial burdens of which will have to be borne by future generations. Responsibility for the future also means that the Constitution must be economical in the present in order to leave room for expenditures that become necessary later.

A non-debt financed budget of the State contributes to the stabilization of the financial order, which in turn strengthens democracy and the social State.

Democracy also means the realization of projects that require financing by the State. Thus, policy-making requires finances, which should be present in the budget of the State in as balanced a manner as possible. The obligation to pay back debts reduces the State's financial possibilities for shaping policy and therefore affects politics and, generally speaking, democracy. Maintaining democracy also means responsible financial management. The special future sensitivity of the constitutional financial order is therefore evident.[1]

At this point, it is also appropriate to briefly refer to the principle of the social State, which requires the establishment and further development of a fair social system, but whose design is essentially the responsibility of politics, i.e. of the ordinary legislator. Nevertheless, it is precisely here that a special need for reform can be identified, which

[1] The connection between democracy and financial order has been pointed out by the FCC https://www.servat.unibe.ch/dfr/bv129124.html

results from the particularly concise demographic development of today's society. Even in the present, there is a constitutional obligation to consider a model for the future that can accommodate the aforementioned changes. It is not the obligation to design the best model, but it is sufficient if it is an adequate, sustainable model. It is up to the legislature to decide on the details, and it is up to the politicians to decide on the best time for the reform to come into force. Only obviously erroneous determinations can be unconstitutional.

If we speak of a duty to protect values in the case of fundamental rights, we can speak also of a duty to preserve existing structures such as democracy, the republic, the rule of law, the social State and - in Germany - the Federal State embedded in fundamental principles of the State, which constitute objective constitutional law. Such a duty is an important safeguard for the future, which is already anchored in the current constitutional order.

This does not mean that further developments and certain changes to these structural principles over time are ruled out; such concretization and change processes can certainly take place on the basis of the various instruments of constitutional development, i.e. formal constitutional amendment and also constitutional interpretation. Only the functional core, which is the essence of the structural principles, must not be changed.

SAFEGUARDING INSTITUTIONAL EFFICIENCY

So far, the focus has been on the values dimension, on fundamental rights and structural principles of the State that are value-oriented, such as democracy, the rule of law and the social State. But even if the focus is not primarily on values, i.e., on institutional definitions of a constitution that are value-neutral or only secondarily value-based (such as territorial organization, the federal State, which has the value aspect of vertical separation of powers), there is a constitutional obligation for the future: it includes the duty to ensure the efficiency of this institution. This means that institutional development must be monitored and critically evaluated, that possible undesirable

developments must be avoided or, if they already exist, corrected, that efforts must be made to increase and optimize efficiency, and so on. A constitutional obligation to reform through constitutional amendment and accompanying and concretizing legislation must be assumed. This should be tackled without delay as soon as serious deficiencies and undesirable developments become apparent. However, judicial sanctions in the form of declaring the State's failure to comply with this obligation appear to be possible only within narrow limits and in the event of an evident violation of the constitutional requirement to ensure efficiency.

THE ORIENTATION TOWARDS THE FUTURE OF OPEN STATEHOOD

The State of today is the open State which is characterized by its integration into the international community, respect for international law, and transfer of sovereign rights to intergovernmental bodies in special areas of integration.

Open statehood is necessarily future-oriented. Many intentions are to recognize the fundamental developments of the community of States, especially in the area of values, as decisive for internal State development as well. A State integrates itself into the international community by, on the one hand, preserving its own statehood and protecting its identity[1], and, on the other hand, being prepared to incorporate international standards into its own legal system and to respect them, and to keep its State actions in line with binding international rules.

Open statehood is particularly characteristic of the member States of the European Union. Supranational law is joined to national law and

[1] See also R.Arnold, La Cour de Justice de l'Union européenne comme gardienne de l'identité constitutionnelle des États membres, Mélanges en l'honneur de Pierre Bon (Dalloz, 2014), 49 – 56.

forms a common legal order with it. Its special influence is brought about by the fact that supranational law is recognized as having priority.

The legal order of the European Union is dynamic; its competences are final and therefore purposeful. This goal, which lies in the future, must also be taken into consideration in the present; present legal norms must not impair the future achievement of the goal, irrespective of all substantial openness of the goal. In this context, the national constitutional order is shaped by the openness and orientation towards the future of supranational law. From there, too, there is an obligation to orientation towards the future. Responsibility for integration, as it arises in Germany from Article 23 (1) BL, is also responsibility for the future because of the dynamism and openness of the supranational order.

SUMMARY OF IMPORTANT ASPECTS

(1) the Constitution is a living instrument, which is fundamentally intended to regulate the basic State order in perpetuity. The Constitution is therefore normatively anchored not only the present, but has permanent significance also for the future time. It has responsibility for the future, for future generations.

(2) In interpreting the Constitution, the objective will of the Constitution at the time of interpretation shall be determined. In no case shall the meaning of the Constitution be determined in relation to the time of its creation, but the dynamics and evolutionary development inherent in the nature of the Constitution shall be taken into account.

(3) The core content of the constitution is the triad of values: human dignity, freedom and equality the principle of freedom is specified by fundamental rights, which are partly written, partly unwritten. Human dignity is absolute, freedom is relative, it is limited in the interest of the freedom of others in the community. Freedom is to be recognized as a principle, the restriction of freedom as an exception, which must be justified. The principle of proportionality determines the boundary between freedom and restriction. The essence of freedom is to be preserved in any case.

These values of the Constitution are preserved for the present and the future. Their preservation in the future is a constitutional requirement even in the present. If freedom is restricted in a certain period of time, the individual time phases of this overall period must be designed in such a way that the burden in each of the time phases is proportionate. A lesser burden at the beginning and an excess burden at the end would be unconstitutional. The burden on future individuals must already be designed as reasonable in the present. Otherwise, the encroachment on freedom would already be unconstitutional in the present because of the excessive burdens on the future. This was the quintessence of the decision of the German Federal Constitutional Court in March 2021 on the German Climate Protection Act.

(4) The freedom and the special fundamental rights as well as the basic structural principles of a State, which are primarily value-based (democracy, republic, rule of law, social state) must be preserved in the present and in the future and developed in an adequate manner in harmony with society.

The task of the future already begins in the present and starts with researching the dangers to these values, forecasting the further development processes and considering suitable protection mechanisms. It is a permanent constitutional duty to do this now with a view to the future.

Of course, prognoses are always uncertain. It is a constitutional duty to make a forecast responsibly and to exhaust all possible sources of knowledge, even if the prognosis then proves to be incorrect. In such a case, there is no constitutional violation whenever remedial action is taken without delay.

These principles also apply to non-pimary value-oriented State structures such as the respective territorial organization (in Germany, the federal State order). Here it is a question of securing the efficiency of this institution also for the future.

Future-oriented is also the so-called open statehood, which depends essentially on the dynamics of inter- and supranational law.

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LEGAL REGULATION OF THE PROCESS ENSURING POLITICAL SECURITY AS A COMPONENT PART OF THE NATIONAL SECURITY OF THE REPUBLIC OF MOLDOVA

Alexandr CAUIA [1]

Abstract:

The legal regulation of the process ensuring the national security is also a concern for experts in the field of legal science. The normative assurance of certain processes specific to the desired security assurance are of maximum importance both at the national and international level. Political security is one of the five segments of national security conventionally established by the specialists of the Copenhagen School.

In this article, we will analyze the concepts of national security, political security, the socio-political situation and the legal mechanisms and instruments to ensure the process of preventing and combating the negative effects caused by the risks and threats that can negatively affect the effective implementation of political security as a component of the national security of the Republic of Moldova.

Key words: *legal regulation; risks and threats; national security; political security.*

INTRODUCTION

The national security of a state implies the identification of the basic objectives for the practical actions of the various state institutions,

[1] Ph.D in Law, Associate Professor, The Free International University of Moldova (ULIM) (Kishinev, The Republic of Moldova). E-mail: cauia.alex16@gmail.com; acauia@ulim.md

so that their coherent, interdependent and correlated fulfillment guarantees and ensures the achievement and affirmation of the country's fundamental interests. In this context, the political dimension of national security can be analyzed from several perspectives.

The political dimension of security includes the relationship between the state and its citizens. Proceeding from this relationship, the premise is admitted that the state was created to improve the state of security of its citizens, but it is possible that it may become a source of threat to their security.[1]

The political security is a stable state of society's political system effective development, which allows to adequately respond to negative internal and external influences, to maintain the integrity of society and its essential qualities. It can be characterized as a dynamic equilibrium of the political sphere. In addition, political security is understood as a system of certain measures, organs and functions of the state and society to protect the political interests of the state, citizens and, in general, the entire people.

The socio-political processes are a powerful factor in social change. Their possible destructive dynamics on a regional and national scale is capable of reaching the degree of intensity and acuteness in which there are threats of social disorder, active expression of protest states, their escalation to the level of socio-political clashes and conflicts, political "explosions" that undermine constitutional order and state integrity.[2]

Monitoring the dynamics of socio-political processes is advisable to stand out as an independent type of changes monitoring in society, together with an assessment of socio-economic, spiritual, cultural, environmental, criminogenic, military-political and other conditions, in

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[1] N. Albu, *Securitatea națională: Aspecte teoretice și practice* (Chișinău : Academia Militară a Forțelor Armate "Alexandru cel Bun", 2013), 40-41.

[2] V. M. Rodačin, "Metodologija ocenki social′no-političeskoj obstanovki v obŝestve v interesah obespečenija nacional′noj bezopasnosti", *V: Evrazijskij Sojuz Učenyh* (ESU), № 3 (60)/(2019): c. 49.

order to preserve the existing constitutional order, political and social stability and the non-use of violence for political purposes, etc.[1]

1. LEGAL ANALYSIS OF THE NATIONAL NORMATIVE PROVISIONS THAT ENSURE THE REALIZATION OF SOCIO-POLITICAL ACTIVITIES

Even if we cannot find in the national legislation of the Republic of Moldova express provisions that regulate the notion and essence of political security, this fact must not generate and potentiate the error that would summarize to the non-existence in the normative acts of the regulations that would legally substantiate its basic elements. In this sense, the Constitution of the Republic of Moldova guarantees the respect of political pluralism.[2]

The democracy is a concept and an integrative phenomenon, accumulating the moral, political and legal values of society in a determined social-historical context.

The socio-political phenomena and processes are of a relatively independent nature and are divided into two closely interconnected spheres of social life: social (the social structure of society) and political (the political system of society). Each of them has many structural elements, the condition and development of which largely determine the stability of the social system and the security of the state. The timely adoption of measures that "compensate the negative effect of the factors creating tension will allow the management of socio-political processes".[3]

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[1] V. Larin, "Bezopasnostʹ razvitija i razvitie bezopasnosti", *V: Svobodnaja mysl'*, № 7(1996): c. 37.

[2] The Constitution of the Republic of Moldova, article 5 (1) "Democracy in the Republic of Moldova is exercised under the conditions of political pluralism, which is incompatible with dictatorship and totalitarianism."

[3] L.B. Vnukova and Čelpanova D.D. and Paŝenko I.V. *Social'no-političeskaja naprjažennostʹ v poliètničnom regione* (Rostov n/D: Izd-vo Južnogo naučnogo centra RAN, 2014), c. 46.

The socio-political situation is the term actively used in the practice of sociologists, political scientists, lawyers, politicians, journalists, etc. Intuitively, it is perceived quite clearly. However, there is no clear and meaningful explanation of it so far in the specialized literature.[1] The socio-political situation in the country is "a characteristic of the relations that are formed between society and government in specific historical conditions in a certain territory that has its own state administration. The socio-political space is a consequence of the interaction of social and political spheres within a certain state entity".[2]

The constitutional normative provisions to be analyzed in this sense are established in paragraph (1) art. 38 which provides that citizens can freely associate in parties and other social-political organizations and article 41 of the Constitution of the Republic of Moldova establishing both the right of citizens to associate in parties and other social-political organizations, as well as state guarantees in order to ensure their good functioning:"[3]

The jurisprudence of the Constitutional Court[4] set out that the right to association is enshrined in art. 41 of the Constitution and provides for the possibility of citizens to associate, freely, in parties or social-political formations.

For the purpose of this research, a crucial importance rests on the analysis of the socio-political situation that defines the circumstances in

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[1] G.V. Evel′kin, "Social′no-političeskaja situacija kak problema poznanija: k konceptualizacii ponjatij i issledovatel′skih podhodov", *V: Sociologija,* № 2 (2014): c. 47

[2] Г.В. Евелькин, ***Социально-политическая ситуация как проблема познания: к концептуализации понятий и исследовательских подходов***, с. 48

[3] The Constitution of the Republic of Moldova, article 41 "(1) Citizens can freely associate in parties and other social-political organizations. They contribute to defining and expressing the political will of citizens and, under the law, participate in elections. (2) Parties and other social-political organizations are equal before the law. (3) The state ensures respect for the rights and legitimate interests of parties and other socio-political organizations. (7) Public positions whose holders cannot be part of parties are established by organic law."

[4] Decision of the Constitutional Court, no. 28 of 21.02.1996. In: Official Gazette of the Republic of Moldova, no. 16/182 of 14.03.1996.

which the rigors of political security in particular and national security in general are to be realized. The socio-political situation would be a combination of a number of conditions, factors and circumstances of varied nature and origin, which form a specific situation, a position in the socio-political sphere, establish the relationship and alignment of social and political subjects and affect both the environment politically, as well as society as a whole".[1]

Thus, this is a set of circumstances, a situation that characterizes a specific state of interconnection and mutual influence of social and political processes, manifested in various forms of expression of relations between social groups, population and authorities, parties and other bearers of these relations.[2]

A number of authors use the concept of "socio-political climate" in society to characterize the socio-political situation, interpreting it as "a characteristic of the state of society, reflecting the degree of social tension and the level of political stability, as well as the nature of relations and interactions between social groups, social categories, the essence and subjects of state policy".[3]

It is considered that this term, in its functional sense, is close to the concept of "socio-political situation", but to a greater extent reflects the socio-psychological characteristics of the state of social relations.

In the sense of ensuring an adequate socio-political climate and a socio-political state that would satisfy the requirements imposed by the desired European integration of the Republic of Moldova, the provisions of art. 41 para. (2) and para. (3) suppose the state's obligation to apply equal and fair legal treatment to all legally constituted parties.

Any interference in the internal activity of political parties is prohibited, with the exceptions provided by law. All parties have equal rights to participate in the election of Parliament and local public

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[1] O. A. Mitrošenkov, "Obŝestvenno-političeskaja situacija v mestnom samoupravlenii: metody i kriterii ocenki", *V: Sociologija vlasti*, №4 (2006): c. 28.

[2] V. K. Egorov, *Ènciklopedija gosudarstvennogo upravlenija v Rossii*. Tom vtoroj (n-ja). (Moskva, 2008).

[3] V.I. Popov, "Nekotorye problemy opredelenija ponjatija social′no-političeskogo klimata", *V: Polzunovskij vestnik*, № 3 (2006): c. 292

administration authorities, all political parties participating in the electoral campaign and their candidates for elective positions are granted free and fair airtime on public radio and television stations. The state supports the development of political parties, and the discrimination against political parties when granting support from the state is not allowed.

The right of (political) association is not absolute, its exercise can be restricted, if necessary, and does not contradict the stipulations of international acts and constitutional provisions. Para. (4)-(6) from art. 41 of the Constitution establish limitations of the right to free association in parties.[1]

In the same vein, the Law on Political Parties expressly establishes the conditions under which the activity of a political formation can be limited or prohibited.[2]

In a more detailed form, the socio-political situation characterizes the composition of social and political subjects, the nature of expressed interests and the contradictions between them, the state of relations between social groups, social categories, ethnic groups, subjects of ideological and political influence in the state, civil society, in the non-systemic opposition, the balance of their forces, the dynamics of the socio-political processes development, the likelihood of their radicalization, the emergence and growth of threats to state security.

[1] The Constitution of the Republic of Moldova, article 41 "(4) Parties and other social-political organizations that, through their goals or activity, militate against political pluralism, the principles of the rule of law, sovereignty and independence, territorial integrity of the Republic of Moldova are unconstitutional. (5) Secret associations are prohibited. (6) The activity of parties made up of foreign citizens is prohibited."

[2] The law on political parties, article 21: "(1) The activity of the political party can be limited if its actions cause serious damage to political pluralism or fundamental democratic principles."

2. ESSENCE OF THE POLITICAL SECURITY CONCEPT AS A COMPONENT OF NATIONAL SECURITY

The political security is a set of measures to identify, prevent and eliminate those factors that can harm the political interests of the country, society, citizens, cause political regression and even the political death of the state, and also transform power and politics from creative elements and constructive into destructive force, a source of threats and dangers to citizens. This is the essence of political security:

a) for a specific state;

b) for the citizens of the state;

c) for the world community.[1]

Using the classification and definition methodology of this phenomenon has an important meaning for an objective analysis and forecast of the development trends of the socio-political situation. From the point of view of the misalignment of the balance of power and the interests of socio-political subjects and the increase in the level of tension and conflict in their relations, an approach that highlights four main types in assessing the state of the socio-political situation has become very widespread.

This includes: normal environment (calm), tense environment, pre-crisis situation (pre-conflict), crisis situation (conflict). In the same vein, but in five typical stages, the political-military situation is evaluated: "The following typical states of the political-military situation are distinguished by the degree of tension in the relations between the existing forces:

a) a calm (normal) situation;

b) aggravated (tense) situation;

c) crisis situation;

d) situation of military (armed) conflict;

e) conditions of war".[1]

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[1] V.V. Serebrjannikov, „Političeskaja bezopasnostʹ ", *V: Svobodnaja mysl'* № 1 (1997): c. 19

The advantage of the described typologies is the identification of such types of situations that reveal the different levels of the state, from the point of view of a possible worsening of the situation and the eventuality of the appearance and development of threats to the security of the state.

However, they do not lack certain disadvantages. Especially from the point of view of their static nature, the lack of ability to take into account the dynamics in the evolution of the situation, its inconsistency and uncertainty factors, especially in the intervals between its main states, i.e. the transition between them. With a static approach, the trends of ongoing changes and possible transitions from one state to another are not obvious.

In this sense, a typology model is proposed to be used in the evaluation of the socio-political situation, which takes into account not only the main typical states (normal, tense, pre-conflict, conflict), but also intermediate between them, which characterize options for the direction of a change of state or towards further escalation of tension or towards its decline.

Thus, the following options are possible:

- a normal situation with a tendency to change to a tense one;
- a tense situation with a tendency to escalate the tension and move to the pre-conflict stage;
- a tense situation with a tendency to return to normal;
- a pre-conflict situation with a tendency to escalate to the level of the conflict;
- a pre-conflict situation with a tendency to weaken its severity and return to the tense stage;
- a conflict situation with inevitable risks of socio-political clashes and antagonistic forms of conflict resolution;

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[1] L.B. Vnukova and Čelpanova D.D. and Paŝenko I.V. *Social'no-političeskaja naprjažennost' v poliètničnom regione* (Rostov n/D: Izd-vo Južnogo naučnogo centra RAN, 2014), c. 25-30

- a post-conflict situation with the tendency to relax it and normalize the state based on the resolution of contradictions and the regulation of socio-political relations.

Discussing *open-source software* evaluation methodology involves considering and choosing some research approaches, theoretical models and paradigms, as well as measurement tools that allow the most adequate and accurate analysis of the state of an object according to key criteria and characteristic features, i.e. diagnosing it and identifying its main trends, development and forecasting changes over time.[1]

Some of the main socio-political matters are:

- low standard of living;
- high level of corruption;
- problems of interethnic interaction;
- a decrease in the level of education;
- deterioration of critical infrastructure availability;
- economic problems;
- environmental problems.

The internal political security is the security of political institutions, due to the preservation of the constitutional order stability, of the state power institutions, ensuring the civil peace and national tolerance, the territorial integrity, the unity of the legal space, the rule of law. The security of foreign policy is also the security of the interests of politics, authorities and state, at the level of world politics. It includes, in particular, the state integrity protection, national interests, the strengthening of borders and the prevention of claims on national territory.[2]

Thus, the socio-political situation can be defined as the state of guaranteed security of the individual, the society, the way of life, the institutions, the sovereignty of the country, the territorial integrity, the

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[1] V. M. Rodačin, *Metodologija ocenki social'no-političeskoj obstanovki v obŝestve v interesah obespečenija nacional'noj bezopasnosti*. c. 51

[2] V. F. Darmokrik, *Političeskaja bezopasnost' v sovremennoj Rossii: avtoreferat dissertacii, kandidata političeskih nauk* (Saratov, 2007).

natural resources, the inviolability of the state borders, the constitutional order and the government system of the country.[1]

From the point of view of internal conditions, the political security consists in the stability of the political system, the expression of the fundamental interests of the main social groups and ensuring the socio-political stability of the society, the absence of social and political conflicts.

Three important points are highlighted that logically follow from such an understanding of political security:

- First of all, the political security means the stability of the political system, i.e. the totality of the socio-political institutions that manage the society.

- Secondly, the political security is the expression and implementation by the political system of the basic interests of the main social groups, while ensuring socio-political stability.

- Thirdly, the political security means the absence of severe socio-political conflicts in society, or constant and at the same time effective actions, first of all, of the political power to minimize the destructive impact of such conflicts on society.

From the point of view of external conditions, the political security means the ability of the state authorities to defend the main interests of the country on the international arena, to ensure its integrity and sovereignty and to actively participate in international relations. The only thing that can be noted with certainty is that the political security must be analyzed through two interdependent aspects (in terms of internal and external conditions).

If armed forces are created to ensure military security (first of all), then special structures are created to ensure political security (from the point of view of internal conditions) (starting with state institutions and ending with services).

An analysis of the actual state of affairs suggests that often, people invested with power can incorrectly identify threats to the political security of the state. For example, believing that the danger

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[1] R. G. Janovskij, *Global'nye izmenenija i social'naja bezopasnost'* (Moskva, 1999).

comes mainly from democracy, openness, freedom of speech and generally from the population.

Thus, the most important role in the structure of political security belongs to state security, but it does not limit to it. In a narrow sense, the political security can be understood as the protection of the political elite and the highest bodies of state power from political dangers, challenges and threats. But in this case, some restrictions of human rights and freedoms, a slowdown in the pace of social development, will be objectively possible, because the political system will close and serve mainly the interests of a small group of people. The key role in ensuring the political security of any society is played by the political elite, the highest bodies of state power, as well as the power structures of the state, which are the primary subjects of its provision.

The issues related to ensuring human security in modern society are increasingly topical. In fact, with the advent of nuclear weapons and their delivery missiles, when scientists and politicians realized the real possibility of the self-destruction of mankind as a biological species, security issues began to occupy more and more space in research scientific, in the documents of international forums and in the decisions of international organizations.

Almost simultaneously with the emergence of security science, the differentiation of scientific knowledge about security began. In fact, informational, food, environmental, military and other types of security are also studied in detail and quite independently of each other. Many scientists write about the presence of a certain and quite strong dependence of any type of security on the degree of safety and security of the state system, the level of stability and security of political power.

At the same time, with rare exceptions, for various reasons, they avoid analyzing political security, and the essence of security in the most general sense means the ability to maintain the possibility of development in the face of threats. The presence or absence of phenomena and processes that can be considered challenges, risks, dangers and threats is the key to understanding the essence of security.

Avoiding or shirking from the analysis of challenges, risks, dangers and threats, the concept of “security” actually loses its meaning.

Therefore, the position of researcher E.I. Glushenkova is acceptable, who believes that we live in the "era of the Risk Society".[1]

Today, the world faces a number of challenges that are quite stable, long-term as impact and cumulative.

3. DANGERS AND THREATS TO THE PROCESS OF ENSURING POLITICAL SECURITY IN THE REPUBLIC OF MOLDOVA

An exhaustive list of threats and dangers to political security, as a component of the national security of the Republic of Moldova, cannot be identified in a normative act in force. In this sense, it is interesting and useful to analyze the text of the National Security Strategy project of 2016, which establishes that external political pressures adopt various forms of manifestation: from the provision of economic, military and political support to the unconstitutional regime in Tiraspol and up to impelling artificial obstacles in the access of Moldovan products to traditional markets.[2]

Along the same lines, the following internal risks and threats that could directly affect the political security of the Republic of Moldova are highlighted: political interference in state institutions and the poor criminal practice of investigating and sanctioning cases of violating the rules of financing political parties, electoral campaigns and voter corruption cases.[3]

In this sense, the circumstances and conditions under which a political party can cease its activity in the Republic of Moldova are established at the normative level.[4]

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[1] E.I. Glušenkova, *Političeskie aspekty modeli ustojčivogo razvitija: avtoreferat dissertacii, kandidata političeskih nauk* (Moskva 2001), c. 1.

[2] The 2016 National Security Strategy Draft, 13-14 "1) providing economic, military and political support to the unconstitutional regime in Tiraspol;

[3] The 2016 National Security Strategy Draft, 16, point 3 and 7.

[4] The Law on political parties, article 22(2) "The Ministry of Justice will introduce an action to the court requesting the dissolution of the political party if there is at least one of the following grounds: a) the party operates based on its statute and program with changes and additions that have not been registered in the established manner by law; b)

Analyzing this issue, A.V. Vasiliev, in his work, notes that "... today, public administration bodies work in a completely different institutional environment, and also contact with a significantly larger number of subjects and objects of management, including those that did not exist before and against which it is impossible to apply administrative methods. The new conditions also require the search for appropriate management methods".[1]

At the same time, the researcher believes that the issue of taking political factors into account in the development of managerial decisions has not yet been reflected in modern fundamental works on the development of managerial decisions.

The researcher B.V. Sysoev, analyzing this issue from a slightly different perspective, mentions: "... military-strategic security factors, the use of force and actions close to them lose priority, giving way to such political and economic measures as the development of a correct commercial and economic strategy, new approaches to the rights of national minorities, settlement of disputes to prevent their development into crises and conflicts, settlement of conflicts through negotiations and peacekeeping missions".[2]

This, however, does not mean that the role of military force has completely lost its significance for public and political life. The list of factors, challenges, dangers and threats could be continued, especially since the vast majority of scientists are currently looking at other factors

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during one year, which begins to run from the date when the decision of the Chisinau Court of Appeal regarding the limitation of the party's activity became final, it committed actions similar to those for which the party's activity was limited; d) the party's activity takes place by illegal methods or means or by committing acts of violence;

e) the party was declared unconstitutional by decision of the Constitutional Court."

[1] A.V. Vasil′ev, *Modelirovanie političeskoj situacii kak sredstvo soveršenstvovanija političeskogo upravlenija v regione: avtoreferat dissertacii, kandidata političeskih nauk* (Moskva, 1998). c. 1, 2.

[2] B.V. Sysoev, *Političeskie problemy evropejskoj bezopasnosti* (Moskva, 1999), c. 1 – 2.

and challenges (which are political in nature or can be considered as such). Thus, the state must stabilize the political system.[1]

Therefore, it can be assumed that political security is understood as the ability of a political system (primarily state power) to resist negative trends for itself and society (dangers, risks, challenges and threats) and at the same time to expand and actively implement societal development trends.[2]

In general, the political dimension of security refers exclusively to the stability of a social order, listing among the key dangers that are insistently referred to those that threaten the sovereignty of the state.[3] It also takes into account the organizational stability of the states, the governance systems, the ideologies that give them legitimacy and the internal and external development strategies. When talking about the internal level of the national security political dimension, it is taken into account that the state can be highlighted through the concepts of good or bad governance.[4]

According to the documents developed by the EU, governance represents the ability of states to serve their citizens based on the rules, processes and behaviors through which interests are expressed and managed and through which power is exercised in society.[5] In addition, we mention that governance also includes the mechanisms and processes used by citizens to meet their interests, differences and exercise democratic rights and legal obligations.[6]

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[1] A.A. Žirikov, *Problemy političeskoj stabil'nosti Rossijskogo gosudarstva (ètnopolitičeskij analiz): avtoreferat dissertacii, kandidata političeskih nauk* (Moskva,, 1996), c. 4.

[2] A.A. Mizer, *Političeskaja bezopasnost' gosudarstva: postanovka problemy. V: Naučnye i obrazovatel'nye problemy graždanskoj zaŝity* (2012), c. 91

[3] D. Dungaciu, *Moldova ante portas* (Bucharest, 2005).

[4] P. Duţu, "Globalizarea şi raportul dintre securitatea naţională şi securitatea internaţională" in: *Impact Strategic. Revista ştiinţifică trimestrială a Centrului de Studii Strategice de Apărare şi Securitate, no. 1* (2005). Bucharest: Editura Universităţii Naţionale de Apărare „Carol I", 11-17.

[5] P. Duţu And Seserman D. "Globalizarea şi securitate naţională", in: *Impact strategic, no. 3* (2004): 91- 97.

[6] Albu, *Securitatea națională: Aspecte teoretice și practice*, 40-41.

Also, in the sense of researching the normative basis of the process ensuring the political security of the Republic of Moldova, we are going to highlight the fact that the national legislation clearly and unequivocally defines the legal status of the political party, establishing the principles and rigors on the basis of which it is to operate.[1]

It is important that public structures and the civil society in general do not remain outside the process of ensuring political security. Only through joint and coordinated efforts, state and civil structures can ensure the progressive development of modern society and guarantee the stability of the political system of society.

Thus, the political security means the inviolability of national sovereignty, the viability of the state order and the constitutional system, the formation and efficient functioning of the political system, but also of all state institutions in the interest of the majority of citizens.

At the same time, together with other dimensions of national security, political security implies the reduction of external pressures and the non-admission of violent interference in state affairs of the outside forces.[2] The Republic of Moldova has been facing the problems of training, maintenance and practical implementation of political security. Ensuring the political security of the country depends on the policy of stability, the maturity and responsibility of the political parties, the supremacy of the law in society and the effective actions of the state power, which determines the country's development path.[3]

The political security system of any society is called to settle a rather contradictory task: on the one hand, to reliably protect a policy that corresponds to the national interests of the state, and on the other hand, to prevent its transformation into a process harmful and dangerous to the interests of the state. Today, the political security of the society should

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[1] The law on political parties, article 1(1) "(1) Political parties are voluntary associations, with the status of a legal entity, of the citizens of the Republic of Moldova with the right to vote, who, through joint activities and based on the principle of free participation, contribute to the conception, expression and realization of their political will."

[2] Florea L. *Globalizare şi securitate economică* (Lumen, 2007).

[3] Albu, *Securitatea națională: Aspecte teoretice și practice*, 43.

still be understood as the stability of its political system and its real social effectiveness.

It is very difficult to define the boundary between the security of society and the state. Although, a clear distinction between the political aspects of public and state security will make possible to understand the essence of political security. The essence of the state's political security equates to its ability to function stably, develop and prosper in conditions of interaction, to fight with other socio-political systems that have conflicting or opposing values, interests and political goals, with incomplete or non-existent information about the directions and strategies for the development of the state and the likelihood of deteriorating the implementation policy in conditions of political conflicts and uncertainties.[1]

The security of society depends largely on its political stability, and threats to political stability under certain conditions become threats to the security of society as a whole. This implies, in particular, the need to first clarify the causes and analyze the possible consequences, first of all, phenomena such as distrust in political leadership, low rating of power structures and political leaders and the clearly insufficient effectiveness of the "power vertical" in the country. In this sense, S.O. Alehnovich supports the position that sustainable development is an integral component of the political and legal institution existence in a modern state.[2]

In the contemporary world that urges the person to personal development, expansion and diversification of social contacts (at least in virtual form), citizens can no longer be satisfied with the role of passive consumer of information generated by the authorities.

Now the ideologemes, received from the authorities, are actively discussed and criticized at the level of interaction in the network of

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[1] S.Z. Pavlenko, *Bezopasnost' Rossijskogo gosudarstva kak političeskaja problema: avtoreferat dissertacii, kandidata političeskih nauk* (Moskva, 1998), c. 13.

[2] S.O. Alehnovič, *Mehanizmy realizacii regional'noj bezopasnosti v paradigme federativnogo gosudarstva: avtoreferat dissertacii, kandidata političeskih nauk*. Moskva, 2001, c. 3.

citizens from traditional mass media, and the social network develops its own worldview, which often does not match the officially recommended one. Numerous exhortations and prohibitions, even at the level of criminal law, cannot stop such a civil process of communication.[1]

Without the security of political communication, the democratic state cannot effectively counter the extremist challenges and threats in the contemporary world.[2]

CONCLUSIONS

According to the results of the presented analysis and similar approaches to political security by other authors, the following conclusions are made, the main ones include:

- first of all, there is no common idea about the essence of this concept;

- secondly, the existing theoretical approaches commonly shall mean that political security is an integral part of national security in terms of respecting the country's political interests (including all institutions, relationships and vital processes of the political sphere of society, and citizens) and the appropriate response to internal and external threats.

The analysis carried out allows us to reiterate the indisputable need for the development and adoption of a National Security Strategy of the Republic of Moldova that would meet the rigors of time, would directly and unequivocally reflect the risks and threats to national security in general and political security in particular.

Determining the dangers, risks and threats to political security and the mechanisms and tools to prevent and combat their negative effects in

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[1] I.L. Morozov, „Information and political security of the democratic state - world experience and Russia", in *Life Science Journal* Nr. 11 (2014): 622.

[2] S. S. Bodrunova and Litvinenko A. A. *New media and the political protest: the formation of a public counter-sphere in Russia of 2008–12. Russia's Changing Economic and Political Regimes: The Putin Years and Afterwards* (London: Routledge, 2013), 29–65.

a special normative act or within a sectoral strategy would be the most appropriate solution to this dilemma.

It is also obvious that the continuous education of the population in the spirit of democratic values, in order to increase the level of political culture, ensuring respect for the principles of the rule of law and guaranteeing the well-being of the citizen would constitute the necessary but not sufficient prerequisites for ensuring a high level of national security in the Republic of Moldova.

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GOVERNANCE OF LOCALITIES AND CHALLENGES TO SECURITY IN NIGERIA'S FOURTH REPUBLIC: WHAT CAN TRADITIONAL RULERS DO?

Biola Muhibat OSUNGBOYE[1]
Adeleke ADEGBAMI[2]

Abstract

Nigeria is currently facing a plethora of challenges, out of which is the security of lives and properties. The scheming out of traditional rulers, considered to be gatekeepers of the local communities from the governance of their localities, perhaps has been one of the reasons remarkable result has not been achieved in securing the country as a whole. Against the backdrop, the study analyzes the constitutional provision for the traditional authorities in Nigeria, examines their relevance in maintaining security, and determines the restraining factors to traditional rulers' involvement in the governance of Nigeria. Using secondary data and authors' observations, the study revealed that the whittling down of the powers of traditional rulers has inhibited them from adequately maintaining security in their domains. This has affected their power of adjudication of criminal justice at the local level, and so, contributed to security degeneration in the country. That "all politics is local" and should be meted with local solutions cannot be overridden. Given the foregoing, the study argues that although traditional rulers are contributing in little way to curtail the

[1] **Department of Public Administration Olabisi Onabanjo University Ago-Iwoye, Nigeria**
[2] **Department of Public Administration Olabisi Onabanjo University Ago-Iwoye, Nigeria,**
https://orcid.org/0000-0002-3582-1680, adeleke.adegbami@oouagoiwoye.edu.ng, adeadegbami@yahoo.com

menace of insecurity in their neighborhoods, they can contribute more if they can be given constitutional roles in the governance system of the country.

***Keywords**: Security Challenges; Traditional Rulers; Gatekeepers; Minority Area; Local Communities;Governance Affairs.*

INTRODUCTION

Nigeria one of the key players in global affairs, a leading country in Africa, with abundant human and natural resources, is at its trying period. For some time now, the country has been facing a plethora of challenges, out of which is the security of lives and properties. This has unremittingly shaken the country to its very foundation, hardly can a day pass without one case of insecurity or the other, and this has continued to threaten people's lives and their properties.

Although, the history of Nigeria in the last sixty-two years cannot be completely dissociated from the challenge of security. From the time of Nigeria's civil war that commenced in July 1967, just seven years into Nigeria's independence, to that of recurring violent conflicts, a series of ethnic-associated conflicts, and various religious crises and poverty-induced crises[1]. Then to a series of insurgents and bandits menace, as well as agitation for self-determination by some ethnic groups, among other challenges.

Even though successive administration of the country has introduced and continue to introduce different policies and programs to curtail various security challenges, yet; these have not been enough to bring a lasting solution to the challenges. The pattern of governance brings into being by the successive administration in Nigeria possibly will determine whether the security challenges will subside or not. This is because governance remains central to every security challenge Nigeria

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[1] Salawu, W. "Ethno-religious conflicts in Nigeria: Causal analysis and proposals for new management strategies", in *European Journal of Social Sciences, 13(3),* 345-353. http://www.sciepub.com/reference/101122 2010; Adegbami & Adeoye, 2021

is facing. Many of the security issues confronting Nigeria were direct consequences of poor governance, manifesting in inequality and socio-economic marginalization, among other factors. As such, a country that does not practice good governance is making itself susceptible to insecurity[1]. In line with the aforementioned, the Africa Center for Strategic Studies further states thus: „*From ethnoreligious faultiness to rising extremism among marginalized communities to weak military professionalism, a common theme for virtually all of Nigeria's security challenges is poor governance. In many instances, these security concerns are, in fact, symptoms of weak, exclusionary, or exploitative government processes. These security issues, therefore, will persist until the underlying problems of governance are addressed"*[2].

Apart from the modern system of administration, as denoted by the civilian and military dispensation, is the traditional administrative system. Although the traditional administrative system has been in place before the other two systems of administration named above. However, with the coming of the European imperialists, and their eventual subjugation of African states, the traditional administrative system was suppressed, while their pattern of administration was introduced and lords over Africa's pattern of administration. In essence, the introduction of modern forms of governance and administrative systems to Nigeria and the subsequent adjustment and readjustment of the country's constitutions have made the traditional institution lose considerably its relevance. Thus, traditional rulers, considered to be the gatekeepers of the local communities, a symbol of unity, and custodians of traditional authorities, are being schemed out of or not adequately involved in the security-related matters, as well as other governance affairs of the country.

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[1] The Africa Center for Strategic Studies, „Fundamental security challenges Nigeria must face, Part 8: Governance, 2015. https://africacenter.org/spotlight/fundamental-security-challenges-nigeria-must-face-part-1-identity/fundamental-security-challenges-nigeria-must-face-part-8-governance/ [Accessed 18 May 2022].

[2] The Africa Center for Strategic Studies, para. 1.

Against the backdrop, the study analyzes the constitutional provision for the traditional authorities in Nigeria; examines the traditional rulers' relevance in maintaining security in Nigeria, as well as determines the factors restraining traditional rulers from involving in the governance of Nigeria. This is with a view to determining what traditional rulers can contribute to curbing security challenges in Nigeria.

THE TRADITIONAL RULERS AND THE SOURCES OF LAWS IN THE PRE-COLONIAL ERA

Different ethnic groups of the areas, now refers to as Nigeria had for a long time devised and deployed laws, regulating the governance and administrative activities, as well as; people's conduct, before the colonial intervention into their affairs. In addition to this were well-structured adjudicatory systems through which the traditional rulers adjudicated criminal justice in their localities, as well as settling or resolving conflicts among the people. During the periods, however, the powers of the traditional rulers were uncodified, while the laws or constitutions of various ethnic groups were completely unwritten. In essence, the pre-colonial administrative institutions were not formal; this notwithstanding, those informal institutions served effectively, the purpose for which they were created.

Essentially, the various laws available to the traditional rulers before modern state institutions were unwritten but embedded in the cultures and traditions of people, which were passed down from generation to generation. Put differently, the African laws were derived from their customs and traditions, religious and common laws. Suffice it to say; those African laws in the pre-colonial era were defined by their customs, religions and previous occurrences. For instance, their customary laws were developed based on the established pattern of behaviours and were rooted in African values, morals and principles. The religious laws, on the other hand, cover principled and moral codes being inculcated and indoctrinated to adherents of different traditional religions. And with regards to common laws, which is also refers to, as judicial precedent, African people developed this out of the examples

earlier set by a person or group of persons. In other words, the traditional rulers and elders of the community did look to past happenings or occurrences and formulated laws to safeguard or discourage future reoccurrences. With all these forms of laws, traditional rulers were able to regulate the affairs of their people. In essence, traditional rulers related well with their subjects, maintained laws and orders and dispensed justice according to the laws of the land and offenders or erring members of the community were sanctioned accordingly.

THE CONSTITUTIONAL PROVISION FOR THE TRADITIONAL AUTHORITIES IN NIGERIA

Once upon a time in this part of the world, traditional rulers, believed to be the custodians of people's cultures and traditions, were considered the highest authorities in the areas of governance and administration of their domains, and accordingly, they were highly revered by their subjects[1]. For that reason, their views and thoughts on issues were incontestable, while their words were laws. However, things have changed so fast for the traditional rulers; thus, in contemporary times, their powers are weakening and disappearing steadily. The roles once assigned to them in consecutive Nigeria's constitutions were completely removed from the current constitution (1999 Nigeria's constitution) being adopted by the country.

The 1960 constitution, for example, allotted greater powers to the traditional rulers in Nigeria. It allowed for the institution of a Council of Chiefs for traditional rulers in each of the regions. Under the constitution, there were the Senate and Regional House of Chiefs, where traditional rulers were automatic members. In northern Nigeria, the Council of Chiefs was headed by the Premier of Northern Nigeria, but the Council was in charge of traditional affairs. One of the responsibilities of the Council was to render advice to the government, and such advice did

[1] Logan, C. „The roots of resilience: exploring popular support for African traditional authorities", in *African Affairs, 112(448)* (2013): 353–376. http://www.jstor.org/stable/43817329

binding upon the government. For instance, the Council of Chiefs had powers to decide concerning the appointment, recognition, and approval of persons to become Chief, the grading and upgrading of Chiefs, and of course, their removal[1].

In the Eastern and Western regions of Nigeria, the Governor then has the power to declare any area of the region a minority area and can institute a Minority Council. Under this arrangement, the traditional rulers in the areas were allowed to participate in the Minority Council[2]. The Minority Council was saddled with the responsibility of advising the government, especially on welfare, development, and cases of discrimination in the areas. It must be noted that the council only performs an advisory role, while the issues raised by the council can be publicized; the council on its own cannot make decisions[3]. In the Western Region, it was as a result of the authorities accorded to the traditional rulers and enshrined in the constitution that made one of them in the person of Oba Adesoji Aderemi rose to the position of the Governor of the Western Region of Nigeria, where he ruled between 1960 and 1962.

Similarly, the 1963 constitutions also created a Council of Chiefs for traditional rulers at the regional level, and so the traditional rulers had a say; in the governing affairs of the country. In other words, under the 1963 Republican Constitution, the traditional rulers were still involved in the affairs of the country. However, when the Military took over the governance and administration of the country following the 1966 coup, the traditional rulers' roles in the affairs of the country began to dwindle as their roles in governance became less important.

The 1979 constitution allowed the traditional rulers representation in the National Council of States at the federal level and the Council of

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[1] Reed, W. C. *The role of traditional rulers in elective politics in Nigeria.* Fifth Annual Graduate Student Paper Competition, African Studies Program (Indiana: Indiana University, 1982).

[2] Ekwueme, A. I. „Nigeria's Federal Constitutions and The Search for "Unity in Diversity".“ https://forumfed.org/document/nigerias-federal-constitutions-and-the-search-for-unity-in-diversity/ [Accessed 18 May 2022].

[3] Reed, *The role of traditional rulers in elective politics in Nigeria*.

Chiefs at the state level. Consequently, the council was assigned the powers to render advice on customary matters, cultural affairs, and chieftaincy matters, as well as advised on the maintenance of public order. It must be noted, however, that the 1979 constitution also incorporated the earlier constitutional reforms of 1976 that gave birth to the local government reform of 1976. The aftermath of the 1976 local government reforms was the restriction of the powers of traditional rulers by transferring their powers to the local government. Therefore, the roles being performed by the traditional institutions in the post-independence constitutions were taken over by the local government. From 1979 to date, especially with intermittent military interruptions in the governance and administration of the country, the traditional institution relevance in the country's governance system has been reduced.

The 1999 constitution made matter worse by neither recognizing the traditional institution nor assigning them any constitutional role. Thus, traditional rulers became mere machinery in the hands of politicians who continue to use them for their political scheming. This greatly reduced the relevance of the traditional rulers in the political activities of the country. The fact that the traditional institution is the oldest and surviving cultural-political institution, which has always strived for security, peaceful coexistence, and national development of the country, should have ordinarily earned the institution a special role in the country's constitution. However, the committee that drafted the 1999 Nigerian constitution failed to realize this and so, did not make constitutional provisions for the traditional institution. For that reason, it could be said that the 1999 constitution completely eroded the recognition accorded to the traditional rulers in the previous constitutions, including the advisory role given to them by the 1979 constitution. It was to this extent that the National Traditional Council of Nigeria declared thus: "*Currently, traditional rulers do not have the constitutional or other legal backings to perform effectively as they are not even mentioned in the 1999 constitution. This is a great departure from all earlier constitutions that recognized them, and even gave them*

some functions to perform. Constitutionally and protocol wise, traditional rulers are relegated to the background"[1].

In essence, no recognition is accorded to the traditional institutions as far as the 1999 constitution of the Federal Republic of Nigeria is concerned. And so, the traditional rulers' subjection to the political officeholders is inconvertible, as they have to take permission from them, for every single activity being performed in their domains. For instance, traditional rulers cannot leave their domains without taking permission from the Chairman of their local governments. No traditional ruler can ascend the throne without the approval of the Governor of the state in which the town is located. It is the governor that gives the traditional ruler the staff of office, and of course, the Governor can remove the traditional ruler at will. For example, the Kano State Government on March 9, 2020, dethroned the Emir of Kano, Sanusi Lamido Sanusi. Not only that, the dethroned Emir was immediately detained in a private home until March 13, 2020. This signifies the non-recognition and non-relevance of the traditional rulers in contemporary Nigeria's political system.

TRADITIONAL RULERS AND SECURITY MAINTENANCE IN NIGERIA

Given the trend of insecurity in Nigeria, and the seeming incapacitation of the security agencies at taming the challenge, the participation of the traditional rulers is highly essential at this decisive time to salvage the situation before it completely goes out of hand. The government needs to go back to the drawing board and re-strategize the way out of the conundrum. One of the best ways to achieve this is through collaboration with traditional rulers. The traditional rulers seem to be critically needed because of their affiliation, interactions, and relations with the locality. They have done it before in the pre-colonial

[1] cited in Elumoye, D. And U. Orizu. „Nigeria: Monarchs Make Case for Role in Constitution", in *This Day.* (2021, March 12)., https://allafrica.com/stories/202103120529.html [Accessed 18 May 2022], para. 7-8

era, and they can still do it if they are allowed. Traditional rulers command respect in their domains, they are held in high esteem, by this, they can perform credibly well if incorporated into the governance and administration of the country, especially in the areas of resolving conflict and maintaining peace.

The essentiality of the traditional rulers in security maintenance is well documented by Tamuno. According to him, law and order are easily maintained through "undemocratic methods" that are well-structured. He went on memory lane, to the pre-colonial era, when traditional rulers with their unlimited and unrestricted powers, could punish any erring personality within their domains in line with the codes of conduct of the land. By this, traditional rulers were able to maintain internal security by dealing with intruders in their environments on time, before their activities degenerated into insecurity of the land. The traditional rulers then; due to their powers performed the executive, legislative and judicial roles, which allowed them to pass judgment on time on any person or group whose activities could degenerate the security of their environments[1].

The relevance of traditional rulers in the area of security maintenance cannot be overemphasized, even though they were not given any constitutional authority to participate in the governance activities of Nigeria. It is not news that the Nigerian government always called on traditional rulers whenever issues that bothered on insecurity ensued in their areas or when security issues is going out of hand[2]. On several occasions, the government did call upon the traditional rulers to find solutions to insecurity situations in their domains, and on those occasions, traditional rulers have always been able to tackle the problem.

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[1] Tamuno, T. N. *Crime and security in pre-colonial Nigeria: Policing Nigeria, past, present, and future* (Lagos: Malthouse Press Limited., 1993)

[2] Uthman, A. A. „Traditional rulers and security administration in Nigeria: Challenges for the 21st century", in *IOSR Journal of Humanities and Social Science, 21(8),* (2016): 01-11.
https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1058.6935&rep=rep1&type=pdf

Traditional rulers were able to achieve this feat because they are closer to the people, they understood their environments, they are well revered in their domains and they were acceptable in their environment, unlike many political leaders who either rigged themselves into powers or forced themselves on the people which made them unacceptable to the citizenry. The attributes of traditional rulers make them indispensable in the governance and administrative activities of the country. For that reason, traditional rulers are factors that can be reckoned with when it comes to maintaining peace and enhancing development. However, the intermittent call up of traditional rulers only when there are security challenges or crises situation to normalize the situation has not been only counterproductive but inimical to the peace and security of the country. This has also been a major reason remarkable success has not been achieved in the area of maintaining peace and securing the lives and properties of the citizens despite the huge yearly security spending by the government.

In essence, traditional rulers remain central and key to people's affairs and governance activities of the country. For instance, traditional rulers function as a link between/among the government, both at the federal and the state level and the people at the localities, they mediate and intermediate with people; they equally serve as agents of mobilization and sensitization of the policies and programs of government. There is no way those who perform these laudable responsibilities in the communities can be isolated from the governance activities of the country. The fact that the powers of traditional rulers to operate freely on a matter affecting their communities without consulting the political leaders perhaps inhibit them from nipping in the bud the security lapses in their domains on time, just as the so-called modern security agencies appear incapacitated to handle the challenges.

RESTRAINING FACTORS TO TRADITIONAL RULERS' INVOLVEMENT IN GOVERNANCE OF NIGERIA

One of the factors that seem to be halting the traditional rulers' efforts at maintaining security in their domains is their non-recognition

by the country's constitution. The 1999 constitution of Nigeria as amended failed to accord the traditional rulers any role, nor give them any constitutional responsibility in the political affairs and activities of the country. To this extent, there has been an outcry from traditional rulers and concerned Nigerians requesting constitutional power to be given to traditional rulers to make them a formal partaker in the governance and administration of the country. One of such outcries in recent times was made by Atang following security degeneration in Nigeria, particularly in the middle belt area of the country. To him, the government of Nigeria urgently needs to strengthen the traditional institutions to be more involved in the governance and administrative activities of the country. Atang further states: „*This can be done by assigning a constitutional role to the traditional rulers, giving them more capacity in different models of Alternative Dispute Resolution, especially the monitoring of conflict and early crisis warning signs, as well as getting them involved in the security architecture of states by making them members of the State Security Council"*[1].

The umbrella body of all traditional rulers, otherwise known as the National Council of Traditional Rulers of Nigeria, has also clamored for recognition and inclusion in the governance affairs of the country. The call was made as a result of security lapses that pervades the nooks and crannies of the country. And so, the body has cried out to the Federal Government of Nigeria to immediately address the security challenges tormenting Nigerians. They appealed after they met with Nigeria's President, Muhammadu Buhari at the State House in Abuja. The Etsu of Nupe, Yahaya Abubakar who spoke on behalf of the traditional rulers, states that: "*We gathered ourselves and feel that yes, there is a need for us to come and let the president know that the situation is telling very hard on our people and there is a need to take urgent and immediate steps to actually check the situation…the royal fathers have decided to go back to the old tradition of identifying visitors in their domains and also*

[1] Atang, J. „Traditional leaders and quest for peace, security in the Middle Belt", in *Daily Trust.* (2022, May 3): para. 14-15.https://dailytrust.com/traditional-leaders-and-quest-for-peace-security-in-the-middle-belt [Accessed 11 May 2022].

share intelligence with security agencies, so as to ameliorate the situation. We discovered that the situation is getting too much on our people, our land, our culture, and our tradition. We requested that the president should consider and put us in a position whereby we can directly or indirectly help the situation so as to curtail these excessive insecurity activities"[1].

There is no doubt that Nigeria's constitutions of 1979, and specifically that of 1999 (as amended) weakened the strength of traditional rulers from officially participating in Nigeria's governance activities, as there was no specific constitutional responsibility assigned to them in both the constitutions. The question that "how do they operate without a constitutional backup for their actions?"[2], became relevant as traditional rulers, just like their political officeholders' counterparts need constitutional backing to effectively perform their duties which are being referred to as "constitutional duties". Therefore, it can be inferred that the powers being exercised by the traditional rulers prior to the adoption of the 1979 and 1999 constitutions were completely eroded. And as such, traditional rulers' powers of coercion and enforcement of laws were revoked, for that reason, they can no longer enforce any decision on their subjects. In essence, the modern law enforcement agents have taken over such power from them. Thereby, their subjects may refuse any law, rule, or regulation passed by the traditional rulers, some subjects may even question their authority and challenge them in a court of law. The development has, consequently, limited the power of the traditional rulers to intervene in crises in their domain. Put differently, the lack of constitutional power of traditional rulers is inhibiting them from intervening in the crises, especially at the earlier stage of the crisis. The

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[1] cited in Agency Report, „Address nation's security challenges now, traditional rulers tell Buhari" , in *Premium Times.* (2021, March 11): para. 4-8. https://www.premiumtimesng.com/news/headlines/448324-address-nations-security-challenges-now-traditional-rulers-tell-buhari.html [Accessed 18 May 2022].

[2] Igwubor, J. I.. „Traditional institution and nation building: The role of traditional rulers in the maintenance of national security for sustainable development", in *Unizik Journal of Arts and Humanities, 21(4),* (2020): 201-214. https://doi.org/10.4314/ujah.v21i4.12, 210.

inhibition on many occasions has led to the escalation of the crises that have engulfed, and some of the crises currently plaguing the country.

Another factor that is inhibiting traditional rulers' involvement in security maintenance efforts is funding or low income. While security is a collective responsibility of all and sundry, it requires money to undertake it, especially at the local level of government. The traditional rulers under the contemporary system of government in Nigeria neither have the power to generate resources nor to raise taxes in their domains. Therefore, the preoccupation of many traditional rulers across the country is on how to survive and take care of their families. In the pre-colonial era, the subjects provided all the necessities of life for the traditional rulers. The traditional rulers at the time decided and dictated what they wanted from their communities, which the communities must provide, even in excess. Then, it was regarded as taboo for the traditional rulers to be working, and so, people worked for them. Beyond this, it was believed in some parts of the country that the kings own all the lands and all that were in, or on the lands. By this, the owners of the land should be expected to enjoy it to their fullest satisfaction. But in contemporary times, things have changed, nobody is working for the traditional rulers again for free. While some of the traditional rulers had businesses, they engaged in before they ascended the throne, and they are still operating those businesses by proxy while on the throne, many of them still rely solely on the stipends given to them by the government as monthly salaries. The salaries are grossly poor, which has made some of them seek monetary assistance from politicians. The practice is not only soiling their reputations but also affecting their dignity and integrity. This has equally earned them undeserved names, such as, "errand boy of politicians", and "campaign manager of politicians," among other derogatory names. The traditional rulers who are supposed to be fathers to all are being tossed to and fro, in other to survive the harsh economy in the country.

Although some state governors in the country have reviewed the salaries of the traditional rulers, yet, the salaries remain poor. In a bid to have food on their table, some traditional rulers do not have appreciable time for the communities' affairs. It was as a result of poor remuneration

for traditional rulers that the forum of village chiefs in Kogi Local Government Council, Kogi State, visited the chairman of the council and decried their poor monthly salaries. According to the spokesperson for the forum, the Ohinoyi of Okete, Malam Haruna Ibrahim: the monthly salaries of the traditional chiefs in the local government for some years were nothing to write home about. The Chiefs within the local government will discharge their daily activities effectively well if they have salaries that can sustain them[1]. Lending credence to the issue of poor salaries and financial status of traditional is Jerry Obasi who himself is a traditional titleholder in the south-eastern part of Nigeria. According to him: "*In some states, traditional rulers get as low as N20,000 monthly, this is not enough to fuel their vehicles, maintain their families, and not to talk of monies they spend to host visitors in their palaces. They are the government at the grassroots level, but nothing is being done to encourage them. Traditional rulers deserve more attention from the government".*[2]

To this extent, traditional rulers' financial plight needs to be looked into. They need more resources to meet their daily needs and to be actively involved in the security matters of their localities. In line with this, traditional rulers could be parts of beneficiaries of security votes or grants (security budget) like their political officeholders' counterparts. This will help them to face squarely the business of securing their localities and other business of governance instead of going around begging to survive financially.

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[1] Daily Trust. „Kogi village chiefs, ward heads decry poor salary", in *Daily Trust.* (2021, January 8). https://dailytrust.com/kogi-village-chiefs-ward-heads-decry-poor-salary [Accessed 18 February 2022].

[2] Obasi cited in Okoli, Anayo, Okonkwo, Nwabueze, Alaribe, Ugochukwu, Alozie Chinoso, Odu, Ikechukwu, Oko, Steve and Iheaka, Emmanuel. „Insecurity: Monarchs seek more powers to man rural communities", in *Vanguard* (December 22, 2021): para. 38. https://www.vanguardngr.com/2021/12/insecurity-monarchs-seek-more-powers-to-man-rural-communities/ [Accessed 18 May 2022].

CAN TRADITIONAL RULERS DO ANYTHING ABOUT THE INSECURITY SITUATION IN THEIR LOCALITIES?

While it is true that the 1999 Nigerian constitution (as amended) failed to officially recognize the traditional rulers by not assigning them any constitutional responsibility, can the traditional rulers do anything concerning the security challenges in Nigeria?

The fact that traditional rulers have no constitutional responsibility and are not dully recognized by the country's constitution has made them non-committed, non-responsible, and not answerable for security lapses in their various domains. The usual approach of the government, calling the traditional rulers up whenever insecurity ensues in parts of the country and tasking them to maintain security at all costs or be sanctioned, appears absurd. If traditional rulers are important in modern-day governance, and to their politicians' counterparts, especially in the areas of security maintenance, there is a better way of doing it. The better way of doing this is by giving them a place in the country's constitution and making them swear to uphold the constitution like their political officeholders' counterparts. By this step, they formally become part of the government in their localities, states, and country at large, and as such, they have the constitutional responsibility to which they are committed.

Although it has been argued in some quarters as to whether traditional rulers need constitutional powers to be actively involved in the security matter of their localities. For instance, Damian Opata, a Professor at the Department of English and Literary Studies, University of Nigeria, Nsukka. And, the President of *Ohanaeze Ndigbo*, (an Igbo socio-cultural organization that represents the interests of the Igbo ethnic group), Nsukka Local Government Area of Enugu State Chapter, argues that traditional rulers do not need to have constitutional powers before they can fight insecurity in their neighborhoods. To him, granting constitutional powers to traditional rulers in Nigeria would be structurally problematic. According to him „*This would create structural problems for the country. Is the traditional ruler going to be like another local government chairman? ...where you have up to 30 to 40 autonomous*

communities, will the people obey the traditional rulers, the local government chairman, the state, or the federal government? I am looking at it from the point of view of having the 4th tier of government which would be problematic for the country. Will the traditional rulers now have their police? If different communities have their police system, won't there be clashes within the communities?"[1].

Having said this, traditional rulers cannot fold their arms and watch until security lapses engulf their territories. They can still offer advice to the government probably through the local government chairmen. Given the fact that they know the nooks and crannies of their localities, they can easily identify and expose the hideout of criminals. Tradition rulers can identify new faces or visitors in their localities. They can also share intelligence with security agencies to curb the security menace. Since they still enjoy a modicum of respect from their subjects, they can operate through a vigilante group to monitor those people that are moving in and out of their localities.

For the reason that; they are still the custodians of traditional cultures and powers, they can use this to checkmate some cases of insecurity. They can achieve this by administering oaths to their subjects, using the traditional deities. This is because traditionally, it was believed that the deities or gods of the land were more potent than the modern security system being adopted and applied by security agencies. Besides, the use of the deities or gods of the land has been proven more effective than the use of courts. The potency and efficacy of the deities or gods of the land make fear grip the people, be it; the rulers, the ruled; the high; the mighty; the rich, or the poor. The fear that whoever is guilty; or acts contrary to the laws of the land; and swears a false oath using the deities and the gods of the land will be struck to death within the stipulated times. In this wise, traditional rulers, as part of their involvement in security maintenance, can bring any suspected subject before the deities and god of the land and administer oaths to them. The repercussions on the guilty subjects will serve as a deterrent to others who may want to

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[1] Opata cited in Okoli, *et.al*, „Insecurity: Monarchs seek more powers to man rural communities": para. 28-30.

partake in any criminal activity that can bring insecurity to their localities.

With all said, the security of the environment; should be seen as a collective responsibility of all and sundry. Securing the environment in contemporary times can be seen as voluntary duty or engagement, especially at the community level, as local people have continued to help themselves through "alternative community development efforts". And as such, whether recognition is accorded to traditional rulers in the constitution or not, whether they are given constitutional responsibility or not, there is a need for them to get themselves involved in the security matters of their localities. Their cooperation is needed; with other stakeholders in the security matter so that; peace and tranquility will reign in their localities and Nigeria as a whole. Traditional rulers are, after all, citizens of their localities and Nigeria before they become traditional rulers. They cannot, therefore, afford to see their beloved villages and communities consumed by insecurity under their noses. There is no doubt that the traditional rulers are doing something regarding security challenges in their localities and the country as a whole, they can do more, despite their non-officially recognition by the country's constitution.

CONCLUSIONS

The history of Nigeria in the last sixty-two years, no doubt, cannot be completely dissociated from the challenge of security, especially the security of lives and properties, either during the civil war or the recurring violent conflicts that pervade the nooks and crannies of the country. Prior to Nigeria's Fourth Republic, the traditional rulers, seen as gatekeepers at the localities, were dully recognized and were given a place in the governance and administrative activities of the country, and so, their effort in maintaining peace and security in their localities cannot be overemphasized. They were able to promote peace and security because they possessed enough powers derived from the norms and values of their societies, and were officially recognized; by the country's constitutions. Along the line, the roles of the traditional

rulers were abrogated and left without any constitutional powers and officially assigned responsibilities, just as insecurity pervades the country. Therefore, the study concludes, that although traditional rulers are contributing in little way to curtail the menace of insecurity in their neighborhoods, their non-recognition by the Nigerian constitution notwithstanding, they can, however, contribute more if they are dully recognized; and are allotted constitutional responsibilities.

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ASPECTS OF THE PROCESS OF GOVERNANCE IN CONTEMPORARY STATES

Andrei SMOCHINĂ [1]
Ion CEBANU [2]

Abstract:

This article addresses the issue of the governance process, the notion of governance in contemporary states, its characteristics, as well as some aspects related to this process in the Republic of Moldova. Talking about the aspects of the governance process, concepts such as: state power, form of organization of society, with some contemporary characteristics, but also the phenomenon of globalization and its consequences for state power and the state as a whole, are simultaneously addressed. In the same way, the issue of the evolution of the state administration and the trend at the international level regarding its reform are also addressed.

Key words: *state; state power; governance; local democracy; globalization; civil society; public administration; the new public management..*

INTRODUCTION

Public procurement, the process by which public authorities purchase work, goods or services, makes up a substantial part of the

[1] Doctor habilitate in legal sciences, University Professor, International Free University from Moldova (ULIM), email: asmochina@ulim.md
[2] PhD student, International Free University of Moldova (ULIM), email: ion919991@gmail.com

economies of the European Union Member States.[1] A correct set of the range of bodies (ratione personae) and contracts (rationae materiae) to which the procurement regulation applies is crucial. This provides the initial starting point that defines the remit of the public procurement regulation. One of the most important factors for the applicability of the procurement regulation is the existence of a public contract.

Contractual agreements provide the legal basis for the provision of work, goods or services to the contracting authority. Value for money in public procurement contracts starts with an effective, transparent and competitive procurement process. Public procurement contracts must receive special attention from the contracting authorities, considering their importance in the process. Their relevance is determined by the value of the contracts, the complexity of the object of the contract, the risk of the unforeseen situations in the execution of the contract leading to the necessity of changing the contract, the long-term negative impact of the inadequate quality of the works, generated by the insufficient preparation of the awarding documentation.

Based on the interpretation provided by CJEU, especially in *Aroux*[2] and *Scala*[3] in is clear that the public contract is a EU concept, which must be interpreted in a functional way. There are several aspects that support the approach taken by CJEU, as a different interpretation would allow the Member States to create different forms of public contracts and this would result in a distinct application of the rules on EU public procurement in practice.

This article aims to analyze the impact of the legal nature of the public procurement contract under Romanian law bearing the supremacy of the European law.

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[1] According to the European Commission it accounts for more than 14% of EU's GDP. For more upon this topic see https://ec.europa.eu/growth/single-market/public-procurement_en, last accessed 09.04.2022

[2] C-220/05, *Jean Auroux and Others v Commune de Roanne*, ECLI:EU:C:2007:31.

[3] C-399/98, *Scala*, ECLI:EU:C:2001:401.

THE CONCEPT OF PUBLIC CONTRACT UNDER EU DIRECTIVE ON PUBLIC PROCUREMENT

The concept of the "public contract" represents the starting point in assessing the scope of application of the public procurement regime. The public contracts are defined in Article 2(1), (5) of 2014/24 Directive as being "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services". The Directive goes further and provides specific definitions for works, services and supply contracts. According to the definition from the Procurement Directive, the understanding of an agreement as a public contract can sometimes be a difficult task. Defining the scope of an application of the procurement legislation, a distinction has to be made between public procurement contracts and other types of measures that may seem similar to them, such as concession contracts, in-house procurement, exclusive rights or authorization schemes[1]. It is essential to classify an arrangement between a contracting authority and a private entity (sometimes even a public entity), because the public procurement rules only apply to public contracts.

Important indications about how this definition should be interpreted has been provided by the CJEU[2]. It must be stated from the beginning that the public contract is a EU concept that must be interpreted in a functional way at EU level. The European Court has

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[1] For an extensive evaluation of the way the concept of public contract is defined in different Member States and the criteria used in order to separate them from other types of legislative measures, administrative decisions, or other arrangements, see Ulla Neergaard and Catherine Jacqueson, Grith Skovgaard Ølykke (Eds.), *Public Procurement Law. Limitations, Opportunities and Paradoxes,* The XXVI FIDE Congress in Copenhagen 2014, Congress Publications, Vol. 3 (Copenhagen: DJØF Publishing, 2014).

[2] For a research upon the developments in the Court's case law related to the concept of public contracts, see C. Bovis, "Public Procurement in the EU: Jurisprudence and Conceptual Directions*", Common Market law Review* No. 49 (2012): 247-289.

emphasized this in Aroux Case (in paragraph 40 of the judgement), holding that "the definition of the public works contract is a matter of the Community Law". The Court went further and pointed out that the legal classification of the contract from the Member State (in this case France) is irrelevant[1], in order to determine the scope of the Directive. Any other interpretation that would allow the Member States to bring their own definition and classification of the public contract would lead to different applications of the procurement regulation in practice. We are here in the presence of the use of a systemic argument based on the consistent use of a concept throughout the legal system of the EU public procurement law[2].

THE CONCEPT OF PUBLIC CONTRACT UNDER ROMANIAN LEGISLATION

Being in the presence of a legal definition of the public contract, set by EU regulation, the Romanian legislator has just translated the definition from the Directive and added one issue, its assimilation to the administrative act. Public procurement contract is a contract for pecuniary interest, assimilated, according to the law, to the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services[3].

Romania was influenced by the French view of the public procurement contract. Within the EU there are different theories related to the public/private nature of a public procurement contract. It is a debate about the existence of a third autonomous model regarding the legal nature of the contract[4], but the dualism between the French and the British model is obvious.

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[1] See also *Scala*, C-399/98, ECLI:EU:C:2001:401.

[2] M. Ukkola, *Systemic Interpretation in EU Public Procurement Law* (Helsinki: Unigrafia, 2018), 141.

[3] Art. 3 par. 1 let. L from Law No. 98/2016.

[4] J. B. Auby, "Comparative approaches to the rise of the contract in public sphere", *Public Law*, I. (2007): 40-57. M. Fromont considers in *Droit administratif des Etats*

In general, in common law jurisdiction, there is no formal divide between public and private contracts[1]. The public procurement contract is considered as a civil law contract and does not have an independent status. Quite the opposite, there is another category of jurisdictions that recognizes the public procurement contracts as a disctinct category, as administrative contracts. This category has been developed in France and includes jurisdictions such as Belgium, Spain, Finland, Portugal, Romania. In other countries such as Austria, Denmark, Estonia, Poland, Sweden, Germany, Italy there are no specific set of rules for all public procurement contracts. In these countries the public contracts are governed by the general principles of contract law, but are also subject to certain principles drawn from administrative law.

This classification of the public procurement contracts into three different models takes into consideration the execution phase and not the awarding procedure for which there is only one possible model: the public one. It is in fact undisputable that, in the European Union the award of public procurement contracts are governed by public law, which is stemming from EU Directives on Public procurement[2] . However, even for the execution phase of the contract, the models are quite similar. They all include rules that allow the contracting authority to modify or unilateraly terminate the contract, which are much wider than the powers normally awarded to private parties, even if they are however limited in order to obide the competition rules[3]. With the new directives from 2014

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europeens (Themis Droit, 2006) that this is not a third model, but rather an evolution of the French

[1] In USA, England and Wales there are specific statutory rules that govern public procurement contracts. However, there are different standard terms elaborated by the government. For a research about government contracts and their regulation, see A.C. L. Davis, *Accountability. A Public Law Analysis of Government by Contract* (Oxford: Oxford University Press, 2001).

[2] M. E. Comba, "*Contract Execution in Europe: Different Legal Models with a Common Core", EPPPL*, Vol. 04 (2013): 305.

[3] M. Comba, "Retendering of Sale of Contract in Case of Bankruptcy of the Contractor? Different Solutions in an EU and Comparative Perspective", in G. Piga and S. Treumer (Eds.), *The Applied Law and Economics of Public Procurement* (London, New York: Routledge), 204.

that include special provisions regarding the possibility of amending the contract and terminating it the differences between the models have become even less proeminant.

From the definition found in the Law 98/2016 it is obvious that the legislator decided to keep the legal provision according to which the public procurement contract[1] is assimilated to the administrative[2] act.

The concept of the *administrative contract* has French origins. It represents a creation of the jurisprudence of the Conseil d'État that has been further developed and systematized by the doctrine, especially through the works of Gaston Jèze [3]. In France, in order to give the private persons the possibility to redress in case they were affected by the exercise of public powers a system of administrative courts was created, separate from the regular judicial ones. As a consequence, the Conseil d'État, [4] which was originally an advisory body[5] within the

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[1] See also P. Craig, "Specific Powers of Public Contractors", in R. Noguellou, U. Stelkens (Eds.), *Droit comparé des contracts publics*, 173 et seq.

[2] For a paper that seeks to reframe the comparative administrative law as an accountability network of rules and procedures designed to embed public administration and civil servants in their liberal democratic societies, see F Bignami, "From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law" (2011): 59 Am. J. Comp. L. 859.

[3] See G. Jèze, *Les principes généraux du droit administrative* (Paris: Berger-Levrault, 1904) and G. Jèze, *Cours de Droit Public, Theorie Generale des Contrats de l'administration* (Paris: Edition Marcel Girard, 1933).

[4] Nowadays the Conseil d'État has a dual function, both jurisdictional and consultative: it is the ultimate judge of the actions of the executive, of local government, of independent authorities or of any other public administration establishment which possesses prerogatives of public power and also the Government's advisor in matters concerning the preparation of draft legislation, ordinances and certain decrees. For further details, see the Conseil d'État, Complete Guide, available at http://english.conseil-etat.fr/content/download/67555/616460/version/1/file/Pdf_complet_versionanglaise-18p.pdf, last accessed 13.03.2022.

[5] It was created in 1799, after the French Revolution, as an advisory body for the Government with no judicial functions. In 1870's the Conseil d'État became a true administrative court without giving up its advisory role. The process is detailed in S.-R. Ackerman, "Policy Making and Public Law in France: Public Participation, Agency

administration, evolved into an administrative court. As for the competence of the Conseil d'État, it was admitted that the said court had competence not only over matters for which specific statutes attribute explicitly this competence to this court, but also that, by virtue of the 1790 Act, it enjoyed jurisdiction over all administrative matters[1].

Due to the appearance of a separate administrative jurisdiction there was the need to set criteria in order to establish the nature of a *contrat administratif* entered into by the Administration. There are two contractual concepts according to French law: *contrat de droit civil* (droit prive or droit commun) and *contrat administratif*. The contract that is of special interest from a public procurement point of view is the *contrat administratif*. It is a contract for the performance of a public service, in which the parties have intended that all rights and liabilities should be governed by the special applicable rules[2]. The differences between the two concepts would require more space, because it is considered one of the most intricate issues of French administrative law. In addition to the contracts that are considered administrative by a statute, in order to qualify an agreement as administrative contract it must meet two requirements: the existence of exorbitant terms[3] in the tender book and the inclusion of one of the parties in the category of administrative authorities[4].

Independence and Impact Assesment", Faculty Scholarship Series, Paper 4946. http://digitalcommons.law.yale.edu/fss_papers/4946, last accessed 13.03.2021.

[1] E. Piccard, "The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law", in M. Ruffert (Ed.), *The Public Private Law Divide: Potential for Transformation?* (London: British Institute of International and Cooperative Law), 50.

[2] A. W. Mewett, „The Theory of Government Contracts", *McGill Law Journal*, Vol. 5, Issue 4 (1959): 222-246.

[3] Clauses in a contract are exorbitant if "their object is to confer rights or impose obligations upon the parties quite unlike in their nature compared to those which anyone would freely agree to in the context of civil or commercial law" (CE 20 October 1950, STEIN). For further details see L. N. Brown and J. S. Bell, *French Administrative Law*, 142 et seq.

[4] G. Pequignot, *Theorie generale cu contrat administratif* (Université de Montpellier, 1945), 169-175. *Apud* L.-T. Pascariu, "The Distinction of the Administrative Contract

Regarding the existence of administrative contracts, in Romania, until the adjustment of the Constitution from 1948, our literature has expressed three major opinions: acceptance of the theory of administrative contracts in a narrow sense, rejection of any theory related to administrative contracts (it starts from the theory of the division of the acts of the public administration in acts of authority and act of a managerial nature) and acceptance of the theory in a broad sense[1]. The first opinion was promoted by E. D. Tarangul[2] and I. Vantu. The theory of administrative contracts appeared in some decisions of the Court of Cassation, section III[3] that found that the administration can conclude with individuals, for the purpose of public service either private law contracts governed by civil common law or administrative contracts, governed by public law. The contrary opinion, that denies the existence of the administrative contract starts from the thesis of L. Duguit, respectively from the theory of the division of the acts of the public

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from other Types of Contracts", The Annals of the "Ștefan cel Mare" University of Suceava, Fascicle of The Faculty of Economics and Public Administration, 408. The fact that the administration is a party in a contract does not necessarily transform the contract into an administrative one. The particular characteristics of each contract transform it in either an administrative, or a private contract.

[1] See A. Iorgovan, *Tratat de drept administrativ* (Bucharest: All, 2005), 108. See also M. B. Petrișor and A. Badia, "Analysis of Public Procurement Contracts in the EU Member States and their Implications", *Journal of Public Administration, Finance and Law*, Issue 3 (2013): 115.

[2] E. D. Tarangul, *Tratat de drept administrativ roman* (Cernauti: Tipografia Glasul Bucovinei, 1944), 480-482.

[3] Decision No.279/1929 V. Roata: the court held that in order for the contract to be considered as an administrative one, the parties must agree to be governed by the special regime of public law, Decision No.1917/1934 I. Aron: the court held that as long as the parties have set the competence of the ordinary court, Ilfov Tribunal, to solve the disputes that may appear during the execution of the contract, the contract cannot be considered as an administrative one, but a civil one. For more on these decisions, see Constantin G. Rarincescu, *Contenciosul administrativ roman* (Bucharest: Universul Juridic, 2019), 198. According to the rulings of the Court of Cassation in order for the contract to be considered as an administrative, one the parties must agree for it to be governed by the special regime of public law and also upon the competence of the administrative courts to solve the disputes that might arise during its performance.

administration in acts of authority and act of a managerial nature[1]. In the light of this theory the concession contract was a mere civil-law contract subject to ordinary courts[2]. The third theory considers as administrative contracts all contracts concluded by the public administration.

During the communist era, as Iorgovan points out, it was difficult to support the theory of administrative contracts as long as the distinction between the public and the private property of the state did not exist any more and the order of the day were the "economic contracts"[3]. The period after 1989 can be considered as a new phase in the evolution of the theory of administrative contract, starting with the provisions of the Constitution form 1991 that recognizes its existence and expressly qualifies it as administrative contract[4]. However, there are rules for special administrative contracts without a developed general framework representing the ordinary law in the field[5].

The contracts considered of an administrative nature[6] have a series of characteristics that differentiate them form contracts that are governed by private law:

– At least one of the contracting parties is an administrative authority;
– Mandatory written format;
– It is governed by specific public law regulations;

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[1] Iorgovan, *Tratat de drept administrativ*, 110.

[2] I. Lazar, "Contractul administrativ in activitatea administratiei publice (The Admnistrative Contract in the Activity of Public Administration)", *Revista Transilvana de Stiinte Administrative*, No.1 (25)/(2010): 98.

[3] Iorgovan, *Tratat de drept administrativ*, 102.

[4] V. Vedinas, *Drept administrativ* (Bucharest: Universul Juridic, 2015), 139.

[5] For more details on this, see A. Tabacu, „Scurte consideratii asupra contractului administrativ si asupra procedurilor de control jurisdictional in materia achizitiilor publice", *Revista Transilvană de Ştiinte Administrative*, 1(23)/(2009): 67-88.

[6] For an overview of the administrative contracts in Romania, see N. Gamenț-Antoniu and C. G. Zaharie, "The Field of Administrative Contracts in the Romanian Positive Law Related to the Provisions of art. 2 item (1) let. C)" from Law No.554/ 2004, Regarding the Administrative Legal dispute, Contemporary Legal Institutions, 2(1), 40-46.

– The parties must accept some special clauses established by law or according to the law, by means of government decision[1];
– The contract has a special regime which confers certain powers of control to the public administration[2];
– The contracting authority has the right to unilateral modification or cancellation when it deems to be in the public interest or the contractor breaches the contract or it becomes unreasonable or impossible[3] for him to execute the contract;
– The state in its transactions is not in an equal bargaining power with other private entities[4]. There is a juridical inequality (subordination of the private entity towards the public authority);
– The *intuitu* character of the contract, as cessation is only allowed with the permission of the public authority[5];
– There are special tribunal entrusted with deciding matters related to an administrative contract, i.e Contentious Courts.

Regarding the legal nature of the public procurement contract, we may speak about an ongoing controversy, i.e civil/commercial or administrative[6]. One of the reasons for this non-consistent qualification of the procurement contract was the continuous alteration of the legal framework related to public procurement specially regarding the

[1] M. A. Rațiu, *Dreptul achizițiilor publice*, Vol. 1 (Bucharest: Universul Juridic, 2017), 58.
[2] C. Ionaș, "The Administrative Agreement as a Legal Form for Public Services in Comparative and Roman Law", *Bulletin of the Transilvania University of Brașov*, Vol. 5 (54), No. 1 (2010): 104.
[3] M. P. Singh, "German Administrative Law", in *Common Law Perspective* (Berlin, Heidelberg: Springer Verlag, 1985), 53.
[4] M. Ismail, *Globalisation and New International Public Works Agreements in Developing Countries* (New York: Routledge, 2016), 9.
[5] Pascariu, "The Distinction of the Administrative Contract from other Types of Contracts", 409.
[6] For a paper that discusses the problems that may appear due to the qualification of a FIDIC contract (used in major infrastructure projects) as an administrative contract see Z. A Bamberger, „Statute of Limitation in FIDIC Contracts Concluded in the Public Procurement Procedures", *Romanian Construction Law Review* (2016): 49-54.

competent courts[1] on solving the complaints against the acts/actions taken by the contracting authority. The Romanian Courts were very helpful, because there were many contradictory decisions upon this matter[2].

Government Ordinance 12/1993 and EGO 60/2001 with the subsequent amendments as the Romanian public procurement legal framework did not include any express mention related to the legal nature of the public procurement contract. Nevertheless, the doctrine considered this contract as an administrative one[3]. This perception continued after the adoption of EGO 34/2006. If one analyzed the evolution of the legal framework starting from 2006, the Romanian legislator was not constant regarding the legal nature of the public procurement contract. The legislator was pending between an administrative and a commercial nature of the public procurement contract. These constant changes were not doing any good to the Romanian public procurement system. Quite on the contrary, in long term, this legal uncertainty and the resulting arbitrariness of the procurement process may permanently discourage some economic operators from participating in expensive tendering procedures, which could provoke further efficiency losses[4].

The strangest situation appeared in 2010[5], when from the legal provision resulted a mixed character of the discussed contract: an administrative contract for the pre-contractual phase and a commercial

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[1] For a research regarding the competence of the contentious administrative courts for direct actions or the illegality plea, and remedies in administrative litigations, see E. M. Fodor, "The Current Form of Law 554/2004 of the Administrative Contentious", An. Inst. de Ist. „G. Bariţiu" din Cluj-Napoca, Series Humanistica, vol. XII (2014): 279–290.

[2] See the Decision of the Bucharest Court of Appeal 18/18.01.2010: the Court considered the public procurement contract and the subcontrancting agreement as administrative contracts.

[3] For a study that considers the contract as administrative, see D.C. Dragoș and D. Buda, "Considerații teoretice privind noul cadru juridic al încheierii contractelor de achiziție publică", *Revista Transilvană de Științe Administrative*, nr. 1(7)/(2002): 201-221.

[4] C. Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2012): 466.

[5] EGO 34/2006 was changed through EGO 76/2010 and Law No. 278/2010 (published in the Official Gazette of Romania No. 898 from 31.12.2010).

one for the execution phase of the contract. The said bill adopted a new definition of the public procurement contract. The only element of novelty was represented by the qualification of the contract as a commercial one[1]. The legislator explained this change as a need for an improved matching of the legislative framework[2]. It could be considered anything, but for sure not a correlation with the legislation in force. According to article 2, par. 1, letter c form Law no. 554/2004 on administrative litigation[3] the administrative decision is *a unilateral decision issued for specific purposes or for regulatory purposes by a public authority with a view to enforcing or ensuring the enforcement of the law, thereby generating, modifying or extinguishing legal relationships; for the purposes hereof, on a par with administrative decisions shall be those contracts entered into by public authorities and having for an object: to capitalize on public property items; to perform works of public interest; to provide public services; public procurement. Special laws may establish other categories of administrative contracts that come under the jurisdiction of Administrative Litigations courts.* As Law no. 554/2004 (organic law) considers the public procurement contract as administrative we cannot help wondering where is the correlation with the legal framework. As for a correlation with the European regulation[4] on public procurement contract again it is not a solid argument. Directive 2004/18/EC considered public contracts as *contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or*

[1] See Decision No. 1402/01.06.2012 of Bucharest Court of Appeal.

[2] The commercial character of the public procurement contract was an amendment brought by the Deputies Chamber as the decisional chamber. The legislative process is available at http://m.cdep.ro/pls/proiecte/upl_pck.proiect?idp=11427, last accessed 07.10.2020.

[3] Law No.554/ 2004 on administrative litigation published in Official Gazette No. 1154 from 07.12.2004.

[4] When detecting a failure to comply with Community law, the Commission may initiate the infringement procedure against a member state for failing to implement EU legislation.

the provision of services within the meaning of this Directive[1]. It is clear from the wording of the Directive that the European legislation did not impose the legal nature of the public procurement contract. It is the member states' duty to transpose the Directive at a national level and they have the possibility to consider the public procurement contract as either a private one or an administrative one[2]. The only correlation that the legislator was possibly considering was the one with the regulation from EGO 76/2010[3] which stated the competence of the commercial tribunal as a first instance court regarding public procurement contract litigations. According EGO 34/2006 as modified by EGO 76/2010: "The trials and applications for granting compensations for reparation of damages caused in the awarding procedure, as well as those concerning the execution, the nullity, cancellation, resolution, termination or unilateral termination of public contracts are settled in the first instance by the commercial department of the tribunal in the jurisdiction of which the contracting authority is headquartered"[4]. The Romanian legislator started somehow with the end: first awarded the commercial courts the competence to solve the disputes related to public procurement contracts. Perhaps it has proceeded in such a way for the exact reason to justify the "legislative correlation" when it qualified the public procurement contract as a commercial one.

The qualification of the public procurement contract as commercial raised serious problems as the rules of civil law were applicable instead of special regime of administrative contracts[5] i.e there

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[1] Art. 1, par. 2, letter a.

[2] Another state that considers the contract as administrative is France. The relevant legislation in France is Ordinance no 2015-899/23.07.2015 on public contracts and Implementation Decree no 2016-360/25.03.2016 on public contracts that transpose the European directives on public procurement and entered into force on April 1st, 2016.

[3] Government's Emergency Ordinance 76/2010 for amending and supplementing Government's Emergency Ordinance No. 34/2006 regarding the award of public procurement contracts works concession contracts and services concession contracts, published in the Official Gazette of Romania No. 453 from 02.07.2010.

[4] Art. 286 from GEO 34/2006 amended by GEO 76/2010.

[5] See decision 3553/10.10.2012 of the Vâlcea Tribunal. According to the said decision, as the public procurement contract is a commercial contract the parties are equal and the

is no subordination towards the public authority, but a equality of the contract parties, the contracting authority does not have the right to invoke the public interest in order to adapt the terms of the existing contract to the actual needs[1], the applicability of the exception *non adimpleti contractus*[2] and the list may go on.

By means of the same amendment the action regarding the review of decision taken in the pre-contractual stage of a public procurement contract before the Council became mandatory[3]. It was an odd solution adopted by the Romanian legislator who claimed that otherwise access to EU funds will be blocked by lengthy court proceedings[4]. Depending on the stage in the award of the public procurement contract the legal actions regarding the review of decisions had to be brought before different review bodies: the National Council for Solving Complaints for the pre-contractual stage and courts of law (commercial department of the tribunal in the jurisdiction of which the contracting authority is headquartered) for actions related to decisions after the conclusion of the contract. Before this moment the complainant had the possibility to choose between the National Council for Solving Complaints[5], a body

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economic operator has the possibility to ask the commercial tribunal for delay penalties as in any other private commercial contract, by using the simplified procedure provide by Emergency Government Ordinance 119/2007 concerning measures to combat late payments in commercial transactions.

[1] According to the principle of Fait du prince, the unilateral and unpredictable power of the public authority to modify the existing contract is mitigated by the requirement that the contractual equilibrium should be maintained and that any changes imposed by the administration should be compensated appropriately. See J. Bell and S. Boyron, S. Wittaker, *Principles of French Law* (Oxford: Oxford University Press, 2008), 197.

[2] One party (in this case the economic operator) has the possibility to invoke this exception and to withhold his or her own performance until the other party duly performed his or her obligations under the contract.

[3] This procedure became mandatory through Law No. 278/2010 the approval law of EGO 76/2010.

[4] D. Dragoș, "Alternative Dispute Resolution Mechanism in the Field of Public Procurement: Between Effectiveness and Constitutionality", *Transylvanian Review of Administrative Sciences*, No. 34 E (2011): 101.

[5] In case the economic operators decided to lodge their initial complaint with the Council and was not satisfied with the decision, they had the possibility to introduce an

with administrative-jurisdictional activity and the court of law, the Administrative and Fiscal Section of the tribunal being competent in the first instance. The Constitutional Court Decision no. 284/2012[1] was the decision that put an end to the doctrinal debates and the difficulties from a practical point of view related to the mandatory character of the review before The National Council for Solving Complaints[2].

As of 1 January 2013, by means of Government Emergency Ordinance no. 77/2012[3], the public procurement contract was re-qualified as an administrative contract, as opposed to a commercial one. Starting from that moment the legal provisions applicable to administrative contracts were applicable (again) to public procurement contract. The administrative courts gained back the competence for handling complaints against public procurement contract that were already concluded.

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appeal against the decision to the Appellate Court as the recourse instance. There were several pleas of unconstitutionality against this legal provisions related to the limitation of free access to justice and the absence of the first court instance. The Constitutional Court ruled that the administrative procedure before the Council is constitutional and it does not represent a limitation to the free access to justice since it is elective and free of charge (Constitutional Court of Romania, Decision No. 230/4.08.2008, published in the Official Monitor of Romania No. 300 from 17.04.2008). For a detailed presentation of the decision of the Constitutional Court see D. Dragoș, „Alternative Dispute Resolution Mechanism in the Field of Public Procurement: Between Effectiveness and Constitutionality", 108 et seq.

[1] Constitutional Court of Romania, Decision No.284/27.03.2012 published in the Official Gazette of Romania No.344 from 21.05.2012

[2] The Court held that the person who intends to introduce a complaint against the act/action taken by the contracting authority within the award procedure of a public procurement contract has the possibility to choose between a review before the Council or going straight to court. By this decision it became clear (again) that the complainant is allowed to resort either to the discussed administrative body or choose the judicial way according to their own choice. The Constitutional Court explained the reason that the legislator had introduced this administrative procedure was the fact that it is seen as an efficient and fast procedure for preventing the possible abuse of the contracting authority within the public procurement procedure.

[3] Government Emergency Ordinance No.77/2012 published in the Official Gazette, Part I, No. 827/10.12.2012 amended Government Emergency Ordinance No. 34/2006.

From the definition found in Law no. 98/2016, it is obvious that the legislator decided to keep the legal provision according to which the public procurement contract is assimilated to the administrative act.

However, with the amendments brought in 2018[1] to the Remedies Law that shifted once again the competence to solve the legal disputes regarding the performance of the contract from the divisions for administrative and fiscal litigations of the tribunals to the civil ordinary courts in whose jurisdiction the contracting authority is headquartered the controversy about a change in the legal nature of the public procurement contract was again raised. Was it in the intention of the legislator to consider again the public procurement contract as a civil one?

We are of the opinion that the choice of the legislator to select the jurisdiction of the civil ordinary courts for actions concerning the performance of the public procurement contract does not represent a change of the legal nature of the contract, from an administrative into a civil one[2]. The dissociation between the courts that are competent to solve disputes related to breaches to public procurement legislation regarding the valid conclusion of the contract - annulment or nullity of the contract (purely public law issues) and the ones competent to solve issues related to the execution of the contract may be justified by the fact that after the valid conclusion of the contract the court has to analyze the way the contract is being implemented which is closer to civil legal mechanism[3].

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[1] Law 101/2016 was amended by Law 212/2018 Published in the Official Gazette no. 658/30.07.2018.

[2] In the substantiation of grounds for Law 212/2018, the lawmaker has declared that the intention for resorting to such a solution was to balance the volume of activity among the various departments of the court.

[3] See also O. Puie, "Consideration Regarding the Jurisdiction of the Courts That Settle Disputes Regarding the Execution of Public Procurement Contracts, Sectoral Procurement Contracts, Concession Contracts as Well as the Procedure for the Execution of These Judgments", *Universul Juridic*, No.11 (2018).

CONCLUSIONS

Bearing the supremacy of the European law, the CJUE has stated on several occasions the fact that a public procurement contract must respect the European legal framework irrespective of the legal regime (public or private) that governs its terms according to a national legislation[1].

Taking into consideration the present Romanian law system, we join the authors that consider appropriate to qualify the public procurement contract as an administrative contract. Special attention must be given to principle of public interest[2] in public procurement contracts. In is true that the provisions of the Article 8(3) of Law No. 554/2004 on administrative litigation enshrines the principle that contractual freedom in administrative contract is subordinated to the principle of priority in the public interest[3], but as can be seen in different ares of the Procurement Directive there are many circumstances where the European legislation seems to favor the prevention of distortion of competition and a general protection of economic operators, rather than looking exclusively over the „imediat" public interest[4]. The contracting authority does not have the right to justify its actions on administrative contract theory when they are contrary to the European regulation.

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[1] C-264/03, ECLI:EU:C:2005:62.

[2] See C.S. Sararu, "The Interpretation of Administrative Contracts*", Juridical Tribune*, Vol. 4, Issue 1 (2014): 153.

[3] See O.Puie, *Contractele administrative în contextul noului Cod civil şi al noului Cod de procedură civilă* (Bucharest: Univers Juridic, 2014) 7.

[4] This may be seen in certain areas of contract modification; e.g the right to change the contractual partner, which is allowed only under certain precise conditions, even if continuing the contract would be in the best interest of the contracting authority, or in the cases of the unilateral termination of the contract as seen by Article 73 of the Directive (the need to terminate a contract where material amendments have been brought to a public contract, where the contract should not have been awarded to the said economic operator due to the existence of ground/s of exclusion in its concern).

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GOOD GOVERNANCE AND THE NEED TO REGULATE. IS IT REALLY NECESSARY TO REGULATE? AN INTRODUCTION

Marius VACARELU[1]

Abstract:

The first problem that a man interested in the idea of government has today is that of the quality that political power and public administration can offer to citizens. From this perspective, one will either observe the quality of the political class but the poor performance of public administration, or the other way around – obviously, both negative and positive results of both are possible. However, most governance issues will be analysed at a limited, empirical level, seeking to identify an easy relationship between cause and effect. Obviously, this perspective is that of average human intelligence, but we cannot ignore the fact that it may be higher, as a result of education and today's huge access to sources of information – or lower, for various and not always controllable reasons (e.g. those of a biological nature).

Having reached a higher level in the political-administrative hierarchy, the man who analyses governance has to observe realities and correct shortcomings. This is not easy, and short-term interests can end up blocking a stable and long-term development perspective. In this perspective, this man has to choose the best among the possible instruments, trying to provide a coherent vision for institutions and systems of public and private law.

As a rule, action is preferred, and less the reduction of political-administrative force. Among the most common forms of action is the regulation of any situation, with variable effects and frequency. But it is necessary to ask ourselves – and we will do so briefly in this text – whether it is not better to use regulation less often, thus reversing a trend that has been common to the states for many decades.

[1] **Lecturer PhD, National School of Political and Administrative Studies, Bucharest, (Romania), marius333vacarelu@gmail.com.**

Key words: *Good Governance; Regulation; Needs; Expectations; Evaluation; Long-term perspectives.*

INTRODUCTION

The first problem that a man interested in the idea of government has today is that of the quality that political power and public administration can offer to citizens. From this perspective, one will either observe the quality of the political class but the poor performance of public administration, or the other way around – obviously, both negative and positive results of both are possible.

However, most governance issues will be analysed at a limited, empirical level, seeking to identify an easy relationship between cause and effect. Obviously, this perspective is that of average human intelligence, but we cannot ignore the fact that it may be higher, as a result of education and today's huge access to sources of information – or lower, for various and not always controllable reasons (e.g. those of a biological nature).

The last decades have offered numerous tools, usually created by scientists, to analyse the idea of governance, which have measured different indicators and have turned into regional, continental or world rankings. The fact that they appeared was a great step forward, which turned into a gigantic leap forward in the idea of good governance, through the fact of the enormous spread of information, first through the print media, then through broadcasting, and for several decades, also as an effect of the Internet.

Suddenly – at least on a historical scale – a wealth of data has become available to ordinary citizens, in contrast to what for hundreds of years had been the preserve of privileged political and economic groups. Even if some data is not publicly available now, most of the amount of real-life information is readily available to the majority of the population, which offers a major advantage in shaping the idea/concept of good governance. Thus, academic research no longer remains something abstract, available only to a few people, but appears (or can appear) in

everyday language, so that even the average person can have access to data and ideas that give them a better assessment of the activities of governments.

1. Very often lawyers and specialists in governance issues get stuck in a rather technical approach, and if they want to improve it they will rather use ethical and/or philosophical arguments. Without denying the importance of these two types of approach, it seems to me insufficient to better explain what is happening today within the political and administrative sphere.

We live today in a complex world, where different elements, not always controllable factors and other situations can easily disturb a person's reasonable level of understanding.

Speaking about complex world, we must accept the common idea on this concept: complexity is, in many ways an unfortunate word, implying head-scratching difficulty of comprehension. Complexity is non-linear (more of that later), its components might be known, but they interact in unpredictable ways. The interactions may be simple, but the outcomes great[1].

Humans do not always think rationally. This is not necessarily problematic. What is problematic is to neglect it and base politics on the assumptions that they do. The emergence of the Internet, particularly social media, has led to a relative decline in the importance of traditional media curating the political debate. It has made information available as never before, and has disrupted the business model that underpinned the media's traditional role. Evaluating the veracity of information, photos and videos, once a task done by media gatekeepers, is therefore now left to users themselves. The information overload, coupled with the decline of the media gatekeeper role is putting our cognitive capacities under unprecedented pressure. This has led to an epistemic crisis, where

[1] Malcolm Williams, *Realism and complexity in social sciences* (New York: Routledge, 2021), 22.

individuals do not have the capacity to fully understand and explain critical information about events. The mental structures and information infrastructure they traditionally relied upon to explain reality are no longer fit for purpose[1].

Under these new conditions, the human mind is more easily influenced, but it has more tools at its disposal to either contradict an official position or a scientific opinion. Even if we get into a discussion of the theory and practice of manipulation here, we cannot ignore the fact that any criticism – even expressed through a dislike on social media – is based on the fact that the person who makes it does not believe in the truth of others. If the persons contradicted are from government, it means that any critics represent a kind of protest against governmental vision of good governance (we presume that the main purpose of any government is the good for nation, despite the fact we have a lot of examples which are expressing a different one).

2. The big problem for today's political and administrative leaders is expressed in the form of accountability for their actions. If thousands of years ago it was more important to be in the king's good graces, with little regard for the people's opinion, the situation in recent decades has changed. Today a political and administrative leader is forced to confront the electorate quite often, is forced to conquer the minds and souls of voters, and – very important – to understand that voters can nowadays aggregate against him through social media in a very short period of time.

All these vulnerabilities would not have been possible in the absence of a fairly universal legal framework – in terms of the idea of elections and voting citizens. However, the fundamental threat comes from the educational direction, as this is where the two visions of good governance indirectly clash. Basically, governments have their own

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[1] European Commission, Joint Research Centre, *Understanding our political nature. How to put knowledge and reason at the heart of political decision-making* (Brussels, 2019), 11, available at https://publications.jrc.ec.europa.eu/repository/handle/JRC117161, consulted on 21st of December 2022.

vision of how a community or a country should be run, and citizens have different opinions, not always in line with the will expressed by the political power. This difference is logical and normal in principle, but it cannot hide the fact that political leaders want power for very long periods of time. In this paradigm, we basically have a real mental conflict between the idea of electorate (people who can vote for leaders) and the concept of holding a position of public dignity.

In this equation, good governance becomes a fundamental issue in understanding the relationship between the electorate and the political class. Both groups are unhappy with each other's performance, and each would like to limit the power of the other as much as possible, but only the political class also has the power provided by the constitutions to act. However, as the careers of political leaders have shortened over the last two centuries – as a result of changes in the economy, education and technology – people got more courage to ask for effective good governance and for a non-discriminate treatment from the public institutions.

Educational development from the last decades was an unique phenomenon in the mankind history and offered for the first time a space for a global spreading of good governance concept. More specifically, schools have not only trained children in the sense of learning a trade, patriotism and certain aspects of a general nature, but have also provided many examples of good governance. In school textbooks are presented not only strictly technical questions – such as mathematics, physics, chemistry, biology, astronomy, etc. – but also aspects related to history and literature. In these two disciplines, however, there is a great differentiation from other topics: literature textbooks present important events, major and noble feelings, life lessons, etc., treated in an elegant form of writing, and history textbooks focus on the qualities of leaders – from tyrannical to those loved by nations.

Educating a nation in state schools means – as conclusion – to choose some examples of good/bad governance and to present them, underlining what is good and what was unpleasant. This knowledge will not remain in an abstract child mind, but they will join the future adult for all his life, being a referential system to what daily life will show. It

means in fact that adult will analyse the whole governmental activity by remembering his school knowledge, comparing and offering good or bad marks to politicians.

It should not be forgotten that education of this type starts from the secondary cycle, at a level sufficiently useful for life. But to this is added an element present especially in the last decades, namely the education of a nation at the university level, related to the bibliography that potential/former students can consult, and which is contained by the best libraries of each country. Thus, the population of our planet was 1.56 billion people in 1900[1], and in 2022 it reached 8 billion people[2], that is, a five-fold increase. However, in the same period of time, the increase in the number of students globally was more than 450 times, more specifically, from 500,000 in 1900 year[3], to 235 million in 2022 year[4].

The benefit of this huge schooling for millions of people in a short period of time – at least a century – is obvious in the economy, industry, technology, etc. However, much less is discussed about the fact that these people do not learn over 15 years only what is necessary to obtain a well-paid profession, but also other things about governance, good practices in the public sphere, examples of bad leadership of a country etc.

To these aspects that are strictly related to training through schools is added the culture – deeper or more popular – that is acquired through movies, music, anecdotes, humour, current situations and memorable events. Thus, a rare situation regarding the exercise of the office of

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[1] "Population Year 1900", available at https://worldmapper.org/maps/population-year-1900/, consulted on 21st of December 2022.

[2] United Nations, "World population to reach 8 billion on 15 November 2022", available at https://www.un.org/en/desa/world-population-reach-8-billion-15-november-2022, consulted on 21st of December 2022.

[3] Ewan Schofer and John W. Meyer, "The Worldwide Expansion of Higher Education in the Twentieth Century", available at https://cpb-us-e2.wpmucdn.com/faculty.sites.uci.edu/dist/c/219/files/2011/03/Schofer-Meyer-Higher-Education-ASR.pdf, consulted on 21st of December 2022.

[4] "UNESCO Higher Education Global Data Report 2022": 2, available at https://cdn.eventscase.com/www.whec2022.org/uploads/users/699058/uploads/c4fb749e5ddb3daca6d92dc280de404ad4ff3935e798ec3bc823a0d5cd8ca83765b71059379ec37b4d42717a7689ec02b9a9.629a0f82b4e16.pdf, consulted on 21st of December 2022.

president of a country can bring into question the education of an entire nation regarding certain constitutional law issues, which will remain in the memory of many of those who lived those situations for years or even decades, influencing later different electoral behaviours and implicitly, the normative framework of that country.

3. About what the citizens want, there have been several researches in recent years, and they converge around the idea of good governance, capable of solving public needs quickly and at low costs[1]. As a rule, the citizen is not extremely concerned with the big topics that are researched in universities and government analysis institutions – for example geopolitics, global environmental problems, the situation of natural resources at the global level, etc. – so that his life is directly influenced and in a larger proportion by the national public administration and the politicians of their own country. Our text does not aim to discuss major topics that can sometimes be discussed with great intensity by political leaders – military operations, large-scale geopolitical actions, etc. – because the size of the article would reach that of a volume. However, it is necessary to understand that today's citizen, much better educated and connected technologically and physically to the global space – see the ease of travelling by plane today – is able to understand more clearly the government actions in any sphere, and to support them or harsh criticism with more arguments than he ever had.

Practically, politicians have to face more than ever not only internal opponents, but especially the voice of millions of people who can quickly

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[1] See, as example: Eric Harrison, Elissa Sibley, Sotiria Theodoropoulou and Benedetta Guerzoni, "What do citizens want? What survey results reveal about values, attitudes and preferences", *EPC Issue Paper No. 62* (January 2011), available at https://www.epc.eu/content/PDF/2011/EPC_Issue_Paper_62_-_What_do_citizens_want.pdf; Antoaneta Dimitrova and Elitsa Kortenska, What do citizens want? And why does it matter? Discourses among citizens as opportunities and constraints for EU enlargement, *Journal of European Public Policy*, 24:2, 259 – 277, 2017, DOI: 10.1080/13501763.2016.1264082; Jose Luis Fernandez Martinez, *What do citizens want from participatory democracy*, PhD thesis (University of Granada, Spain, 2018), available at https://digibug.ugr.es/bitstream/handle/10481/55424/56828.pdf?sequence=4&isAllowed=y., consulted on 21st of December 2022.

express their opinions on social media, destroying the careers of incompetent or incoherent national or local leaders. It can therefore be said that an entire education system is not only for the benefit of the common man and his well-being, but especially in providing arguments for analyzing the politicians' actions as objectively as possible. As a result, it can be said that some political leaders will not necessarily want too well-educated citizens[1], because their standards will be too high, influenced by the good practices that they can pick up at any time from history books, or from reading various reports and rankings global in the sphere of governance, rule of law, democracy, etc.

4. If this century has brought with it an extraordinary increase in the number of educated citizens, what is left for politicians to do? The discussion is fundamental, because today's political system is completed by a much diversified public administration, with increased competences in many fields and with a daily presence in the lives of citizens with an average level of education.

The real discussion can be delimited in two directions, which we will present in this introductory text only.

First, the politician must show his presence through something, namely through actions that separate him in the public consciousness from the public administration. If there is confusion to the point of identity of the public image between a politician and the public administration, it means that the political system is unitary and effective. The politician will thus see himself at the head of an administration that acts in the same way as him, and the citizens will therefore consider that the administrative instrument is in full agreement with the political will. /Not surprisingly, this type of public message can even hide a dictatorship, which means that the administration's options are entirely those drawn by the political environment, without being able to modify in any way the application of the legal framework.

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[1] For a "Machiavellic" political strategy and dangers faced by politicians today see Bruce Bueno de Mesquita and Alastair Smith, *The Dictator's Handbook: Why Bad Behavior is Almost Always Good Politics* (New York: Public Affairs, 2011).

The second direction considers the situation in which the politician leads the public administration in a real way, but his actions are manifested in terms of the appointment to management positions in public institutions and the modification of the normative framework that they must fulfil. In this hypothesis, the public administration has a wider framework of action, and in different formulas it will influence both the lives of citizens and the actions of politicians. The fulfilment of public services – basically, this is the essential mission of the public administration – will depend on a set of factors in which the politician is not the only "violinist": the budget dimension, the political coalitions' algorithms, the functional and territorial competences will not be perfectly stable. Because of these factors, the politician will separate himself from the ordinary civil servant. The idea of serving the community will thus have a dual nature, in which the public servant directly serves the community, and the politicians will serve the community in relation to the power of the party they come from, in relation with the institutions they lead budgets.

In this context, what will the politicians do for 5 days a week? What is their real job? If the public administration is capable of performing public services to a good extent – and it is logical for the politician not to sit daily at a counter where he can receive the necessary documents for the various human interests' authorisation – why are these policy makers still needed?

An answer needs to be provided, because there are two public criticisms brought to this social group.

First, that many things in our lives can be self-regulated[1] – more precisely, professionals in a field can practically adopt rules that are stronger than what a legislation can offer, by the fact that their competence will make certain patterns to be acceptable, and other behaviours to be excluded.

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[1] See Craig Volden and Alan E. Wiseman, *Governmental Regulation and Self-Regulation*, Vanderbilt University, Department of Political Science, November 2012, available at https://www.vanderbilt.edu/csdi/events/prvtgov_wiseman.pdf, 7, consulted on 21st of December 2022.

We must bear in mind that in this situation we will end up analyzing rather the proportion of regulation that a state can do, relative to what the professionals of a system can do. In fact, the latter cannot ensure the competition of the constancy force of the state[1], but they can claim that their rules are more ethical than what the legislator adopts, and to a large extent this is true. But as people are not completely ethical, the presence of the state is necessary in the sphere of regulation of the majority of human activities, in order to offer a firmer line to those who wish to participate in the various activities in society.

The second problem to be solved is that of the lack of trust in politicians. In the last decades, the trust in these people has eroded a lot[2], and as a result of this fact, more and more citizens want to examine more carefully the financial benefits that politicians have, as well as other types of social privileges. From the beginning, human communities' level of education development comes into conflict with a sphere of action in which any person can enter, without fulfilling even the smallest legal condition of studies. From this perspective, public pressure will increase in the coming years on the political environment, which will have to reach a self-regulation of its own privileges, but only in the sense of reducing them, in order not to give the opportunity for the emergence of long-lasting protests.

Considering these two situations, we must note that the idea of legislating becomes a necessity for politicians, but the number of situations that must be regulated is not infinite. In fact, not all human activities can be subject to laws, if only because it would take too long to inventory them. In addition, excessively regulating attracts both public mistrust, and above all the danger of hijacking the fundamental purpose of the public administration, which will turn into a "body that sanctions

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[1] Andrei Shleifer, "Understanding Regulation", in *European Financial Management, Vol. 11, No. 4* (2005), 440.

[2] Victor Orri Valgarðsson, Nick Clarke, Will Jennings and Gerry Stoker, "The Good Politician and Political Trust: An Authenticity Gap in British Politics?", [online], in *Political Studies, Vol. 69(4),* (2021): 858 – 880, https://journals.sagepub.com/doi/10.1177/0032321720928257, consulted on 21st of December 2022.

violations of normative acts", rather than a public actor in the service of communities and citizens. Moreover, the regulatory process is not instantaneous, and what is debated today in political forums – parliaments or local councils – can be overtaken by the realities of the day shortly after a legal framework for a situation is established.

That is why we consider it more effective for a country for political leaders to consider refraining from regulation. To have in mind means to have such conduct first, because life forces people to adapt, and some practices resulting from this process are better than what a legislator can imagine. If in fact a normative act is not capable of simplifying situations and in practice creates more barriers for those who want to invest in the field, then it would be better if the idea of regulation is brought up less often. Obviously, we are not referring here to urgent matters, or to situations in which, in order to pursue a major goal – difficult to achieve in a 4-years political mandate – it is necessary to adopt a strict framework, which limits certain actions considered to be dangerous. However, since the latter are fewer, it would be better for legislators to refrain more from regulating, leaving more power to professionals and ethical norms.

CONCLUSIONS

Regulating can be a simple man's dream, who sometimes considers his intellectual and professional abilities to be exceptional. However, to regulate is not an easy matter to do, and even less to leave within the reach of anyone, regardless of their position in society.

The capacities of the public administration have increased enormously in the last decades, its institutions being called upon to solve more and more difficult situations every day, which require both professional skills and substantial budgets. In this perspective, a good public administration largely eliminates the political factor intervention, which is thus forced to pass in the shadow of the institutional machinery of a state. This will always be a success of the administration, but also a loss of image of the political environment, which will be seen to be

distant from part of the essential attributes of the idea of political leadership.

It will be dangerous for any state that the political environment wants to regulate situations just to avoid losing power in front of the public administration. However, as the case of Romania shows, in which more than 150 thousand texts appeared in the official journal of the country starting with 1989, it becomes logical and necessary that the power to regulate should be better fixed in a framework that does not harm both the nation and the political class itself.

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THE PREFECT INSTITUTION UNDER THE ROMANIAN ADMINISTRATIVE CODE PROVISIONS

Miruna TUDORASCU[1]

Abstract:

The aim of this article is to present The Prefect Institution under the light of the new provisions in force, The Romanian Administrative Code[2]*. Will be establish the the role of the Prefect and of the Sub-Prefect, their duties, the functional structures, the rights, the obligations and the prefect's responsability.*

Key words: *Prefect; Public Administration; duties; Administrative Code; Government.*

INTRODUCTION

To answer to our first question: who is the Prefect? We will pay attention to art. 123, al. 2, from the Romanian Constitution, which settles: "*The Prefect is the representative of the Government at local level and he manages the deconcentrated public services of the ministries and of the other central public administration bodies in the administrative-territorial units*".

A more specific definition of the Prefect, we find in the Administrative Code, in art. 249, al. 1: "*The Prefect is the Government's local representative*."

[1] **Associate Professor, PhD., 1 Decembrie 1918 University of Alba Iulia, Alba Iulia (Romania), miruna762001@yahoo.com.**

[2] Government Emergency Ordinance No. 57/2019 – regarding the Administrative Code.

This institution has deep roots, beginning with Antique Rome, when this "Prefect" was in charge with administrative or political duties. In contemporary administration[1], we find this institution also in France, where the Prefect is the representative of the State in each French Regions, and the Institution where the Prefect is working is called "Préfecture" – Prefecture/Prefect's Office. The French model was copied by other countries, such as: Belgium, Italy, Spain, Latin America, etc.

In Romania the Prefect Institution was settled before by Local Public Administration Law No. 215/2001 and Law No. 340/2004 on the Prefect's Institution. In the present days, as we mentioned before, we have a new regulation, such as Government Emergency Ordinance No. 57/2019 – regarding the Administrative Code: 4th Part, art. 249-276.

THE PREFECT, THE SUB-PREFECT AND THEIR DUTIES

In the doctrine, over the time, a lot of opinions were expressed in connection with this institution[2], such as "the prefect must be a high public servant, professional, apolitical, who can ensure the stability, legality and functionality of the administration, during political changes"[3].

In present days, according to the Administrative Code, the rules has changed.

According to art. 249, al. 1-4 Administrative Code, *"(1) The Prefect is the representative of the Government at local level. (2) The*

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[1] *To be seen* Andreea Tabacu and Amelia Singh, "Review in administrative contentious" (International Conference European Union's Hystory, Culture And Citizenship, ISSN2360-395XCD-ROM: ISSN 2360 –1841ISSN-L 2360 –1841, 2019), 255-266.

[2] E. Bălan, *Prefectul şi prefectura în sistemul administraţiei publice* (Bucharest: Foundation - "România de Mâine", 1997), 37.

[3] PhD. Irina Alexe, "The Prefect and the Deputy Prefect in the View of the Legislative Proposal on the Revision of the Constitution of Romania", in *CJ, No. 10* (2014): 586-589.

Prefect leads the decentralized public services of ministries and other central public administration bodies from administrative-territorial units. (3) The Prefect shall ensure the management of the county committees for emergency situations. (4) The Prefect shall ensure the verification of the legality of administrative acts of local public administration authorities and may appeal before the Administrative Court their acts which they consider illegal".

We see in this context who The Prefect is, but we also have to determine who the Deputy Prefect is. To the same provision, al. 5, the Deputy Prefect is the person who helps the Prefect to fulfil the duties and the prerogatives in his activity. Both functions are functions of public dignity.

If we refer to the Prefect Institution, by the art. 265 Administrative Code, this institution is a public one with legal personality, with its own budget, subordinated to the Government, and it helps the Prefect to exercise the prerogatives according to the Romanian Constitution. The Prefect is running this institution.

In connection with the appointment and the dismissal of the Prefect and the Deputy Prefect, it's done by the Government, and the legal act for these is Government Decision. Also, it is useful to precise that the person who can be a Prefect or a Deputy Prefect should cumulatively fulfil the next conditions (art. 251, al. 2, ind. 1 Administrative Code):

"a. is a Romanian citizen, and the domicile of the person is in Romania;

b. has all the electoral rights;

c. has full exercise capacity;

d. has not suffered criminal convictions, except in the situation where rehabilitation has occurred.

e. has a bachelor's studies completed with a bachelor's degree or an equivalent;

f. has completed specialized training programs for being appointed as a prefect or as a deputy prefect, organized by the National Institute of Administration, under the law."

By art. 250, al. 1: "the functions of prefect and deputy prefect are public dignity functions". So „the prefect becomes again a political

servant, ... there is a requirement of high education studies and graduation of professional training to obtain a public dignity. In other words, the prefects will be appointed on political grounds, but they will have graduatedhigh education or professional training"[1].

In connection with the duties of the Prefect and the Deputy Prefect, we will make analyses over the most important ones. By article 252 Administrative Code, there are five main cathegories of duties, such as:
„*a) responsibilities for ensuring local implementation of government policies and public order compliance;*
b) powers in exercising the constitutional role of leadership for decentralized public services of ministries and other central public administration bodies in administrative-territorial units;
c) duties on checking the legality of administrative acts of local public administration authorities and attacking the administrative acts of these authorities that they consider illegal;
d) guidance attributions, at the request of the local public administration authorities, regarding the application of the legal norms within the scope of competence;
e) responsibilities in the field of emergency situations."

Of course that the Prefect can also fulfil other duties provided by the Administrative Code, but also by some other organic laws.

We would like to analyse more specific, the prefect's exercise of the management of public services decentralized in the administrative-territorial units. „As a representative of the Government at the local level, the prefect ensures the operative connection between each minister, respectively leader of the central public administration body subordinated to the Government and the leader of the decentralized public service subordinated to it."[2]

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[1] Dinca Dragos**, "**Perspectives Regarding the Prefect Institution in Romania", *in HOLISTICA – Journal of Business and Public Administration Issue 1* Vol. 8 (2017): 7-14.

[2] Catalin Silviu Sararu, *Administrative Law in Romania* (Bucharest: ADJURIS, International Academic Publisher, 2019), 162.

Ministers and other top officials of central government organizations that report to the Government may assign some of the prefect's management and oversight responsibilities for the operation of the subordinated decentralized public services.

With the prefect's advice and consent, the minister appoints and dismisses the leaders of the decentralized public services.

Also, by art. 254 (b) the Prefect endorses budget projects and financial statements on the budgetary implementation of decentralized public services of the Ministries and other central public administration bodies subordinated to the Government and transmits them to the head of the institution hierarchically superior to the decentralized public service. The counselling shall be advisory.

THE PREFECT INSTITUTION

The Prefect Institution is found settled in the Romanian Administrative Code in art. 265, that statues that the management is assured by the Prefect. It is a public institution, that is organized for The Prefect to be able to exercise his prerogatives ruled by the Constitution and other laws. It has its own budget, being financed by the State, legal personality and is subordinated to the Government.

This Institution is settled in each county of the state, and in Bucharest also (for Bucharest and Ilfov County).

As a novelty in the legislation, there is a new public function in the Prefect Institution, called the General Secretary of the Prefect Institution, he is a high rank public servant, with a Degree in Law, Political Sciences or Administrative Sciences.

The General Secretary of the Prefect Institution ensures the stability of the functioning of the Prefect Institution, the continuity of the management and functional connections between the departments of the institution. He shall support the Prefect’s activity in the exercise of the duties in connection with verification of the legality and shall coordinate the specialized structure/structures through which these duties are carried out. The duties of the General Secretary of the Prefect Institution shall be established by Government decision on the proposal of the ministry that

coordinates the Prefect Institution, with the approval of the ministry with attributions in the field of public administration.

CONCLUSIONS

The Administrative Code is changing the Prefect from a public official once more. Prior to the 2004 reform, a servant might become a public dignitary who was chosen by the government based on a political decision[1]. Because the qualifications for experience and education in the field of public administration are not the same as those that a high civil servant was required to meet, it can be said that this policy has established the conditions for the deprofessionalization of this institution.

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RESOLUTION OF LEGAL CONFLICTS OF A CONSTITUTIONAL NATURE. CONSTITUTIONAL JURISPRUDENCE

Marius ANDREESCU[1]
Andra PURAN[2]

Abstract:

The meaning of the phrase legal conflict of a constitutional nature is not defined by the Constitution, but the Constitutional Court, in its jurisprudence, specified the content of this attribution. Thus, the legal conflict of a constitutional nature involves concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences which, according to the Constitution, belong to other public authorities or the omission of some public authorities, consisting in declining the competence or in the refusal to perform certain acts that are part of their obligations.

The Constitutional Court recalled the fact that it found, over time, behaviors contrary to the mentioned principle, and ruled on the obligation of constitutional loyalty, of loyal constitutional behavior that governs the exercise of the powers of public authorities in a state of law.

In this study, we analyze aspects of doctrine and jurisprudence regarding conflicts of a constitutional nature between state authorities and the meanings of the concept of "loyal constitutional behavior".

Key words: *legal conflict of constitutional nature; interpretation and application of constitutional norms; loyal constitutional behavior; constitutional jurisprudence.*

[1] **Associate Prof PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Pitesti (Romania), email: andreescu_marius@yahoo.com**
[2] **Lecturer PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Pitesti (Romania), email: andradascalu@yahoo.com**

INTRODUCTION

The mandate of the Constitutional Court to resolve legal conflicts of a constitutional nature between public authorities was introduced as a result of the revision of the Constitution in 2003.

The resolution of legal conflicts of a constitutional nature between public authorities is regulated by the provisions of art. 146 let e) of the Constitution and by art. 34-36 of Law no. 47/1992. The Constitutional Court resolves legal conflicts of a constitutional nature between public authorities, only at the request of the President of Romania; of one of the presidents of the two Chambers; of the Prime Minister and of the president of the Superior Council of the Magistracy.

The Constitution of Romania and Law no. 47/1992 on the organization and functioning of the Constitutional Court use the phrase "legal conflict of a constitutional nature" without specifying its content. Therefore, for establishing the features of the content of the legal conflict of a constitutional nature, the main benchmark is the jurisprudence of the Constitutional Court.

The request for the resolution of the legal conflict of a constitutional nature will mention: the public authorities in conflict; the legal texts on which the conflict is based; presentation of the position of the parties and the opinion of the requestor.

In order to resolve the legal conflict of a constitutional nature, the president of the Constitutional Court, upon receiving the request, must communicate it to the conflicting parties, requesting them to express, in writing, within the established term, their point of view on the content of the conflict and possible ways of its resolution, and designates the judge-rapporteur.

On the date of receipt of the last point of view, but no later than 20 days after receiving the request, the president of the Constitutional Court sets the term for the court session and summons the parties involved in the conflict, its debate taking place in non-adversarial conditions.

Expressing the points of view by the parties in conflict is not mandatory, the debate will take place on the date set by the president of the Constitutional Court, even if any of the public authorities involved

does not respect the deadline set for the presentation of the point of view, or does not appear, being legally quoted.

The debate takes place on the basis of the report presented by the judge-rapporteur, the referral request, the points of view presented, the evidence administered and the pleadings of the parties.

Within this attribution, the Constitutional Court issues, in accordance with the provisions of art. 11 para. (1) let. a)-e) from the Law no. 47/1992, a decision. This is taken with the vote of the majority of the judges of the Court.

The decision by which the legal conflict of constitutional nature is resolved is final and is communicated to the author of the notification, as well as to the parties in conflict, before its publication in the Official Gazette of Romania, Part I.

The public authorities involved in the conflict comply with those ruled by the Court, considering the general-mandatory character of the decisions it pronounces, according to art. 147 para. 4 of the Constitution.

In the jurisprudence thus developed, the Court ruled on the conditions of admissibility of referrals (object, authors, conflicting parties) as well as on the merits, on the interpretation and application of constitutional provisions, in litigious situations that concerned fundamental institutions of the state.

1. CONSTITUTIONAL JURISPRUDENCE

The meaning of the phrase legal conflict of a constitutional nature is not defined by the Constitution, but the Constitutional Court, in its jurisprudence, specified the content of this attribution.

Thus, the legal conflict of a constitutional nature involves concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences which, according to the Constitution, belong to other public authorities or the omission of some

public authorities, consisting in declining the competence or in the refusal to perform certain acts that are part of their obligations[1].

The legal conflict of a constitutional nature exists between two or more authorities and can concern the content or extent of their attributions, arising from the Constitution, which means that these are conflicts of competence, positive or negative, and which can create institutional blockages[2].

According to art. 146 of the Constitution, the Court has the competence to resolve any conflict of a constitutional nature between public authorities, and not only conflicts of competence.

The text of art. 146 lit. e) of the Constitution "establishes the competence of the Court to resolve in substance any legal conflict of a constitutional nature arising between public authorities, and not only conflicts of competence arising between them"[3].

The Constitutional Court established that these conflicts are not limited to litigation that could create institutional blockages. A constitutional conflict refers to any conflicting legal situations that are directly generated by the text of the Constitution[4].

It was also noted that to the extent that there are mechanisms through which public authorities can self-regulate through their direct and immediate action, the role of the Constitutional Court becomes a subsidiary one. "On the other hand, in the absence of these mechanisms, to the extent that the mission of regulating the constitutional system falls exclusively on the litigant, who is thus put in a position to fight for the guarantee of his rights or freedoms against an unconstitutional but institutionalized legal paradigm, the role of the Constitutional Court becomes a primary and essential one for removing the constitutional

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[1] Decision no 53/28 January 2005, published in the Official Gazette of Romania, no 144/17 February 2005

[2] Decision no 97/7 February 2008, published in the Official Gazette of Romania, no 169/5 March 2008

[3] Decision no 270/10 March 2008, published in the Official Gazette of Romania, no 290/15 April 2008

[4] Decision no 685/7 November 2018, published in the Official Gazette of Romania, no 1021/29 November 2018

blockage resulting from the limitation of the role of the Parliament in the architecture of the Constitution"[1].

The Court cannot analyze legal conflicts of a hypothetical constitutional nature. Consequently, the existence of a litigious situation cannot be assumed since, by definition, it must refer to concrete acts or facts committed by public authorities. Thus, in the absence of the act/fact generating an alleged conflict, it is not possible to draw the conclusion of the existence of a litigious situation that even concerns the commission of the said act or fact[2].

The legal conflict of a constitutional nature was also defined by means of Decision no. 26/2019 on the request to resolve the legal conflict of a constitutional nature between the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice, the Parliament of Romania, the High Court of Cassation and Justice and the other courts[3]. Thus, by legal conflict of a constitutional nature we will mean "concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences, which, according to the Constitution, belong to other public authorities, or the omission of some public authorities, consisting in declining the competence or in refusing to perform certain acts that fall within their obligations".

The Court ruled that it cannot reject a request made in this procedure as having remained without object, in the absence of an express provision in this sense.

When Mrs. AB's mandate as Minister of Justice ended on November 4, 2019, the question arose as to whether the request of the President of the Superior Council of Magistracy could still be analyzed given that this conflict seemed no longer current, the Court recalled its finding according to which "the non-existence, at the time of the decision, of a conflict does not lead to the implicit finding that that

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

[2] Decision no 26/2020, published in the Official Gazette of Romania, no 168/2 March 2020

[3] Published in the Official Gazette of Romania, no 193/12 March 2019

conflict did not exist previously, respectively at the time of its notification"[1].

By Decision no. 158 of March 19, 2014[2], the Court took note of the fact that, between the time of its notification and the moment of the pronouncement of the decision, the President of Romania issued the decree in the absence of which the Prime Minister notified the Court for the resolution of a legal conflict of a constitutional nature and noted, consequently, that there was no conflict. By the same decision, the Court rejected the request to withdraw the referral on the grounds of "remaining without object", showing, in this sense, that the nature of the procedure carried out before the Constitutional Court is determined by the nature of the powers that the Constitutional Court exercises by virtue of its role of guarantor of the supremacy of the Constitution.

The Court emphasized, by Decision no. 148 of April 16, 2003[3], published in the Official Gazette of Romania, Part I, no. 317 of May 12, 2003, that the attribution established by art. 146 lit. e) from the Constitution "is a necessary measure, aiming at the removal of possible institutional blockages".

Therefore, the Court held that the remedy or the disappearance of the situation generating the conflict, after the referral to the Court, cannot, in the absence of an express provision in this regard, cause the request to remain without object and to be rejected as such. The Court continues to be notified and empowered to decide, within the limits of its competence and constitutional procedures[4].

So, based on constitutional jurisprudence, by legal conflict of a constitutional nature we will understand concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences; the attributions, powers and competences belong to other public authorities; omissions of some public authorities, consisting

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[1] Decision no 26/2020, published in the Official Gazette of Romania, no 168/2 March 2020

[2] Published in the Official Gazette of Romania, no 292/22 April 2014

[3] Published in the Official Gazette of Romania, no 317/12 May 2003

[4] Decision no 504/18 September 2019, published in the Official Gazette of Romania, no 801/3 October 2019

in declining competence or refusing to perform certain acts that fall under their obligations; by solving existing conflicts between different public authorities, the aim is to remove possible institutional blockages; the conflict between a political party or a parliamentary group and a public authority does not fall into the category of conflicts whose resolution is given to the competence of the Constitutional Court; the conflict concerns the content or extent of the powers of the constitutional authorities.

The legal conflict of a constitutional nature as well as a conflict of competence is thus generated by the mode of action of the public authorities and is capable of determining an imbalance under the aspect of the principle of separation of powers in the state.

Regarding the holders of the right to refer the Constitutional Court with requests for the resolution of legal conflicts of a constitutional nature, they are expressly and limitedly provided for by the text of art. 146 lit. e) from the Constitution.

According to the Court's jurisprudence, "the legal subjects that the Fundamental Law entitles the Court to refer to are limited, the constitutional provision not distinguishing whether the authorities they represent are or are not parties to the conflict with which the Court is notified"[1].

The mentioned decisions illustrate situations in which the notification belonged either to the President of Romania, or to the president of the Superior Council of Magistracy, or to the president of the Senate, or to the Government, even though these public authorities were not parties to the reported conflicts.

As a result, the legal subjects provided by art. 146 lit. e) according to the Constitution, they have the right to submit requests regarding the resolution of legal conflicts of a constitutional nature, although they are not parties to these conflicts, so they do not justify their own interest.

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[1] Decision no 270/10 March 2008, published in the Official Gazette of Romania, no 290/15 April 2008; Decision no 685/7 November 2018, published in the Official Gazette of Romania, no 1021/29 November 2018

Therefore, the constitutional text of art. 146 lit. e) operates a distinction between the two categories of legal subjects, namely the holders of the right to refer to the Constitutional Court, expressly listed by the constitutional norm, respectively the public authorities that can have the status of a party in the conflict and aims to delimit their procedural qualities in the case referred to the judgment of the Court. Thus, the first category, by formulating the referral request to the Court, acts by virtue of the right conferred by the Constitution, without acquiring the procedural status of a party to the conflict, while the second category acquires the procedural status of a party to the conflict.

The Court held that, according to art. 35 para. 1 and 2 of the Regulation of the Chamber of Deputies, the vice-presidents fulfill the duties established by the Permanent Bureau or entrusted by the President of the Chamber of Deputies, respectively lead the activity of the Permanent Bureau and the plenary session of the Chamber of Deputies, at the request of the President or, in his absence, by decision of the President Chamber of Deputies.

Therefore, the delegation decision is opposable to all legal subjects, and the acts performed/issued in consideration of this decision are considered to have been carried out by the president of the Chamber of Deputies himself.

The competence of two subjects of law, namely the Prime Minister and the president of the Chamber of Deputies, to refer the Constitutional Court under art. 146 lit. e) from the Constitution, it cannot be delegated by the Prime Minister to another member of the Government, considering that the exclusive powers of the Prime Minister are intrinsically linked to his person, while the holder of the position of President of the Chamber of Deputies can delegate any power his, regardless of its constitutional or regulatory level to a vice-president of the Chamber of Deputies, considering that his exclusive attributions are not related to the person of the office holder. Thus, the nature of the function and its position within the represented public authority determine different solutions regarding

the possibility of delegating the attribution to formulate requests before the Constitutional Court[1].

Like any of the decisions of the Constitutional Court, the decisions by which the Constitutional Court solves a legal conflict of a constitutional nature are binding from the date of publication in the Official Gazette of Romania.

As for the specific effects of the mentioned decisions, they must be examined from the perspective of the role of this attribution of the Constitutional Court, of the reason for which it was established.

Under this aspect, in Decision no. 85/2020, by which such a conflict was found, it was noted that, by virtue of the provisions of art. 142 para. 1 of the Constitution, according to which "it is the guarantor of the supremacy of the Constitution", the Constitutional Court has the obligation to solve the conflict, showing the conduct in accordance with the constitutional provisions to which the public authorities must comply.

In this sense, the Court considered the provisions of art. 1 para. 3, 4 and 5 of the Constitution, according to which Romania is a state governed by law, organized according to the principle of separation and balance of powers – legislative, executive and judicial, a state in which the compliance with the Constitution, its supremacy and the laws are mandatory, and the relations between state authorities/institutions are based on the principle of loyal collaboration and mutual respect. One of the conditions for achieving the fundamental objectives of the Romanian state is the proper functioning of public authorities, respecting the principles of separation and balance of powers, without institutional blockages (Decision no. 460 of November 13, 2013, Decision no. 261 of April 8, 2015, para. 49, or Decision No. 68 of February 27, 2017, para. 123). Also, the text of art. 146 lit. e) the Constitution does not give the Constitutional Court the authority to only ascertain the existence of legal conflicts of a constitutional nature, but to settle these conflicts.

[1] Decision no 417/2019, published in the Official Gazette of Romania, no 825/10 October 2019

Decision no. 85/2020[1] is also important because it expressly refers to the obligation of constitutional loyalty of public authorities to avoid legal conflicts of a constitutional nature.

The Constitutional Court emphasized that "respecting the supremacy of the Constitution, a corollary of the rule of law, is not limited to respecting its letter. If it were so, a constitution would never be sufficient, because it could never explicitly state solutions for all situations that may arise in practice, including the relations between public authorities of constitutional rank" (para. 120).

The Court also noted, as a matter of principle, that accepting a strictly literal and fragmented interpretation of the Constitution could lead to the conclusion that anything not expressly prohibited by the constitutional text is permitted by it, even if it would obviously contravene the logic and spirit of the Constitution, and such a conclusion is unacceptable, as it is incompatible with the principles of the rule of law (para. 121).

In this sense, the rulings of the Venice Commission were invoked, which noted that "respect for the rule of law cannot be limited only to the implementation of the explicit and formal provisions of the law and the Constitution"[2]. In the same Opinion, the Venice Commission also noted that the "respect for the Constitution cannot be limited to the literal execution of its operational provisions. The Constitution by its very nature, in addition to guaranteeing human rights, provides a framework for state institutions, establishes their attributions and obligations. The purpose of these provisions is to allow the proper functioning of the institutions, based on the loyal cooperation between them. The Head of

[1] Decision no 85/2020, published in the Official Gazette of Romania, no 195/11 March 2020

[2] Opinion regarding the compatibility with the constitutional principles and the rule of law of the actions of the Romanian government and the Parliament regarding other state institutions and the Government's Emergency Ordinance amending Law no. 47/1992 regarding the organization and functioning of the Constitutional Court and the Government Emergency Ordinance amending and supplementing Law no. 3/2000 on the organization and conduct of the referendum in Romania, adopted by the Venice Commission at the 93rd plenary session, Venice, December 14-15, 2012, para. 72

State, the Parliament, the Government, the judiciary, all serve the common purpose of promoting the interests of the country as a whole, not the narrow interests of a single institution or of a political party that appointed the office holder. Even if an institution is in a position of power, when it is able to influence other institutions of the state, it must do so considering the interest of the state as a whole (…)" (par. 87).

Referring to the same Opinion cited, by which the Venice Commission noted that "in Romania the political and constitutional cultures must be developed. Officials do not always pursue the interests of the state as a whole. First of all, there was a lack of respect for the institutions. Institutions cannot be viewed separately from the people who lead them. (…) Such disrespect for institutions is closely related to another problem in the political and constitutional culture, namely the violation of the principle of loyal cooperation between institutions. (…) Only mutual respect can lead to the establishment of mutually accepted practices that are in line with the European constitutional heritage and that allow a country to avoid and overcome crises with serenity" (para. 73).

2. LOYAL CONSTITUTIONAL BEHAVIOR OF PUBLIC AUTHORITIES

The Constitutional Court recalled the fact that, over time, it found behaviors contrary to the mentioned principle, and ruled on the obligation of constitutional loyalty, of loyal constitutional behavior that governs the exercise of the powers of public authorities in a state of law.

Thus, the Court showed that the relations between the authorities "must function within the constitutional framework of loyalty and collaboration, to achieve the constitutional attributions distinctly regulated for each of the authorities; the collaboration between authorities is a necessary and essential condition for the proper functioning of the public authorities of the state"[1]. This is because the

[1] Decision no 356/5 April 2007, published in the Official Gazette of Romania, no 322/14 May 2007

“respect for the rule of law (..) implies, on the part of public authorities, constitutional behaviors and practices, which have their origins in the constitutional normative order, seen as a set of principles that underpin the social, political and legal relations of a society. In other words, this constitutional normative order has a broader meaning than the positive norms dictated by the legislator, constituting the specific constitutional culture of a national community.

Therefore, loyal collaboration implies, beyond respect for the law, the mutual respect of state authorities/institutions, as an expression of assimilated, assumed and promoted constitutional values, in order to ensure the balance between the state powers. Constitutional loyalty can be characterized, therefore, as a value-principle intrinsic to the Basic Law, while the loyal collaboration between state authorities/institutions has a defining role in the implementation of the Constitution”.

According to the Court, “the institutional conduct that circumscribes loyal collaboration has (...) an *extra legem* component, based on constitutional practices, which have as their primary purpose the good functioning of the state authorities, the good administration of public interests and respect for the citizens’ fundamental rights and freedoms. The secondary purpose is to avoid inter-institutional conflicts and remove blockages in the exercise of their legal prerogatives. The instruments that contribute to the achievement of these goals and that prove a loyal behavior towards the constitutional values are the institutional dialogue and the establishment of mutually accepted practices. These instruments must represent the foundations of the settlement “together”, “by agreement of the parties”, and not “against”, “to the detriment” of one or the other, of any disputes arising in the relations between the authorities, caused by confusing factual or legal situations, equivocal. By virtue of the principle of loyal cooperation between the authorities, it is thus necessary for each of them to perform rational and increased diligence in the framework of the legal

institutional dialogue in order to avoid as much as possible the generation of legal conflicts of a constitutional nature[1].

The obligation of the authorities, namely the Parliament and the executive to have a loyal constitutional behavior was stipulated for the first time in the jurisprudence of the French Constitutional Council, which is the Constitutional Court of France.

This obligation is found in the powers that state authorities have to interpret and apply constitutional norms. It is not limited only to the simple requirement of legality of the acts and dispositions of the rulers, that is, to the formal observance of the law.

The normative activity of drafting the law must be continued with the activity of applying the norms; in order to apply, the first logical operation to perform is their interpretation.

Both the Constitution and the law present themselves as a set of legal norms, but these norms are expressed in the form of a normative text. What constitutes the object of interpretation are not the legal norms, but the text of the law or the Constitution. A legal text can contain several legal norms. A constitutional norm can be deduced from a constitutional text by way of interpretation. The text of the Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. Through interpretation, the constitutional norms are identified and determined.

It should also be emphasized that a constitution can include certain principles that are not clearly expressed *expressis verbis*, but they can be deduced through the systematic interpretation of other norms.

In the sense of what was shown above, it was specified in the specialized literature: "The degree of determination of the constitutional norms by the text of the fundamental law can justify the need for interpretation. The norms of the Constitution lend themselves very well

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[1] Marieta Safta, *Notă de jurisprudență a Curții Constituționale* [2-27 martie 2020]. *Conflictele juridice de natură constituțională*, published at www.juridice.ro; Marius Andreescu and Andra Puran, *Drept constituțional. Teoria generală și instituții constituționale. Jurisprudență constituțională*, 4th Edition (Bucharest: C.H. Beck, 2020), 107-114

to an evolution of their course, because the text is par excellence imprecise, formulated in general terms. The formal superiority of the Constitution, its rigidity, prevents its revision at very short intervals and then interpretation remains the only way to adopt the normative content, usually older, to the constantly changing social reality. The meaning of the constitutional norms being by their very nature, that of maximum generality, its exact determination depends on the will of the interpreter".

The scientific justification of the interpretation results from the need to ensure the effectiveness of the norms contained both in the Constitution and in the laws, by means of institutions that mainly carry out the activity of interpreting the norms dictated by the author. These institutions are primarily the judicial and constitutional courts.

We find that in the legislative, interpretive and application activity of the constitutional norms, the President, the Parliament and the Government often do not respect these minimum requirements of loyal constitutional behavior. The constitutional jurisprudence to which we are referring to in the first part of this study is an argument in this sense, without being singular.

The constitutional obligation that the governors have to behave constitutionally loyal to the normative content but also to the purpose of the Constitution is also an expression of the legitimacy requirement that the normative acts must fulfill, as well as the adopted governmental measures and dispositions. To be the expression of a loyal constitutional behavior, the legal and political acts of the Parliament and the executive must not only be legal, i.e., formally correspond to the Constitution, but also legitimate. The legitimacy of a legal, individual or normative act reveals the requirement that the act in question must correspond not only to the letter of the law (the Constitution), but also to its spirit.

Unfortunately, at the current stage of the Romanian legal system, the requirement of legitimacy of the laws and not only cannot be verified by the constitutionality control of the Constitutional Court. It is sad to note that nowadays, in the exercise of the powers of government, those who exercise state power are concerned and often not so much with the requirements of legality, the formal correspondence of a legal act adopted with the constitutional norms and very little or no place for the

fulfillment of the requirement of legitimacy. The consequence of such behavior in the exercise of governing duties, which violates the obligation of loyalty to the Constitution, but primarily to the Romanian people, is the excess and abuse of power with serious consequences on the respect, defense and promotion of the Romanian people's traditions and orthodox faith values, asserting public and not personal interest, exercising important fundamental rights and freedoms.

The obligation to correctly interpret and apply the Constitution and the law also rests with the governors, respectively the President, the Parliament and the Government, in relation to the powers they have. The activity of interpreting constitutional norms and, in general, legal norms carried out by the governors must correspond to some formal minimum imperatives:

• the obligation to respect the supremacy of the Constitution;

• the obligation to guarantee fundamental rights and freedoms;

• the prohibition not to add by interpretation to the interpreted normative text;

• the obligation to respect the meaning and purpose of the constitutional norm;

• the obligation to give effect to the interpreted legal norm;

• the obligation to strictly respect the competence and constitutional procedures and those established by law in the exercise of the powers;

• avoiding as much as possible constitutional and political conflicts between state authorities.

These are formal requirements that are part of the notion of loyal constitutional behavior[1].

Loyal constitutional behavior of public authorities is essentially a requirement of the rule of law that the Constitutional Court expressed in its jurisprudence, even if the constitutional court does not explicitly use the concept of "loyal constitutional behavior", some jurisprudential aspects are part of the content of this concept. We exemplify with some aspects of jurisprudence: the requirements of the rule of law concern the

[1] Andreescu and Puran, *Drept constituțional. Teoria generală și instituții constituționale. Jurisprudență constituțională*, 107-114

major goals of the state activity, namely the supremacy of the law, which implies the subordination of the state to the law. In this sense, the law provides the means by which political options or decisions can be censored and eliminate any abusive and discretionary tendencies of the state structures. In this sense, the law provides the means by which political options or decisions can be censored and eliminate any abusive and discretionary tendencies of the state structures. At the same time, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of public powers and enshrines guarantees, including of a jurisdictional nature, which ensure respect for the rights and freedoms of citizens, primarily by limiting the authority of the state, which represents the inclusion of the activity of public authorities in the limits of the law. The jurisprudence of the Constitutional Court thus expresses the main requirements of the rule of law in relation to the goals of state activity. A particularly eloquent synthesis of the doctrine regarding the notion and features of the rule of law is thus achieved through jurisprudence. Decision no. 17 of January 21, 2015[1] is significant in this sense, by which the Constitutional Court gives a pertinent explanation to the character of the rule of law, enshrined in art. 1 para. 3 first sentence of the Constitution: „the requirements of the rule of law concern the major goals of its activity, prefigured in what is usually called the rule of law[2], a phrase that implies the subordination of the state to the law, the provision of those means that allow the law to censor political options and, in this framework, to consider the possible abusive, discretionary tendencies of state structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers that must act within the limits of the law, namely within the limits of a law that expresses the general will. The rule of law enshrines a series of guarantees, including jurisdictional ones, to ensure respect for the rights and freedoms of citizens through the self-limitation of the state,

[1] Published in the Official Gazette of Romania, no 79/30 January 2015
[2] Published in the Official Gazette of Romania, no 334/19 July 2000

respectively the inclusion of public authorities within the coordinates of the law"[1].

The principle of stability and security of legal relations is not expressly enshrined by the Romanian Constitution, but, just like other constitutional principles, it is implied by the constitutional normative provisions, respectively art. 1 para. 3, which enshrines the character of the rule of law. In this way, our constitutional court accepts the deduction, through interpretation, of some legal principles implied by the express norms of the Fundamental Law. In this sense, by Decision no. 404 of April 10, 2008[2], the Constitutional Court ruled that: "The principle of stability and security of legal relations, although it is not expressly enshrined in the Romanian Constitution, this principle is deduced both from the provisions of art. 1 para. 3, according to which Romania is a state of law, democratic and social, as well as from the preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its jurisprudence"[3]. Moreover, our constitutional court considered that the principle of the security of civil legal relations constitutes a fundamental dimension of the rule of law[4].

The Constitutional Court constantly pronounces for the clarity and predictability of the law, these being requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of some legal provisions through other provisions contained in the same normative act led to the violation of the principle of the security of legal relations, as a result of the lack of clarity and predictability of the norm, principles that constitute a fundamental dimension of the state of

[1] Decision no. 70 of April 18, 2000
[2] Published in the Official Gazette of Romania, no 347/6 May 2008
[3] Decision no 685/25 November 2014, published in the Official Gazette of Romania, no 68/27 January 2015
[4] Decision no 570/29 May 2012, published in the Official Gazette of Romania, no 404/18 June 2012; Decision no 615/12 June 2012, published in the Official Gazette of Romania, no 454/6 July 2012

right", as it is expressly established by the provisions of art. 1 para. 3 of the Basic Law[1].

Regarding the rule of law, the Constitutional Court showed that justice and social democracy are supreme values. In this context, the militarized authorities, in this case the Romanian Gendarmerie, performs, under the terms of the law, specific duties regarding the defense of public order and tranquility, the fundamental rights and freedoms of citizens, public and private property, the prevention and detection of crimes and other violations of the laws in force, as well as the protection of the fundamental institutions of the state and the fight against acts of terrorism. Consequently, the Constitutional Court ruled: "By the possibility of some militarized authorities to ascertain the contraventions committed by civilians, art. 1 para. 3 from the Constitution is not affected in any way, referring to the Romanian state, as a democratic and social state governed by law"[2].

Human dignity, together with the freedoms and rights of citizens, the free development of the human personality, justice and political pluralism, represent supreme values of the rule of law (art. 1 para. 3). In the light of these constitutional regulations, it was ruled in the jurisprudence of the Constitutional Court that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful to the religious or philosophical beliefs of the parents, which is why the organization of the school activity must achieve a fair balance between the process of education and the teaching of religion, and on the other hand respecting the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviors specific to a certain attitude of faith or philosophical, religious or non-religious convictions, must not be subject to sanctions that the state provides for such behavior, regardless of the faith motivations of the person in question. "As part of the constitutional system of values, to freedom of

[1] Decision no 26/18 January 2012, published in the Official Gazette of Romania, no 116/15 February 2012

[2] Decision no 1330/4 December 2008, published in the Official Gazette of Romania, no 873/23 December 2008

religious conscience is assigned the imperative of tolerance, especially with human dignity, guaranteed by art. 1 para. 3 of the Constitution, which dominates as the supreme value the entire system of values"[1]. It is also interesting to underline the fact that our Constitutional Court considers human dignity to be the supreme value of the entire constitutionally enshrined value system, the value that is found in the content of all fundamental human rights and freedoms. At the same time, it is an important aspect that requires all state authorities to have in mind first of all respect for human dignity in their entire activity.

It should be noted that in its jurisprudence, the Constitutional Court also identifies the content components of human dignity, as a moral value, but at the same time constitutional, specific to the rule of law: "Human dignity, from a constitutional point of view, involves two inherent dimensions, namely the relationships between people, which refers to the right and obligation of people to be respected and, correlatively, to respect the fundamental rights and freedoms of their fellows, as well as the human relationship with the environment, including the animal world"[2].

CONCLUSIONS

Against the excessive politicism and acts that represent an obvious excess of power of the executive contrary to the spirit and even the letter of the Constitution, with the consequence of the violation of some fundamental rights and freedoms, manifested during the last three decades of original democracy in Romania, we appreciate that the scientific approach and not only in the matter of revising the Fundamental Law, it must be oriented towards finding solutions to guarantee the values of the rule of law, of the right Orthodox faith, to

[1] Decision no 669/12 November 2014, published in the Official Gazette of Romania, no 59/23 January 2015

[2] Decision no 1/11 January 2012, published in the Official Gazette of Romania, no 53/23 January 2012; Decision no 80/16 February 2014, published in the Official Gazette of Romania, no 53/7 February 2014

limit the violation of constitutional provisions for the purpose of particular interests and to avoid the excess of power on the part of the state authorities.

The provisions of art. 114 para. 1 of the current wording provides: "The Government can undertake its responsibility before the Chamber of Deputies and the Senate in a joint session on a program of a general policy statement or a draft law".

The engagement of the Government's responsibility has a political character and is a procedural means by which the phenomenon of "dissociation of majorities"[1] is avoided in the situation where the necessary majority could not be met in the Parliament to adopt a certain measure initiated by the Government. In order to determine the legislative forum to adopt the measure, the government, through the procedure of assumption of responsibility, conditions the continuation of its activity by requesting a vote of confidence. This constitutional procedure guarantees that the majority required for dismissing the Government, in the case of submitting a motion of censure, coincides with that for rejecting the law, program or political declaration to which the Government links its existence.

The adjustment of the laws as a result of the engagement of the Government's political responsibility has as an important consequence the absence of any parliamentary discussions or deliberations on the draft law. If the Government is supported by a comfortable majority in the Parliament, through this procedure it can obtain the adoption of laws by "bypassing the Parliament", which can have negative consequences regarding the observance of the principle of separation of powers in the state but also regarding the role of the Parliament as defined by art. 61 of the Constitution.

Consequently, the recourse to this constitutional procedure by the Government for the adoption of a law must have an exceptional character, justified by a well-defined political situation and social imperative.

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[1] Gheorghe Iancu, *Drept constituţional şi instituţii politice* (Bucharest: All Beck, 2010), 482

This particularly important aspect for the respect of the democratic principles of the rule of law by the Government was well highlighted by the Constitutional Court of Romania: "This simplified method of legislation must be reached *in extremis*, when the adoption of the draft law in the ordinary or in the emergency procedure is no longer possible or when the political structure of the Parliament does not allow the adoption of the draft law in the current or emergency procedure"[1].

The political practice of the Government in recent years is contrary to these rules and principles. The executive frequently resorted to assuming responsibility not only for a single law, but also for packages of laws without a justification in the sense of what was shown by the Constitutional Court.

The government's politicism, clearly expressed through the high frequency of recourse to this constitutional procedure, seriously affects the principle of political pluralism, which is an important value of the legal system enshrined in the provisions of art.1 para. 3 of the Constitution, but also the principle of parliamentary law, which shows that "the opposition expresses itself and the majority decides"[2]. "To deny the right of the opposition to express itself is synonymous with the denial of political pluralism which, according to art. 1 para. 3 of the Constitution constitutes a supreme value and is guaranteed... the principle *the majority decides, the opposition expresses itself* assumes that in all organization and the functioning of the Chambers of the Parliament to ensure, on the one hand, that the majority is not obstructed especially in the parliamentary procedure, and, on the other hand, that the majority decides only after the opposition has expressed itself"[3].

Censorship by the Constitutional Court did not prove sufficient and effective to make the Government respect these values of the rule of law.

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[1] Decision no 1557/18 November 2009, published in the Official Gazette of Romania, no 40/19 January 2010

[2] Ioan Muraru and Mihai Constantinescu. *Drept parlamentar românesc* (Bucharest: All Beck, 2005), 55-69

[3] Muraru and Constantinescu, *Drept parlamentar românesc*, 56

In the context of these arguments, we propose that in the organic law on the organization and operation of the Government, but also in the Regulations of the Parliament, the right of the Government to resort to engaging its responsibility for a single bill in a parliamentary session should be limited. At the same time, it is useful to expressly provide in the same normative acts that this procedure does not apply to organic laws.

In our opinion, these provisions can be included in normative acts subsequent to the Constitution, without the need for a revision of the Fundamental Law, because the regulations in question do not contravene the provisions of art. 114 of the Constitution, but are a concretization and clarification of them.

All the post-December governments massively resorted to the practice of emergency ordinances, a fact widely criticized in the specialized literature. The conditions and prohibitions introduced by the 2003 revision law regarding the constitutional regime of emergency ordinances, prove in practice insufficient to limit this practice of the executive and the control of the Constitutional Court also proved insufficient and even ineffective.

The consequence of such a practice is the violation of the role of the Parliament as the "sole legislative authority of the country" (art. 61 of the Constitution) and the creation of an imbalance between the executive and the legislature by emphasizing the discretionary power of the Government which has often turned into excess power.

We propose, in the perspective of a revision of the Basic Law, as art. 115 para. 6 of the Constitution to be amended in order to prohibit the adoption of emergency ordinances in the field of organic laws. In this way, an important area of social relations considered by the constitutional legislator as essential for the social and state system is protected from the excess of power of the executive through the practice of issuing emergency ordinances.

The provisions of art. 115 para. 4 of the Constitution shows that: "The Government can adopt emergency ordinances only in extraordinary situations whose regulation cannot be postponed, having the obligation to justify the urgency in their content". The constitutional text does not

define or list the exceptional situations that allow the Government to adopt emergency ordinances that have legal force similar to law. The generality of the constitutional rule, in the absence of loyal constitutional behavior, allows the executive to abuse the powers it has, to issue emergency ordinances without sufficient justification in the sense of the aforementioned constitutional provisions. By this, in an illegitimate and unconstitutional way, the Government subrogates the Parliament in the exercise of the legislative function in the state.

It is gratifying that our Constitutional Court, recently changing the judicial practice in the matter, ruled that the legal regime of fundamental rights and freedoms cannot be affected by emergency ordinances, more specifically the exercise of these rights cannot be restricted.

In order to limit the excess of power of the Government through emergency ordinances, we propose, without the need to revise the Constitution, that emergency situations be defined by an organic law and that the situations that can be considered as emergency situations be strictly and exhaustively listed.

In the current conditions characterized by the tendency of the executive to take advantage of the obvious politicism and to force the limits of the Constitution and democratic constitutionalism in an impermissible and dangerous way, it is necessary to create control mechanisms of the activity of the executive in a position to really guarantee the supremacy of the Constitution and the principles the rule of law.

In our opinion, it is necessary that the role of the Constitutional Court as guarantor of the Fundamental Law be amplified through new attributions in order to limit the excess of power of the state authorities. We do not agree with what is stated in the specialized literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the court of constitutional litigation[1]. It is true, the

[1] Vrabie, Genoveva. "Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice", *Revista de Drept Public*, no. 1 (2010): 33.

Constitutional Court has issued some questionable decisions[1]. Reducing the powers of the Constitutional Court for this reason is not a solution with a legal foundation. Of course, reducing the powers of a state authority has the consequence of eliminating the risk of faulty exercise of those powers. This is not the way in a state of law to improve the activity of a state authority, but by looking for legal solutions to perform in better conditions the attributions that prove to be necessary for the state and social system.

At the same time, in the organic law on the organization and operation of the Constitutional Court, we propose to stipulate the competence and obligation of the constitutional court to rule *ex officio* on the constitutionality of the Government's ordinances, but also of all normative acts regarding the establishment and regime of exceptional states on the territory of the country before these to enter into force.

A few brief explanations are necessary: the Constitutional Court, like any court, operates according to the principle that it cannot self-refer to fulfill its duties, but a referral is required from one of the legal subjects to which the provisions of art. 146 of the Constitution. In the case of the constitutionality control of the laws, there is the procedure of the prior constitutionality control of the laws, before their entry into force, and the procedure of the subsequent constitutionality control of the Parliament's laws and the Government's ordinances. The latter procedure can only be carried out indirectly, the Court can only be approached directly by the People's Advocate, through the exception of unconstitutionality invoked by an interested party before a court in a civil or criminal trial. In this case, the legal subject that can refer the constitutional court is only the court and not the parties involved in the process.

However, the Law on the Organization and Operation of the Constitutional Court (Law no. 47/1972, amended and republished) establishes the competence of the Constitutional Court to verify *ex officio*, without the existence of a referral, the constitutionality of draft

[1] As example, we refer to the Decision no 356/2007, published in the Official Gazette of Romania, no 322/14 May 2007 and to the Decision no 98/2008, published in the Official Gazette of Romania, no 140/22 February 2008

laws regarding the revision of the Constitution. By virtue of this precedent, we believe that it is possible to extend this competence of our Constitutional Court to Government ordinances, normative legal acts issued in consideration of an exceptional state or those exempted from judicial control for the reasons stated above.

For the same reasons, we propose to establish by organic law the competence of the constitutional court to exercise ex officio constitutionality control over the laws of the Parliament and the normative acts of the Government transposing the directives of the European Union into internal law. Also *ex officio*, the Constitutional Court should have the competence to verify the constitutionality of treaties and international conventions ratified by the Parliament. This normative regulation, which can be achieved by law, represents an important guarantee of respect for national sovereignty and the supremacy of the Constitution, primarily in relation to the application of the principle of priority of European Union law and in relation to the Parliament's acceptance of treaties and international conventions contrary to constitutional values and the democratic and orthodox traditions of the Romanian people, contrary to the interests of the Romanian people and national sovereignty.

All *ex officio* control procedures of the constitutionality of these normative acts that we propose must be carried out before the entry into force of the laws of the Parliament and the Government ordinances, of the normative acts regarding the state of emergency and the laws of ratification of international treaties and transposition of the European Union directives.

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THE PROTECTIVE MEASURES. ELEMENTS OF COMPARATIVE LAW

Cătălin Ionuț BUCUR[1]

Abstract:

Protective measures as criminal law sanctions appeared later in the history of criminal law, being included in criminal legislation only in the 20th century. Their development as specific social protection measures was the consequence of the progress made in the field of criminology, as a multidisciplinary science, and of penology, which highlighted the existence of dangerous human and social conditions against which punishments prove ineffective and therefore useless.

Key words: *protective measures; sanctions; criminal law; punishments.*

INTRODUCTION

In criminal law we have three main categories of criminal law sanctions, namely: punishments, protection measures and educational measures. In criminal law, sanctions occupy a particularly important place, as they represent the essential means of achieving the purpose of the criminal law, namely the defense of the fundamental social values of society against the acts provided for by the criminal law.

The protective measures as an independent institution of criminal law appeared in the field of criminal legislation only in the first half of

[1] **Lecturer PhD, Faculty of Economic Sciences and Law, University of Pitești, Pitești (Romania), e-mail: bucurc2000@yahoo.com**

the 20th century due to new concepts regarding the causes of the criminal phenomenon and the means of combating and preventing it.

The institution of protective measures is known by all modern legislation, with regulatory solutions close to those of the Romanian criminal law.

1. French legislation

In the conception of French criminal law, the protective measures are measures that are imposed on individuals who are dangerous for social order, with the purpose of preventing offences made possible by their condition, without having a retributive feature, their purpose being exclusively preventive. Safeguards do not imply guilt and can only be ordered under criminal law[1].

Thus, the French Penal Code regulates a unique sanctioning system that also includes punishments and protective measures, which can be applied cumulatively to an offender. Complementary measures, such as confiscation of assets qualified by law as dangerous, are recognized as protective measures. The same feature is recognized by jurisprudence and other complementary measures, such as the prohibition to be in certain localities, the withdrawal of the driving license, the prohibition to exercise certain professions.

The French criminal law states a general confiscation and a special confiscation, the latter being of lesser importance.

General confiscation is an optional complementary punishment that accompanies some main punishments, which consists in the transfer of some of the convict's assets into the property of the state. However, the French Penal Code in force no longer expressly regulates general confiscation.

[1]Aurelian Posdarie, "Măsurile de siguranță în dreptul penal francez și german" in *Dreptul*, *no. 4*, Union of the Romanian Legal Advisers, Bucharest (2003): 108.

Special confiscation is regulated by art. 131-21 of the French Penal Code, which states that "the penalty of confiscation is mandatory for objects qualified, by law or regulation, as dangerous or harmful". The confiscation is also made on the asset that served or was intended to serve in the commission of the offence or on the asset that is its product, with the exception of objects that can be returned to the victim[1].

In the situation where the confiscated assets have not been seized or cannot be confiscated in kind, the seizure shall be done by equivalent. The confiscated asset is owed to the state, unless there is some provision to the contrary regulating its destruction.

2. The Italian legislation

In Italian doctrine, it is accepted that in the case of dangerous subjects, social defense measures are necessary. The protective measures have a therapeutic, re-educational and re-socializing purpose and are applied to subjects who have committed an offence of criminal relevance.

In Italian law, safeguards are classified into personal safeguards and patrimonial safeguards. Also, in Italian criminal law, personal security measures are divided, in turn, into custodial measures and non-custodial measures. The custodial measures are the admission to an agricultural colony or work unit, admission to a mental hospital, admission to a correctional facility. They are non-custodial security measures: supervised freedom, prohibition to be in one or more localities or provinces, prohibition to frequent premises where alcoholic beverages are sold, expulsion.

In the second category of safety measures, the patrimonial ones, there are: the bond for good behavior and the confiscation[2].

In the Italian Penal Code, admission to a hospital for the insane (art. 222) is listed among personal protective measures depriving of freedom, a measure that applies to accused persons acquitted due to

[1] Mihai Adrian Hotca (coord.), *Noul Cod penal. Note. Corelații. Explicații* (Bucharest: C.H. Beck, 2014), 278.
[2] Hotca, *Noul Cod penal*, 271.

mental alienation or chronic alcohol or narcotic intoxication in cases where proves to be dangerous.

In Italian law, the seizure consists of the removal of assets that originate from illegal criminal acts and that maintain the idea and activity of the offence. The assets that are subject to this measure are: the goods that served or were intended to commit the offence (e.g. tools used for burglary); goods that are produced by crime (e.g. smuggled distilled alcohol); goods which are the price of the crime (e.g. any benefit acquired in furtherance of the crime; goods whose manufacture (counterfeit currency), use (false documents), carry (concealed weapons), possession (contraband) or disposal constitute a crime.

Confiscation is provided for in art. 240 of the Italian Criminal Code, its purpose being to remove dangerous goods.

Another patrimonial protective measure in Italian law is the bond of good behavior which consists of depositing an amount of money between certain limits. This measure can be ordered for a duration from 1 to 5 years, and at the end of the established interval the amount is returned if the person in question has good behavior.

3. The German legislation

In the German Penal Code, the protective measures are stated in Title VI of Chapter II under the name of "Correctional and protective measures", and the special confiscation is subject to the regulation of a separate title – Title VII.

A protective measure cannot be applied if it has no connection with the committed offence or the danger it presents to society[1].

In German criminal law, requiring a person to undergo treatment for an illness or rehab is provided as a measure that complements other institutions, such as conditional suspension of the execution of the sentence.

Among the measures regulated by the German criminal code are: the admission to a psychiatric hospital, admission to a drug rehabilitation

[1]Ilie Pascu et al., *Noul Cod penal comentat. Partea general* (Bucharest: Universul Juridic, 2014), 591.

center, admission to a preventive detention center, as well as measures of a distinct nature, such as supervised release, driving license cancellation and special seizure.

The court can take the measure of hospitalization in a psychiatric hospital if it is found that it is possible that due to the state of health the person in question will commit other illegal acts. So does the admission to a rehab center.

In the German Penal Code, the prohibition of a function or a profession is regulated in art. 70 as an educational and safety measure.

German legislation, like the Romanian one, states the measure of the prohibition of a function or a profession. If a person is convicted of an illegal act that he committed through the abusive use of a position or a profession, the court can take the measure of banning him from holding a position or exercising a profession, for a period between 1 and 5 years if it is found that the perpetrator is in danger of committing other crimes if he is allowed to continue to hold that position. However, the measure can also be ordered for life when it is considered that the legal maximum of the measure is not sufficient to remove the danger that the perpetrator represents to society[1].

In the German Penal Code, the measure of special confiscation is regulated in section VII. This measure presupposes the existence of facts provided for by the criminal law from which an advantage was obtained as a reward for the commission of the crime.

4. The Spanish legislation

The Spanish Penal Code includes in the general part a chapter called "Protective measures". According to art. 95 these measures will be applied by the court, with appropriate prior information, to people who are in certain special cases indicated by the code and if the following conditions are met: the subject has committed an act defined as a crime and from the act and the personal circumstances of the subject infers a prognosis of behavior that reveals the possibility of committing other crimes.

[1]Pascu, *Noul Cod penal*, 607.

Spanish legislation makes an express classification of protective measures into custodial and non-custodial measures. Art. 96 provides that the following are custodial measures: hospitalization in a psychiatric center, admission to a rehab center and admission to a special education center.

The non-custodial measures are: ban on exercising the profession; the expulsion from the national territory of foreign nationals not legally resident in Spain; the obligation to live in a certain place; family supervision; mandatory treatment in medical centers; prohibition to move to certain places or territories, etc.

Spanish legislation regulates a measure with a content similar to that of the obligation to medical treatment in Romanian legislation. If, for reasons related to mental health or a state of intoxication, a person is exonerated from criminal liability, the court will order the person to undergo medical treatment. However, the duration of this measure cannot exceed 5 years.

The Spanish Penal Code also regulates the measure of medical hospitalization. According to art. 101 if, due to an abnormality or mental alteration, a person cannot understand the illegal nature of his act, he may be subjected, if it is considered necessary, to hospitalization for medical treatment. The same will be done in the case of people in an advanced state of intoxication due to the consumption of alcohol, toxic or narcotic substances.

In a separate chapter of the Spanish Penal Code, the possibility of confiscation of the instruments with which the perpetrator committed an intentional crime, as well as the proceeds of the crime, is stated. The civil damages of the injured party will be covered from the sale of these assets.

CONCLUSIONS

Both in the Romanian legislation and in the legislation of the analyzed states, safety measures are criminal law measures, preventive, provided by law that are taken by the court against people who have

committed acts provided by criminal law in order to remove a state of danger of new facts provided by the criminal law.

Both the application and the execution of protective measures are subordinated to the purpose they have – that of eliminating certain states of danger that can generate acts provided for by the criminal law.

Thus, analyzing the Criminal Codes of these states, we can appreciate that there are both similarities and differences in terms of the regulation of safety measures in the legislation of the respective countries mentioned above in relation to the Romanian criminal legislation.

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THE OPPORTUNITY TO AMEND THE REGULATIONS ON MEASURES FOR THE PROTECTION OF PERSONS WITHOUT DISCERNMENT

Răducu Răzvan DOBRE[1]

Abstract:

The context related to the need for real protection of persons with mental disabilities was generated by an interpretation given by the decision of the Constitutional Court no. 601/2020. The consequence generated by this assessment of the constitutional judge led to the radical modification of the texts in the field, adopting in this respect the law nr. 140/2022. The generous principles arising from that piece of legislation regarding the exercise of civil rights by persons who have a limited capacity to discern do not have a judicious reflection in practice as well. If the good practices in this field had some limits until the moment of the appearance of the interpretation given to the constitutional litigation, after this moment the judicial proceedings were suspended, and at this moment they determine questionable solutions. Moreover, the administration of justice cannot be classified as a support for the litigants in these situations, in certain cases the so-called right turning into a real chore for the one with limits of discernment and implicitly for the members of his family who try to replace him in terms of exercising the prerogatives arising from the capacity to exercise. It seems to me that it is necessary to re-establish the modalities of State intervention in this regard, both administratively and judicially. The limits of restricting the exercise of a right must be proportionate to that reason which determines that intervention, but the right of assessment should be a subjective one, the assessment having to be broader for the magistrate and not an objective one, established under rigid conditions such as those now identified.

[1] **Ph.D, Associate professor, University of Pitești, Pitești (Romania), email: raducu.dobre@upit.ro.**

Key words: *mental disability; exercise capacity; prohibition; protection measures.*

INTRODUCTION

Until recently, the procedure by which a minor or adult person suffering from a mental disability was prohibited required a minimum of evidence to that effect. The protective purpose of finding that civil rights cannot be exercised as a result of the person concerned's lack of legal capacity to exercise was reflected in the absence of legal effects of acts concluded by the person who had been the subject of such proceedings.

With the decision of the Constitutional Court no. 601/2020 chaos was created in the adjudication of applications based on the provisions of Art.164-177 of the Civil Code, corroborated with the procedural steps set out in Articles 936-943 of the Code of Civil Procedure. The practice generated a real blockage in the interval between the moment of pronouncement of the solution by the constituent judge and the one represented by the drafting of the motivation of the respective solution.
Some cases have been suspended, others postponed sine die, just pending the concrete expression of the reasons for the decision.

Even after this moment, the solutions have experienced differences of opinion among the magistrates invested with requests based on this basis. Most of them rejected the requests just justified by the fact that a legal vacuum arose, (the legislation was not brought into line with the decision of unconstitutionality within the forty five-day period ruled by the fundamental law).

However, there were also solutions of the kind in which a distinction was made between the irreversible lack of discernment and the situation in which the person in question could make some progress in this regard. On the basis of a forensic expert report, when it came to the conclusion that the person concerned had abolished discernment, the application was granted, with direct reference to the distinction found in the reasoning given by the Constitutional Court regarding the duration in time of the effect that the new optics of the protection measures will generate (whether reviewable or not after a certain period of

time).Although those solutions constituted a real support people in such a hypostasis, strictly formally, leaning on the legal reality at that time, the court decisions were not based on a normative act in force, which did not leave them out of obviously well-founded criticism.

In this respect, one more important aspect should be noted: the participant in these procedures is also the representative of the Public Ministry. Although we are in a civil case, the role of the prosecutor is justified by his competence to defend the fundamental rights and freedoms of the citizen. As a party to the case, it had the recognized prerogative to appeal against such an unfounded solution, but no such initiatives were registered.

Today, the procedure is applicable, but there are still barriers determined, for example, by the concrete methodology that refers to the administration of the technical evidence - the medical and psychological evaluation that will have a completely different format - art.23 of the new law.

Last but not least, the re-examination of the judgments already rendered in the field of interdiction within a period of three years constitutes a real challenge for the Romanian judicial system.

Leaving aside this administrative aspect, there is also the question of respecting the principle of the security of the judiciary, as long as definitive solutions can be modified under a new legal text.

It is not the retroactivity of the norm that would be the problem, as long as we are dealing with a practical situation that can change (the individual's ability to reason and act accordingly) but the problem that arises is the guarantee that the individual in question and especially the members of his family cannot have in relation to the administration of assets and especially in connection with the representation of his interests in various situations.

The problem that arose with the decision of the constituent judge, namely the one with no. 601/2020 refers to the way in which the text of Articles 1, 16 and 50 of the Fundamental Law of Romania has been

interpreted in relation to Article 164 of the Civil Code. In such conditions, an unfavourable treatment occurs for some of the individuals who may experience an oscillation in the way of perception of reality, this implies keeping the exercise capacity intact.[1]

That breach of the correspondence between the text of a higher legislative act of importance and a subsequent one intended to develop those principles must undoubtedly be anchored in the premises laid down in Article 53 of the Fundamental Law.[2]

The lack of exercise capacity of an individual as a result of the interdiction procedure is identical in the legislation up to the adoption of law no. 140/2022 with the non-recognition of the validity of legal acts that he can conclude in his own name, when we are in the presence of impactful acts, such as those of provision.

The Constitution does not accept the thesis that the limitation or restriction of the exercise of a right should be done absolutely, but only partially and for a limited period of time. Although theoretically the decision to ban a person may be ineffective as a result of the adoption of a decision lifting that limitation, it was not in the old form of the Civil Code that a penalty was instituted against subjects of law expressly nominated to whom such liability would be assumed.

The fact that persons from the family of the prohibited person or other authorities with competence in this matter are not required to verify how the person placed under the ban evolves or involutes from the perspective of the perception of the surrounding reality, allows the assessment that the civil rights enjoyed by the person placed under the ban are effectively devoid of substance.

At the same time, it is also questionable in this regard to limit the measure in time, most of the time it is not revised. As such, from that point of view, I consider that the reasons given by the Constitutional Court in resolving that case are supplemented by my arguments above.

Even if Romania is a state that has ratified the Convention on

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[1] Gabriela Goudenhooft, Alina-Carmen Brihan and Ioan Horga, *Social Europe in 100 terms* (Bucharest: Tritonic, 2018), 91.
[2] *Romanian Constitution* (Bucharest: Rosseti International, 2021), 29.

the rights of persons with disabilities, and reference has been made to this aspect in motivating the solution by the constituent judge, we must consider how the public institutions in Romania interact with attributions in this regard. The competences established by the law are not, for example, sufficient when we do not have at hand the procedures that allow the expertise of the person concerned, the necessary funds in this regard, the qualified personnel who can take all these steps within a reasonable time.

Law 140/2022 comes with the novelties in the motivation of the Constitutional Court's decision that I mentioned. This seeks to achieve a 'reasonable adaptation' of mental deficiencies so that the treatment applicable to those persons does not raise the issue of discrimination.[1]

Thus are gradually presented the institution of the assistant appointed by the notary public when it comes to a person who has small difficulties to represent his interests, the judicial counselling that is ordered by the guardianship court for persons with partially abolished discernment, for a maximum term of 3 years, respectively the special guardianship established for persons who cannot represent themselves due to the total impossibility to discern the legal effects of the disposition acts - as a rule, a measure that is also adopted by the guardianship court for a period of five years, which can be extended up to fifteen years.

All situations in which we encounter temporary or permanent losses or abnormalities are deficiencies. Mental disability is actually a result of that deficiency, seen gradually, and disability is the social perception of the person with deficiency. (Dicu,2018, pp.95-96).[2]

The diversification of these solutions is mainly determined by the fact that it has been considered that the banning of a person with abolished discernment is an act that affects human dignity and because, last but not least, discrimination is created between those who are able to manage their civil rights and are not subject to such a procedure,

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[1] Claudia Oprea-Popa, "Human rights:international regulations" in *Social work of risk groups*, coord. Doru Buzducea (Iași:Polirom, 2010),753.

[2] Sevastia Dicu, *Dimensions of socio-professional discrimination of persons with disabilities in Romania* (Bucharest: Tritonic, 2018), 95-96.

although they have certain limits of perception of the risks that may arise in relation to their interests and those for whom such formalities are not started.

Crucially, the regulation of those solutions must be viewed in the recalled order of preference and that they are subject to review. This time also establishes the responsibility of the persons designated as protectors of those partially or totally deprived of the ability to discern, in relation to the temporal limit of the measures put in place. Thus, no later than six months before the moment when the initial solution no longer generates effects, the guardianship court must be seized. It is not only this that is the only case in which it is re-established what a certain support measure is appropriate for the situation of a certain person in such a stalemate. Any relevant change in the way in which the perception of reality can be made by the protected person must lead to the knowledge of the guardianship court. All these regulatory efforts arise as a result of the social pillar at European level. Thus, human dignity, active participation and the adaptation of the activities in which the person with disabilities is involved to their needs are a relevant aspect in the U.N. Convention dedicated to this legal matter.[1] (Olteanu,2021, p.22).

The relevance of the specialized acts drawn up with a view to establishing or amending one of the new measures of occupancy results very clearly from the entire economy of the text of the new law. However, although within only three months from the entry into force of law no. 140/2022, the new standards on the methodology of medical and psychological evaluation had already to be adopted by order of the minister of health and the minister of labour and social solidarity these follow-up acts are only in the procedure of transparency of decision-making as of 22 September 2022. Noteworthy, however, is the fact that in the draft of the text mentioned above we are dealing with a novelty that can have pragmatic effects from the perspective of the amplitude of the phenomenon that will soon appear. The avalanche of such requests will be determined on the one hand by the blockage of the judiciary in

[1] Elena Daniela Olteanu, *Social work systems in the European Union. Impact of COVID 19 on social care policies and systems* (Brașov: Creator, 2021), 22.

the time frame dominated by the legislative vacuum, respectively by the obligation to review all the solutions that have already been resolved by the time of adoption of the new regulation, in accordance with the new philosophy of protection measures.

The simplification of the administrative work that will be the basis for the adoption of the solutions for the protection of the persons whose discernment is affected to a certain degree is possible because the evaluation does not remain the exclusive attribute of the state, allowing the medical-psychiatric and psychological acts to be drawn up at the level of the various providers of this kind of services in the private area. Although it may be an alternative meant to considerably compress the waiting time, which is otherwise extremely important in this endeavour (for example, the medication prescribed on time can increase the balancing chances of the protected patient), we must be realistic in considering that only a small number of beneficiaries will opt in this regard. The costs involved with the assessment in the private environment are extremely high and few families belonging to them can afford to bear them.

An essential component of the evaluation is the psychiatric consultation, and here we are facing a real challenge because the qualified human resource in this medical specialization is extremely rare. Moreover, we must bear in mind that there are also minor beneficiaries, and the pediatric psychiatry specialization is even more difficult to meet.

As such, the desirability of taking a protective measure will become extremely relative. The meaning of the law was to react extremely promptly in order to ensure a real possibility for the individual to exercise the rights in direct correlation with his medical and psychological state. If we take into account, for example, the fact that the medical analysis of a psychiatric nature must be at least four hours carried out over several days of observation, it is clear to us that the report that must be drawn up in this regard will be a long-term bureaucratic process.

In this context, the question arises how much more we can say that this medical finding reflects the condition of the beneficiary to be targeted by the protection measure, whether the interval from the moment

of the specialized consultation until the moment of the final stay of the solution establishing one of the measures will be of the order of months, if not of the order of years.

Another novelty element that also establishes a special procedure is represented by the assistant that the notary public can appoint when a person is in a state of psycho-social need. Here we have expressed the classic model centred on the beneficiary, given that the client himself is a participant in the procedure, which will make less objectionable the need to implement that solution.[1]

For example, such a case can be folded very easily when the person in question has gone into transient depression, when we are talking about toxico-dependent or alcohol-consuming people.

Here, unlike in the case of the other two institutions (judicial counselling and special guardianship), the resolution of the situation takes place administratively. Of course, the notary will not replace the specialist in the field, so there must be a permanent dialogue with the public service of social assistance in the locality where the residence of the person thus protected is located.

The transfer of responsibility to the notary public in order to establish the person who will assist the person in a vulnerable situation is justified by two arguments: on the one hand we are in the presence of an act specific to the general interest (protection of the rights of the person) and the notary provides a service dedicated to the community, even if it is of a private nature, and the second motivation is based on the idea that at the time of concluding a legal act, (especially when we are in the presence of a provision act) the notary must verify whether the expression of consent on the part of the signatory persons is fully valid.

The appointment of the assistant in the notarial procedure does not affect the full capacity of the vulnerable person to exercise, but only gives rise to an additional guarantee as regards the protection of the interests of the person concerned.

As well as the other protection measures, the appointment of the assistant in the notarial procedure is carried out for a predefined term -

[1] Florin Lazăr, *Introduction to comparative social policies* (Iași: Polirom, 2010), 48.

two years, with the possibility of re-establishing the content of the measure. If in the case of the two judicial measures we are in the presence of a lower probability that the remedy of the beneficiary's condition will occur, in the case of that administrative measure the termination of the support granted by such a measure is much more plausible. Affecting the ability to protect their interests is easier to remove, and the notary finds this where appropriate.

Finally, I would like to remind you that it tends to specialize the magistrates who will be invested to solve such cases, thus institutionalizing continuous training courses in this regard. Such an adaptation on the fly has also been a constant solution in other hypotheses closely related to discriminatory acts, such as those related to situations of inferiority arising according to the criterion of gender. . And then a special training was required for the civil servants who had to implement certain specific procedures.[1]

Once these new rules have been applied in concrete terms, (as I have shown before, part of the subsequent legislation is still in preparation for elaboration), a new intervention will certainly be needed to address the highlighted and practical aspects, apart from those we have talked about.

CONCLUSIONS

The novelties in this area are a starting point, taking into account the new European benefit in this respect, but it should be noted that at least at the moment the procedure is difficult and creates profound dysfunctions that, instead of allowing the exercise of civil rights in their fullness, often block the protection of the beneficiaries of new solutions.

[1] Liliana Popescu, *Governing for equal opportunities* (Bucharest: Tritonic, 2006),85.

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THE ETHICAL PRINCIPLES THAT GOVERN THE PROFESSIONAL RELATIONSHIP LAWYER-CLIENT IN EUROPE AND THE UNITED STATES OF AMERICA

Viorica POPESCU[1]

Abstract:

In their work, people belonging to the legal professions, whether they are judges, prosecutors, lawyers or legal advisers, have to make decisions that can affect the lives of others. From this perspective, the lawyer – the person called to defend the rights and fundamental freedoms of his fellow citizens, has a double responsibility, namely towards the client, but also towards the judiciary, of which he is an integral part.

In this context, the relationship that is built between the lawyer and his client cannot be based only on the contractual aspects that are managed through the legal assistance contract, but this relationship must also have a strong ethical and deontological basis.

The importance of the lawyer's role, seen as an "essential agent of the administration of justice[2]*" determined the adoption of regulations containing deontological norms generally valid for the lawyer-client relationship.*

This paper aims to analyze these regulations adopted in Europe and the United States of America, identifying the fundamental principles that must govern the lawyer-client professional relationship.

[1] **Lecturer PhD, Faculty of Law and Economic Sciences, University of Pitești, Pitești (Romania), e-mail: vioricapopescu30@gmail.com**

[2] Art. 12 din Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990, available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf, accessed on 29 November 2022

Key words: *layer; client; deontological norms; fundamental principles.*

INTRODUCTION

In contemporary society, although there is an unnatural tendency of public authorities to minimize the nature of the profession, the lawyer has the fundamental role of promoting and defending the rights, freedoms and legitimate interests of both individuals and legal entities under public and private law[1], and in the exercise of the right of defense, he has the right and the obligation to insist on achieving free access to justice, the performance of a fair trial, within a reasonable time[2].

In carrying out the mission of defending the interests of their clients, lawyers play an essential role in the correct administration of justice[3].

In Recommendation No. R (2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer[4], the lawyer is defined as "a person qualified and authorized in accordance with national law to plead and act on behalf of his clients, for

[1] Art 1 Para 2 of the Law no 51/1995 for the organization and practice of the lawyer's profession, republished in the Official Gazette of Romania, no. 440/24 May 2018, available at https://www.unbr.ro/law-no-51-from-june-7-1995-for-the-organisation-and-practice-of-the-lawyers-profession/, accessed on 29 November 2022

[2] Art. 2 Para 5 of the Law no. 51/1995; T. Savu and Ș. Naubauer, *Comentariile noului cadru legal privind profesia de avocat* (Bucharest:Universul Juridic, 2004), 19.

[3] Opinion no. 16 on the relations between judges and lawyers and the concrete means to improve the efficiency and quality of judicial proceedings, available at https://www.coe.int/en/web/ccje/opinion-n-16-on-the-relations-between-judges-and-lawyers, accessed on 29 November 2022

[4] Recommendation No. R (2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers on 25 October 2000, at the 727th meeting of the Ministers' Deputies, available at https://www.icj.org/wp-content/uploads/2014/10/CoE-rec200021-freedom-exercise-profession-lawyer.pdf, accessed on 29 November 2022.

to engage in the practice of law, to appear before the courts or to provide advice and represent clients on legal issues".

Lawyers are those who value justice and love freedom, seek truths and virtues, respect public order, are brave and have the spirit of public service, despise greed and do not flatter the powerful, strive to educate their personality, cultivate their common sense and to continue academic training[1].

A lawyer is not a luxury, but a necessity and in some developed communities, life cannot be conceived without a lawyer (the problems of the individual become the problems of the lawyer)[2].

In order to ensure the defense of his client, the lawyer is entitled to dispose of all the means of exercising the right of defense. The lawyer's independence cannot harm the interests of his client[3], this rule being expressly enshrined in the law and in the statute of the profession[4].

The lawyer builds the case together with the party, he is the first judge of the case, only at a different time than the judge. The judge who is convinced that a fair trial requires several roles that must be played well – first the lawyer, then the judge – integrates in good faith the effort of the participants in the trial to find the correct, desirable solution"[5].

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[1] Deontological Code of Lawyers in Japan, in E. Poenaru and C. Murzea, *Profesiile juridice liberale* (Bucharest: Hamangiu, 2009), 16 .

[2] Gh. Scripcaru, A. Ciucă, V.M. Ciucă and C. Scripcaru, *Deontologie judiciară. Syllabus* (Iași: Sedcom Libris, 2009), 203.

[3] Art. 7 Para 4 of the Statute of lawyer adopted by the National Union of Bars in Romania on 03 December 2011 states that the independence of the lawyer cannot prejudice the interests of his client. The lawyer is obliged to give the client legal advice in accordance with the law and to act only within the limits of the law, this statute and the code of ethics, according to his professional creed.

[4] I. Leș, *Organizarea sistemului judiciar, a avocaturii și a activității notariale* (Bucharest: Lumina Lex, 1997), 149.

[5] A. Rădulescu, "Unele aspecte privind evaluarea comportamentului judecătorilor din perspectiva calitativă" in I. Copoeru and N. Szabo (coord.), *Etică și cultură profesională* (Cluj-Napoca: Casa Cărții de Știință, 2008), 261-262.

THE PROFESSIONAL RELATIONSHIP LAWYER - CLIENT

Regardless of the legal system, the lawyer-client professional relationship begins with the conclusion of a legal assistance contract, which will govern the entire activity between the two parties. In Romania, art. 28 of Law no. 51/1995 regulates what can be called the "source" of the relationship concluded between the lawyer and his client, namely the legal assistance contract, enshrining, in a general way, the rights and obligations relative to its conclusion, as well as its termination. The legal assistance contract is similar to the mandate contract, bringing together in its content elements of the latter, as well as specific elements of a service contract. Based on this contract, the right of the lawyer to represent or assist the client is born, both in relations with state institutions and in relations with third parties. The object of the legal assistance contract can consist of one or more of the activities that the lawyer can carry out, in relation to art. 3 of Law 51/1995[1].

As for the lawyer, it must be stated that, to the greatest extent, he has obligations of diligence, and not of results, especially when we refer to the activity of assistance and legal representation before the courts, the prosecutor's offices, or any institutions. In this context, the lawyer is required to make every effort to achieve a certain result, without being, however, obliged to obtain the result desired by the client. Within the most common form of legal activity, consisting of assistance and/or legal representation activities, the lawyer has the obligation to use all the

[1] Art 3 of the Law no 51/1995 states that: (1) A lawyer's activity shall be achieved through: a) legal advice and petitions of legal nature; b) legal assistance and representation before the courts of law, criminal prosecution bodies, jurisdictional authorities, public notaries and bailiffs, public administration bodies and institutions, as well as before other legal entities, under the terms of the law; c) drawing up legal documents, and certifying the parties' identity, the content and dates of the documents submitted for authentication; d) assistance and representation of interested natural or legal persons before other public authorities, with the possibility to certify the parties' identity, the content and the dates of the documents being drafted; e) defense and representation, by use of specific means, of the legitimate rights and interests of natural and legal persons in their relationships with the public authorities, institutions, and any Romanian or foreign person; f) mediation activities;

necessary legal levers in order to support his client's cause, to respect the procedural terms and conditions and to show the client all the possibilities he has. However, he does not have the obligation to win or not a case, the result desired by the client does not in itself constitute an obligation of the lawyer.

However, the lawyer has an obligation to always provide his client with competent representation, which in the American Bar Association's[1] sense implies legal knowledge, skill, thoroughness and training reasonably necessary for the representation.

THE DEONTOLOGICAL PRINCIPLES GOVERNING THE PROFESSIONAL RELATIONSHIP LAWYER - CLIENT

However, apart from its contractual basis, the lawyer-client relationship also has a deontological basis, "the deontological norms being intended to guarantee, through their freely consented acceptance, the good performance by the lawyer of his mission, recognized as indispensable for the proper functioning of any society human"[2].

This ethical basis represents not only a system of guiding principles in the lawyer's activity, but also represents his responsibilities, which is why, since 1990, the Basic Principles on the role of the Bar were adopted by the 8th Congress of the United Nations for crime prevention and treatment of prisoners, Havana, Cuba (27 August - 7 September 1990)[3].

According to this international document, the lawyer must carry out his activity based on the following principles:

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[1] See more about the regulations of the American Bar Association regarding the relationship lawyer-client, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/, accessed on 29 November 2022

[2] Para 1.2. of the Charter of core principles of the European legal profession available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf

[3] Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990

- independence[1];
- honor and dignity[2];
- loyalty to the client[3];
- diligence[4].

In order to ensure a balance between the lawyer's duties towards the courts and those towards the clients, regulations containing deontological provisions have also been adopted over time at the European level.

In the following we will analyze these principles by referring to the instruments adopted at the European level and to the system of rules established by the American Bar Association in the United States of America.

THE DEONTOLOGICAL PRINCIPLES GOVERNING THE PROFESSIONAL RELATIONSHIP LAWYER – CLIENT IN EUROPE

Considering the essential role of the lawyer to act both in the interest of the people whose rights and freedoms he defends, as well as in

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[1] Art 16 of the Basic Principles on the Role of Lawyers states that Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

[2] Art 12 of the Basic Principles on the Role of Lawyers states that lawyers shall at all times maintain the honor and dignity of their profession as essential agents of the administration of justice.

[3] Art. 15 of the Basic Principles on the Role of Lawyers states that lawyers shall always loyally respect the interests of their clients.

[4] Art. 14 of the Basic Principles on the Role of Lawyers mentions that lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

the interest of justice, the lawyer-client relationship was the subject of deontological regulations, their purpose being that of "combining in the most appropriate manner the professional and moral obligations"[1].

In Europe, regulations such as the European Union Lawyers' Code of Ethics[2] and the Charter of Fundamental Principles of the European Lawyer have been adopted[3]. These regulations were subsequently transposed by the Member States into specific national legislations, in the form of laws, statutes or ethical codes.

In this sense, it was established that the lawyer-client professional relationship must be carried out in accordance with the following principles:

- **Independence**[4]. By virtue of this principle, the lawyer must avoid any prejudice to his independence and be careful not to neglect his professional ethics in order to please his clients, the judge or third parties. This independence is necessary in both legal and judicial activity. The advice given by the lawyer to his client has no value if it was done out of complacency, self-interest or under the effect of outside pressure.

According to the Charter commentaries, the lawyer must be independent of the state or other powerful interests and must not allow this independence to be compromised by undue pressure from his associates. The lawyer must also remain independent from his client if the lawyer wants to enjoy the trust of third parties and the court. A lawyer cannot ensure a high quality of his services without remaining totally independent from his client.

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[1] Cristinel Ghigheci, *Etica profesiilor juridice* (Bucharest: Hamangiu, 2017), 104.

[2] Code of Conduct for European Lawyers available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf, accessed on 29 November 2022

[3] Charter of fundamental principles of the European lawyer, available at https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf, accessed on 29 November 2022

[4] The principle of independence is stated by art. 2.1. of the Code of Conduct for European Lawyers, available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf, accessed on 29 November 2022

- **Trust and moral integrity**. Art. 2.2 of the Code stipulates those relationships based on trust can only exist when there is no trace of doubt regarding the personal honor, probity and integrity of the lawyer. For the lawyer, these traditional virtues constitute professional obligations.

In the comments on the Charter, it is shown that also the lawyer must enjoy dignity, honor, and probity, he must not do anything that could compromise his reputation or the reputation of the profession, in general, and public confidence in the profession of lawyer. This does not mean that the lawyer must be a perfect individual, but he must refrain from dishonorable conduct and manners that could dishonor the lawyer profession in his legal activity, in other professional activities or even in his private life.

- **Maintaining professional secrecy**. According to art. 2.3.1. and next of the Code without the guarantee of confidentiality, trust cannot exist. The lawyer must respect the secrecy of any confidential information he becomes aware of in the course of his professional activity, and this obligation is not limited in time.
- **Customer interest and loyalty**. Subject to the strict observance of legal and ethical norms, the lawyer has the obligation to always defend his client's interests as best as possible, even in relation to his own interests or the interests of his colleagues. The lawyer advises and defends his client promptly, conscientiously and diligently. He takes personal responsibility for the mission entrusted to him and informs the client about the evolution of the case entrusted to him.

From the perspective of the comments on the Charter, loyalty to the client is at the heart of the lawyer's role. This supposes that the lawyer must be independent, must avoid conflict of interest and must maintain the trust of the client.

- **Professional competency**. The lawyer must not accept to be entrusted with a case when he knows or should know that he does not have the necessary competence to deal with this case, without cooperating with a lawyer who has the necessary competence. Also, the lawyer cannot accept a case when, due to other obligations, he is unable to deal with it promptly (art. 3.1. of the Code).

- **Conflict of interest**. According to the art. 3.2 of the Code, the lawyer cannot advise, represent or act on behalf of two or more clients in the same case, if there is a conflict of interests, or when there is a significant risk of such a conflict occurring between the interests of these clients. The lawyer must refrain from dealing with the cases of both or all of the clients involved, when there is a conflict between their interests, when professional secrecy risks being violated or when his independence risks being undermined. The lawyer cannot accept a case of a new client, if the confidentiality of the information entrusted by an old client risks being violated or when the lawyer's knowledge of his old client's cases would unduly favor the new client.
- **Fair treatment of the client with respect to the fee**. In this sense in art. 3.4 of the Code stipulates that the lawyer must inform the client about everything he asks for as a fee, and the total value of his fees must be fair and justified, in accordance with the law and the ethical rules to which the lawyer is subject.

Regarding the fees, the comments to the Charter state that the lawyer has the obligation to make the client fully aware of the fee, that it be fair, reasonable and in accordance with the law and professional rules, to which the lawyer is subject.

THE DEONTOLOGICAL PRINCIPLES GOVERNING THE PROFESSIONAL RELATIONSHIP LAWYER – CLIENT IN THE UNITED STATES OF AMERICA

In the United States of America, lawyers must obey the following principles governing the professional lawyer-client relationship, rules established by the American Bar Association[1]:

- **Competence** involving legal knowledge, skill, thoroughness and training reasonably necessary for representation.

[1] See more about the American Bar Association's lawyer-client relationship regulations, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ accessed on 29 November 2022

- **Independence**. The lawyer must be independent of the client's opinions or activities. In this sense, the lawyer can refuse a client when the latter's behavior is contrary to the law. Also, the lawyer has the obligation to discuss all the legal consequences deriving from the proposal to carry out the process made by the client.
- **Diligence and promptness**. By virtue of this principle, the lawyer must act with commitment and dedication to the client's interests.
- **Communication**. The lawyer must promptly inform his client of any decision or matter for which the client's consent is required. The lawyer is also obliged to explain to the client, to a reasonable extent, all aspects of the case, so that the client makes informed decisions about the representation.
- **The amount of the fee**. The fee requested by the lawyer must not have an unreasonable amount. The factors that determine the reasonableness of the fee are the following: the time and labor required, the novelty and difficulty imposed by the case, the skills required to perform the activity, the time limitations imposed by the client or circumstances, the nature and duration of the professional relationship with the client, the experience, the reputation and capacity of the lawyer providing the services.
- **Privacy**. A lawyer may not disclose information about a case unless the client gives their informed consent. Exceptions to this principle refer to situations such as:

- preventing death or substantial bodily harm to the customer.
- prevent the client from committing a crime or fraud that will reasonably result in substantial injury to the financial interests or property of another person, the client using the lawyer's services for this purpose.

In order to maintain confidentiality, the lawyer is obliged to make reasonable efforts to prevent accidental or unauthorized disclosure or unauthorized access to information related to the representation of a client.

- **Conflict of interest**. A lawyer may not represent a client if he is in a concurrent conflict of interest. Concurrent conflict of interest exists if:

- representation of one client will be directly opposed to another client;
- there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third party, or a personal interest of the lawyer.

Per a contrario, it is considered that the lawyer is not in a conflict of interest in the following situations:
- the lawyer reasonably believes that he will be able to provide competent and diligent representation to each client;
- the representation is not forbidden by law;
- the representation does not involve the support of a claim by a client against another client, represented by a lawyer, in the same litigation or in another procedure, before a court;
- each client gives their informed and confirmed consent in writing.

CONCLUSIONS

Although currently the lawyer is considered more of a legal service provider, as the challenges of the modern world are multi-dimensional, far exceeding the legal sphere, in reality he still remains a promoter of justice.

In his activity, the lawyer must primarily identify two elements, namely, on the one hand, the rights and interests of his client, and on the other hand, their legitimate character[1].

Between these two limits, the lawyer-client professional relationship must be carried out according to some clear ethical rules, which regardless of the system of which the lawyer is a part, are the same and which are intended to give content to the lawyer's conduct. They

[1] M. Niculeasa, „Anticriștii juridici ai zilelor noastre sau despre cele două relații care ne tulbură viețile profesionale: relația dintre avocat și client din perspectiva ilicitului, respectiv relația dintre dependent și independent, în activitatea avocatului din perspectiva ilicitului fiscal", in Cristinel Ghigheci, *Etica profesiilor juridice* (Bucharest: Hamangiu, 2017), 378.

have the role of guiding the lawyer's behavior, acquiring the character of professional constants.

The fundamental principles, even if expressed in a slightly different manner within different legal systems, remain common rules for all lawyers.

Taking into account the higher position entrusted by society, the lawyer is obliged not to abdicate these principles which represent at the same time, on the one hand, moral virtues and duties for him and on the other hand, guarantees for the client.

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THE PRINCIPLE OF LAWFULNESS, FAIRNESS AND TRANSPARENCY IN THE PROCESSING OF PERSONAL DATA

Andreea DRĂGHICI[1]
Daniela IANCU[2]

Abstract:

The General Regulation on personal data protection, adopted on 27 April 2016, is the act by wich the reform on data protection in the European Union has been completeed. The processing of personal data is governed by a set of principles, the first of the principles regulated by the GDPR is the principle of lawfulness, fairness and transparency in processing of personal data. In accordance with this principle, personal data can be processed only on the basis of one of the 6 elements provided by the GDPR, the controllers must act in accordance with the will of the personal data subject, who must be informed of the way in which his or her data is processed.

Key words: *personal data; data subject; lawfulness; fairness; transparency; right of information; right of access; legal grounds for processing.*

INTRODUCTION

By adopting on 27 April 2016 by the European Parliament and the Council of the Regulation (EU) 2016/679 on the protection of natural

[1] **PhD, Associated professor, University of Pitești (Romania), andreea.draghici@upit.ro ORCID: https://orcid.org/0000-0003-3427-7334**
[2] **PhD Lecturer, University of Pitești (Romania), daniela.iancu@upit.ro, ORCID: https://orcid.org/0000-0002-7733-3642**

persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, also known as The General data Protection Regulation (GDPR) has completed the legislative reform on data protection in the European Union.

At internal level, was adopted the Law no. 190/2018 on measures implementing 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 This data and repealing Directive 95/46/EC (The General data Protection Regulation)[1].

THE PRINCIPLES GOVERNING THE DATA PROCESSING ACTIVITY

Regarding the principles, they could not be missing from the processing of personal data, they ensuring cumulatively: the legality, the equity, the transparency, the purpose and storage limitations, the data minimization, the integrity and the confidentiality, and particularly, the responsibility.

The principles set out in the GDPR therefore concern the data processing activity, the novelty compared to the previous regulation being the express regulation of the principle of responsibility. Any subsequent data protection legislation must comply with the essential principles of European data protection legislation. Under EU legislation, the restriction or limitation of the principles applicable to processing are allowed only to the extent that they correspond to fundamental human rights and obligations. They must be expressly provided for by law and must pursue a legitimate purpose and constitute necessary and proportionate measures in a democratic society, as provided for in Article 23(1) of the GDPR. All these principles are applicable to both adults and

[1] Published in the Official Gazette no. 651/26.047.2018

minors who are offered additional guarantees in terms of their vulnerability[1].

THE LAWFULNESS IN PROCESSING THE PERSONAL DATA

The first of the principles regulated by the GDPR is the principle of lawfulness, fairness and transparency.

EU and CoE data protection legislation requires the processing of personal data to comply with the principle of lawfulness [2].

Lawfulness requires that personal data be processed only on the basis of one of the six elements set out in the GDPR, namely: The consent of the data subject, the necessity of conclusion of a contract; a legal obligation; the need to protect the vital interests of the data subject or of another person; the need to carry out an activity in the public interest; the need to protect the legitimate interests of the controller or a third party, insofar as they do not prevail in that case the interests and rights of the data subject[3].

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[1] Ramona Duminică and Andreea Drăghici, „The processing of personal data regarding children according to regulation (EU) 2016/679“, *In Valahia University Law Study Supplement, (2018): 118-126*. See for developments: Andreea Draghici, *Protecția juridică a drepturilor copilului* (Bucharest: Universul Juridic, 2013) 9-27.

[2]Modernised Convention 108, Article 5(3); General data Protection Regulation, Article 5(1)(a).

[3]Art. 6 para.1 GDPR: “ Processing shall be lawful only if and to the extent that at least one of the following applies::

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

In the absence of one of the specified grounds, the processing will be considered unlawful. It is also important to choose the right legal basis from the beginning of the processing of personal data, as changing this basis is not a practice used by the Regulation [1].

THE FAIRNESS IN PROCESSING THE PERSONAL DATA

However, lawfulness alone is not sufficient for the lawful processing of personal data. In addition to the lawfulness of processing, EU and CoE data protection laws require that personal data be processed fairly[2].

If we refer to the primary meaning of the word "equity" we infer that the equity of data processing would imply accuracy, fairness, justice. All these attributes must be found in the relationship between the controller and the person whose data is processed (the data subject)[3]. The data controller must inform the data subject that his or her data are being processed, how they are processed and provide, in principle, all the information necessary to obtain the consent of the data subject. The right to information of the data subject implies the exclusion of a secret

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(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child." (Article 6(1) of Regulation No 679/2016). See, Maria Maxim, *Răspunderea civilă contractuală în domeniul protecției datelor cu caracter personal* (Bucharest: Universul Juridic, 2021), 71-90.

[1]See, Ruxandra Sava, *GDPR pe înțelesul tău. Sinteză teoretică și recomandări practice* (Bucharest: Universul Juridic, 2019), 61.

[2]The General data Protection Regulation, Article 5(1)(a); Modernised Convention 108, Article 5(4)(a).

[3] About the concept of data subject, identified or identifiable person, see Ramona Duminică, Andreea Tabacu, Bref considerations about the notion of personal data in the context of the regulation (EU) 2016/679 on the protection of natural persons with regard to the procesing of personal data and on the free movement of such data, *in International Scientific Conference HISTORY, CULTURE, CITIZENSHIP IN THE EUROPEAN UNION*, 11th Edition (18th-19th May 2018): 237, https://www.upit.ro/_document/30916/e-book_iccu2018_final.pdf

processing which would put the data subject in difficulty because she can only become aware of the risks that she might assume if she would give consent to the processing.

Fairness requires that controllers act in accordance with the will of the data subject, especially when consent is the legal basis for data processing, which puts fairness in full relation to ethics.

THE TRANSPARENCY IN PROCESSING THE PERSONAL DATA

The third element that completes the principle under analysis is transparency. EU and CoE data protection legislation require that the processing of personal data be done "in a transparent manner in relation to the data subject [1]".

In the recitals of GDPR "the principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing" [2].

From the analysis of this text, it follows that transparency implies the obligation of the data controller to inform the data subject how his data are processed. This concerns three main moments: The stage before the processing which is marked by the obligation of the controller to inform the data subject; the actual stage of data processing, marked by

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[1]The General Data Protection Regulation, Article 5(1); Modernised Convention 108, Article 5(4)(a) and Article 8.
[2]Paragraph 39 of the GDPR Preamble.

the information that should be easily accessible to the data subject and the post-processing stage where the data subject should have easy access to the data processed to him or her when so requesting.

The CoE law also states that it is mandatory for the controller to proactively provide the data subject with certain essential information, such as: the name and address of the controller, the legal basis for the processing, the categories of data processed, the retention period of the data, information about transfers of data to a recipient in a Member State, the risks to which they are exposed, their safeguards and rights in the processing. The information provided shall be easily accessible, concise, comprehensible and adapted to the particular characteristics of the persons concerned[1].

This is, for example, the case of data processing in the case of children[2]. The EU legislator considered it necessary to grant children special legal protection also in the field of personal data processing, with additional guarantees, precisely in order to ensure that the transparency element is applied to them.

Insisting on this category of persons, the reason for the establishment of special protection is mentioned in recital 38 of the Preamble to the General Data Protection Regulation: " Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences, and safeguards concerned and their rights in relation to the processing of personal data. …" Also, it is shown that "such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child".

In other words, under the right to information, the persons whose data are processed must be informed by the controllers or their

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[1]*See, to this effect, Manual de legislație privind protecția datelor (*Edition 2018), 133-134.

[2]It is also the position of the Article 29 working party that argues that transparency is self-standing right that applies equally to children and adults. See, Diana Flavia Barbur, *Protecția datelor cu caracter personal. Ghid practic (*Bucharest: CH Beck, 2020), 59.

empowered persons, in principle before the start of the processing activity, of the purposes, duration and means of processing, all these actions taken by operators in support of the principle of transparency. The transmission of personal data from one controller to another will also be done with the information of the data subject. This principle applies, even when data controllers are two public authorities[1].

According to the GDPR, information must be provided in writing or in electronic format when appropriate. At the request of the data subject, the information may be provided verbally, provided that the identity of the data subject is unequivocally proven by other means. The information must be provided without undue delay or expense[2].

With regard to expenditure, Article 12(a) of Directive 95/46 (right of access) leaves it up to the Member States to collect fees in the event of exercising the right of access to personal data, provided that such costs are not excessive. In other words, they must be regulated at a level at which the data subject can request access and there is a proportionality between the realization of his interest and the obligation of the controller to communicate those data to him. In fact, he European Court of Justice (ECJ) states that "an excessive fee would prevent the useful effect that the provisions that enshrine the rights of the data subject must have, such as rectification, erasure, blocking, opposition and legal action."

The ECHR has stated that it is necessary, by virtue of access to personal data, to make available to the data subjects an efficient procedure that is not hampered by the quantity of information requested or by the shortcomings of the archiving system. Thus, the ECHR considered that the provision of information within an inexcusable large

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[1]Judgment of the CJEU of 1 October 2015 in case C201-/14, *Smaranda Bara and others v National Health Insurance House and others*, paragraphs 28-46. In the note regarding the decision, it was pointed out that the existence of a protocol between ANAF and CNSAS is not sufficient to justify a normative information, as long as it does not constitute a law and was not published. From Nicolae Dragos Ploeșteanu, Vlad Lacătușu and Darius Fărcaș, *Protecția datelor cu caracter personal și viața private, Jurisprudența CEDO și CJUE* (Bucharest: Universul Juridic, 2018), 183.

[2]The General data Protection Regulation, Article 12(5); Modernised Convention 108, Article 9(1)(b).

time, unreasonable, violates article 8 of the European Convention on Human Rights[1].

Furthermore, unjustified refusal to grant access to personal data may constitute a ground for violation of Article 8 of the Convention[2].

CONCLUSIONS

In conclusion, the three elements that complement the principle of legality, fairness and justice ensure the lawful processing of personal data, the GDPR imposing them in the relationship between data controllers and data subjects. Any deviation from this principle is an infringement, in the sense of unlawful processing, which must cease.

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UNENFORCEABILITY - THE PAULIAN ACTION'S ADMISSION EFFECT

Nicolae FALĂ [1]
Mihail POALELUNGI [2]

Abstract:

The Paulian unenforeability is instituted as a sanction for the debtor's fraud. The Paulian unenforceability represents a remedy at the hand of the unsecured creditor against the acts signed by the debtor to his detriment. The unenforceability is intented to facilitate the access of the pursuing creditors to the benefit recieved by the third contracting party or beneficiary from the defaulting debtor. The object of unenforceability is always and in priciple a valid legal act. The unenforceability operates only in relation to the Paulian creditors, who avoid through this way, the competition of other creditors. The unenforceability thwarts the legal effects of the fraudulent act only in relation with the paulian creditors and only to the extent of the damage, manifested by preventing the full satisfaction of the creditor's rights toward the debtor. The elucidation of the legal nature of the paulian unenforceability, implies the analysis of the theories of the relative ineffectiveness of the fraudulent legal act. Pauline unenforceability is the technical mechanism by which the legislator, determining a priori the formula of bad-faith behaviour, deprives the bad-faith third party of the obtained advantage, to the detriment of the creditor, from signing the legal act with the debtor.

[1] University Lecturer, Law Department, Free International University of Moldova (ULIM), trainer at the National Institute of Justice (INJ), Republic of Moldova (ULIM, INJ) (Chisinau, The Republic of Moldova). E-mail: fala.lawyer@gmail.com
[2] Doctor habilitate in law, Associate Professor, Law Department, Free International University of Moldova (ULIM), Republic of Moldova (ULIM) (Chisinau, The Republic of Moldova). E-mail: poalelungim@gmail.com

Key words: *paulian action; creditor; debtor; fraud; unencorceability; inefficiency.*

INTRODUCTION

The unenforceability of the fraudulent legal act, along with the unavailability of the asset, represents „the center of gravity" of the entire legal construct of the Paulian action (repealing in the terminology of the Civil Code). The importance of investigating the paulian unenforceability relies also in the conceptual novelty of this solution, or until the entry into force of the Law on modernization of the Civil Code[1], the paulian action was applied in practice by resorting to the institution of nulity of the civil legal act, namely by qualifying frauduelnt legal acts as according to art. 221 paragraph (1) Civil Code (in force until March 1st, 2019), which implied that a legal act signed without the intention to produce legal effects (fictious legal act) is null[2]. Even in the absence of a special regulation, the paulian action can not be confused with the action of establishing the absolute nullity of the fictitous legal act[3], either - the application of the institution of nullity, makes the additional qualification of the same legal act as fraudulent in the paulian sense unnecessary[4]. The

[1] The Law on the modernization of the Civil Code and the modification of some legislative acts no. 133 from 15.11.2018. In: The Official Journal, no. 467-479/784 from 14.12.2018.

[2] See the Decision of the Supreme Court of Justice from 19th August 2020, pronounced in the file no. 2ra-787/20 - http://jurisprudenta.csj.md/search_col_civil.php?id=57684 (seen at 18.08.2022).

[3] To be mentioned that the very legal construction of the fictitious legal act was radically revised by the Civil Code Modernization Law. The legislator waived the sanction of nullity for such acts, substituting it with ineffectiveness.

[4] This problem still exists in the Russian Federation, which does not have civil law Paulian action regulations, but only insolvency law. Russian doctrine and jurisprudence found normative support for the Paulian civil action directly in the principle of good faith (and not in the rules on the fictitious legal act). Thus, the fraudulent acts of debtors are qualified under art. 10 in conjunction with art. 168 Civil Code of the Russian Federation. The solution has rightly been criticized – see the interview with prof. Sklovsky K. offered to the legal portal www.zakon.ru

lack of intention to generally produce legal effects and the special intention to harm creditors (to produce harmful effects) represents distinct legal facts (diamtetrically oppores) that are mutually exclusive in the process of legal framing.

The regulation, for the first time, of the paulian action confirms the hypothesis of the inadmissibility of confusing it with the institution of nulity of the civil legal act. Either, in the absence of the practical needs, and the distinction between unenforceability and nullity, the legislator would not have focused his attention on the legal regulation of the institution of the paulian action. But the practical needs derive specifically from the inadequate solution, from the perspective of the pursuing creditor, in whose person the civil circuit is embodied, of the effects of nullity of the civil legal act which retractively abolishes the contested legal act, with finally means that the debtor's performance toward the third party re-enteres the general pledge of all unsecured creditors, even those who did not intervene in the process (so they did not bear expenses related to the process). And in the context where between individual creditors operates the principle of priority[1], there is a risk that the mullity action will remain without any practical utility for the plaintiff creditor (while the creditors who remained passive and followed the process will fully benefit from the effects of the nullity). We note in this context that outside of the insolvency process, the granting of preference (preferential payment) does not represent fraudulent conduct in the view of the legislator and cannot be challenged in the paulian way.

In this order of ideas, the unenforceability of the contested legal act through the paulian action, provided at the art. 895 paragraph (1) and 898 paragraph (1) Civil Code, is a much more rational and equitable solution from a practical point of view in relation to nullity.

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https://zakon.ru/discussion/2020/5/8/institut_suda_yavno_otstaet_ot_trebovanij_obschestva__intervyu_s_konstantinom_sklovskim (seen at 18.08.2022).

[1] Outside the insolvency process, creditors realize their claims without taking into account the existence of other creditors. On the other hand, in the insolvency procedure, the principle of equality applies, which means a proportional distribution of the debtor mass among all creditors.

At the same time, giving up the nullity solution represents the expression of the general trend, which we fully support, of limiting the scope of the institution of nullity of the civil legal act, which is a very destructive and dangerous tool for the civil circuit, especially in states like the Republic of Moldova where the legal culture necessary for private law relations is barely formed. From this point of view, unenforceability only annihilates the harmful effects of the fraudulent act (without affecting the validity itself) and only to the extent of the damage. Namely, the problems related to the legal nature and the mechanism of the practical application of paulian unenforceability – represents the object of this research.

I. PAULIAN UNENFORCEABILITY IN THE MODERNIZED CIVIL CODE

The pauline unenforceability is established, as a sanction for the debtor's fraud, at the art. 895 paragraph (1) Civil Code, whish recognizes the right of the injured creditor to request to be declared unenforceable toward him, the legal acts signed by the debtor to his detriment.

Subsequently[1], extends the benefit of the legal protection of the Pauline action also regarding the creditors who, being able to file the respective action, intervened in the judicial process of its examination.

The invoked texts abound in clued with the help of which the essential features of paulian unenforceability can be discerned. It is not superflous to review these briefly.

In principle, paulian unenforceability represents a remedy available to the unsecured creditor against the acts „*signed by the debtor*

[1] Art. 898 paragraph (1) of the Civil Code stipulates that „*the challenged legal act will be declared unenforceable both toward the creditor who filed the revocation action, and against all creditors who, being able to file a revocation action, intervened in the case. They will have the right to be paid from the amounts obtained from the benefit recieved by the third party contractor or beneficiary, respecting the existing order of prefeence between these creditors. The amount remaining after satisfying the claims of all these creditors is returned to the third party contractor, either, as depending on the case, to the beneficiary*".

to his detriment". In this case the damage is specific and manifests itself by „*preventing the full satisfaction of the creditor's rights toward teh debtor*".

The objective character of the damage is not sufficient for the application of unenforceability. This sanctions the bad-faith behaviour of the debtor and of the contracting third party (with some nuances in the case of liberalities), who know, for sure or presumptively, or directly intend to harm the creditor by depriving him of the effective possibility to realize his rights towards the debtor.

The unenforceability operates only in relation to the creditor who filed the revocation action, as well as to all other creditors who, being able to file a revocation action, intervened in the case. In other words, the unenforceability does not act erga omnes, like nulity, but only in relation to creditors who are parties to the legal process or have acted separately. The other unsecured creditors will have to comply with the effects of the fraudulent legal act[1].

The creditors in whose benefit was pronounced the unenforceability of the fraudulent legal act, have the right to be paid from the sums obtaines from the pursuit of the performance received by the third party contractor or beneficiary. Thus, unerfoceability is intented to facilitate the access of pursuing creditors to the benefit (more percisely to the object of the benefit) recieved by the third party contractor or beneficiary from the defauling debtor.

Finally, another evocative clue is the fact that the amount remaining after the satisfaction of the claims of all these creditors is returned to the third party contractor or, as the case may be, the beneficiary. We observe that the legislator allows the third party contractor or the beneficiary, to exclude the pursuit of the benefit by paying the creditor who benefits from the admission of the action an amount of money equal to the damage suffered by the latter through signing and execution of the legal act under the terms of art. 898 paragraph (3) Civil Code. Therefore, the effets of the fraudulent legal act, especially the real ones, are recognized in principle, either pursuing the

[1] Obviously, there is a whole range of remedies outside of paulian action.

benefit takes place precisely at the moment when it is already a part of the contracting third party's or beneficiary's patrimony.

The legal institution of the pauline unenforceability relveals a relatively new legal mechanism for our legal order, differing itself radically from traditional institutions such as nullity or caducity. The insufficiency of the explanations given by the Plenum of the Supreme Court of Justice on the unenforceability, by relating it to the institution of the nullity of the civil legal act, is strongly outlined by the legal regulation of the paulian action and other situations in which publicity is not into question[1].

The paulian action is not the only aplication of the unenforceability. The modernized Civil Code establishes the legal mechanism of unenforceability in the case of other legal institutions as well, such as, for example, the unenforceability toward the third parties, of the constitutive acts or the normative decisions of the legal entity that limit the powers offered to the administrator by law (art. 177 par. (3) Civil Code), unenforceability of the termination of effects of the attorney power toward the bona-fide third party (art. 381 par. (2) Civil Code), the unenforceability of legal acts, to the facts or legal relations that are subject to publicityin the case of non-compliance with the publicity formalities (art. 417 Civil Code), the situation of the bad-faith third party acquirer of the right to registration (art. 427 Civil Code[2]), the unenforceability of termination of the accessory property qualification (art. 467 par. (4) Civil Code), the alienation of the common property without the consent of all co-owners (art. 550 par. (5) Civil Code), the unenforceability of the division toward the creditor (art. 564 par. (5) Civil Code), the unenforceability of acts of the joint creditor by which he consents to the reduction or removal of the rights, accessories or benefits

[1] See the Decision of the Plenary of Supreme Court of Justice regarding the application by the courts of the legislation regulating the nullity of the civil legal act no. 1 din 07.07.2008.

[2] The so-called Paulian land deed action. Pentru detalii a se vedea A.-A.Chiș, *Publicitatea imobiliară în concepția Noului Cod civil* (Bucharest: Hamangiu, 2012), 252.

of the claim (art. 794 par. (2) Civil Code), the unenforceability of the renunciation of inheritance (art. 2401 Civil Code) etc.

From the generalized analysis of the cases in which the legislator applies the mechanism of unenforceability, we can see that the object of unenforceability is always in principle a valid legal act[1]. In the hypohesis of paulian uneforceability, the validity[2] of the fraudulent legal act is derived from the fact that the act is „*signed*" (art. 895 par. (1) Civil Code) with the contracting third party and *executed* by the debtor, and the art. 898 par. (1) Civil Code refers to the right of paulian creditors to be paid from the amounts obtained from the pursuit of the „*benefit received*" by the third party contractor or beneficiary. Thus, if the fraudulent legal act is signed, and the debtor has executed his obligation towards the contracting third party[3], it follows that the object of such execution (performance) is already a part of the contracting third party's patrimony[4]. The hypothesis in which the debtor has not fulfilled his obligation toward the third party contractor or beneficiary exceeds this study given the fact that in this case, the remedy od the paulian action is not applicable, the creditor having the direct possibility to pursue the asset that is still in the debtor's patrimony. The problem that arises in the mentioned hypothesis is related to the competition of the right of claim of the contracting third party or the beneficiary and the right of the pursuing creditor.

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[1] In the context of the present research, we are not interested in the case of the unenforceability of legal facts (reports) stricto sensu.

[2] By „validity" we mean meeting all the conditions required by law or established by the parties for the valid formation of the legal act. For developments see: D. Cosma, *Teoria generală a actului juridic civil* (Bucharest: Editura Științifică, 1969), 110-113.

[3] Art. 858 par.(1) Civil Code stipulates as a matter of principle that „*the basis for enforcement lies in the existence of an obligation*". There is no doubt that the existence of the obligation arising from a legal act depends on its validity. And, the null legal act does not produce legal effects (art. 331 para. (1) Civil Code). In this case, the thesis according to which the civil obligation is an effect of the legal act can be found in art. 1082 Civil Code, which talks about rights, obligations and other legal effects.

[4] In this context, the rules established in art. 510 Civil Code and art. 823 paragraph (1) acquires overwhelming importance on which the existence of the material right to action of the paulian creditor depends.

The subsequent declaration of the unenforceability of the fraudulent legal act (therefore signed and executed by the debtor) allows the paulian creditor to pursue the object of the benefit in the beneficiary or contracting third party's patrimony, a fact which necessairly implies the confirmation of the effects of the fraudulent act (especially the real effects), so as of the act's validity, either the legal nulity does not produce effects[1].

The validity of the fraudulent act also explains the differentiation made by the legislator between paulian creditors (those who filed the revocation action, as well as those who intervened in the case) and other creditors, for whom the object of the debtor's performance remains intangible precisely because of the property right of the contracting third party on it, acquired by the latter as a result of the execution by the debtor of the fraudulent legal act.

Another consequence of the validity of the unenforceable legal act is the fact that the amount remaining after the satisfaction of the paulian creditors' claims is returned to the third party contractor or, as the case may bem the beneficiary, in other words the owner of the asset subject to prosecution. Previously I mentioned that the ownership right of the third party contractor or the beneficiary over the object of the benefit received from the defaulting debtor under the fraudulent legal act can only be acquired as a result of the execution of a valid legal act. We note that the contracting third party can exclude the pursuit of the asset recieved from the debtor by paying the creditor who benefits from the admission of the paulian action a sum of money equal to the damage suffered by the latter through the signing and execution of the fraudulent legal act.

The validity of the legal act declared unenforceable also represents the criterion for delimitation and individualization of unenforceability in relation to the institution of nullity of the civil legal act. Unenforceability operates only in relation to the paulian creditors, who in this way avoid the competition of other creditors. Obviously, in the case of the nullity of the fraudulent act, the effects of the nullity of

[1] See Cosma, *Teoria generală a actului juridic civil*, 111.

the civil legal act operates *erga omnes*. The mentioned aspects fully justify the solution of unenforceability to the detriment of nullity. Unenforceability is a much more appropriate tool[1] for the effective protection of creditors' rights.

Another important thesis on unenforceability that is confirmed in all cases ist hat unenforceability operates not only on a valid but also effective legal act. Emerging from the regulations of the modernized Civil Code, namely in terms of efficiency, we find the specifics of unenforceability.

Generally, the institution of the ineffectiveness of the legal act is expressly regulated in the first place for the law of our country. As a general rule, art. 357 par. (1) Civil Code[2] explains the inefficiency through correlation to the legal effects of the legal act. As it was mentioned above, the fraudulent legal act produces its normal effects, especially the real ones, the paulian unenforceability being a specifici remedy against these effects[3].

From the content of art. 898 par. (1) Civil Code we see that the unenforceability operates only in relation to the creditor who filed the revocation action, as well as to all other creditors who, being able to file a revocation action, intervened in the case. From this results that the paulian unenforceability implies the full validity and effectiveness of the fraudulent legal act in relation to other creditors and even more so in relation to all other third parties. Therefore, the unenforceability „anihilates" the legal effects of the fraudulent act only in relation to the paulian creditors and only to the extent of the damage, manifested by preventing the full satisfaction of the creditor's rights toward the debtor.

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[1] And less destructive compared to nullity.

[2] If, according to the law, the legal act, without being void or cancelable, does not produce, in whole or in part, its legal effects, it is, in this part, ineffective.

[3] The execution of the obligation by the debtor towards the contracting third party or beneficiary based on the fraudulent legal act has the effect of transferring the ownership right to the object of the provision (usually a good). The transfer of ownership of the object of the performance from the debtor to the third party contractor or beneficiary reduces the general pledge of the creditors.

Legal acts that are effective in general, but do not produce legal effects towards a specific person, have been intensively studied in German doctrine since the 19th century, to which the theory of ineffectiveness is also due. These acts represent cases of so-called ineffectiveness (die relative Unwirksamkeit), unenforceability being one of the names given to this legal institution[1]. The starting point for the analysis of the relative ineffectiveness of civil legal acts served the mechanism established at § 135 and 136 BGB[2], which institutes remedies in the case of violation of legal or juridical prohibitions[3] to dispose of an asset[4]. The traditional example of relative ineffectiveness resulting from the provisions of § 135 and 136 BGB ist that of the alienation of the asset in violation of the prohibition imposed on it favor of the creditor, followed by the creditor's action against the third party regarding the transmition of the asset[5]. Namely, the basis and the legal nature of the creditor's claim against the contracting third party (acquirer of the asset) represents the essence of the entire legal construction of relative ineffectiveness (unenforceability). However, the matter is highly controversial and has given rise to many thoeries in German law since the time of the drafting of the BGB. Even today, there is no unanimously accepted theory on the legal nature of the creditor's claim against the third party.

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[1] O. Cazac, Adnotation at the art. 328 [online], pct. 24. Codul civil Adnotation [cited at 19 August 2022]. Available: animus.md/adnotări/328/. Art. 2902 from Italian Civil Code uses the notion of „*inefficacia*" (with the same meaning as „unenforceability" in our law) as an effect of the admission of the paulian action.

[2] Russian translation of the German Civil Code (Bürgerliches Gesetzbuch, BGB) according: German Civil Code: Introductory Law to the Civil Code; per. with him. / [AT. Bergmann, input., comp.]; scientific ed. T.F. Yakovlev. – 4th ed., revised. Moscow: Infotropic Media, 2015, 888.

[3] D. M.Genkin, "Relative invalidity of transactions", *Bulletin of Civil Law No. 4* (2014), 195.

[4] In our law, the corresponding norm of § 135 and 136 BGB is art. 344 Civil Code. However, there is a substantial difference between these rules, namely the penalty for violating the ban: in German law – relative ineffectiveness (unenforceability), and in our law – relative nullity.

[5] Genkin, "Relative invalidity of transactions", 200.

The (absolute) inefficiency provided for in art. 357 Civil Code and relative ineffectiveness (unenforceability) are fundamentally different, which results with the power of evidence even from the positive regulations of the modernized Civil Code. Ineffective acts do not produce legal effects, in whole or in part, because a certain additional requirement that is sometimes imposed by law for certain effects of the act is not met[1]. On the contrary, relatively ineffective (unenforceable) acts are effective[2] for all subjects, except for certain subjects expressly determined by law. So (absolute) inefficiency operates *erga omnes*, while relative inefficiency operates only in relation to certain determined subjects. Inefficiency (absolute) can be invoked by any interested subject, the court having the right to invoke it *ex officio* (art. 357 par. (3) Civil Code), and relative inefficiency can be invoked strictly by the subjects determined by law, in order to the defense of the rights for which it was instituted, the court not being empowered to invoke it from the office. Another difference resides in the imprescriptible nature of (absolute) inefficiency, expressly provided for in art. 357 par. (4) Civil Code, while the relative inefficiency is in principle prescriptive (in the case of the paulian action, a term of 1 year is established - art. 897 paragraph (3) Civil Code)[3].

Therefore, the elucidation of the legal nature of the paulian unenforceability involves the analysis of the theories of the relative ineffectiveness of the fraudulent legal act, mainly elaborated in the German doctrine. In this context, we also note the fact that the paulian

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[1] Cazac, Adnotation at the art. 328, pct. 2.

[2] In the case of relative ineffectiveness (unenforceability), the terminological aspect cannot be considered as a landmark and is to be treated with utmost care in order to avoid misconceptions. The name „relative inefficiency" is not a the most appropriate one, because it creates confusion with the actual inefficiency (art. 357 of the Civil Code). We are primarily referring to the fact that the relatively ineffective acts are in reality fully effective (they do not lack any legal condition to produce the full effects), but their effectiveness is annihilated only in relation to certain determined subjects (third parties, usually creditors). The inadmissibility of confusion between partial inefficiency (art. 357 par. (1) Civil Code) and relative inefficiency is obvious.

[3] For more details and additional comparative analysis of relative ineffectiveness and nullity see Genkin, "Relative invalidity of transactions", 191 - 199.

unenforceability cannot be researched in isolation. On the contrary, its explanation must be done in line with all other cases of relative inefficiency known to the Civil Code.

II. THEORIES ON UNENFORCEABILITY (RELATIVE INEFFICIENCY)

The legal category of the relative ineffectiveness of legal acts was identified with the conceptual delimitation between the civil legal act and its effects. The legal act represents a *vinculum juris*, which creates the possibility of acquiring or losing rights independently of the subsequent will of the contracting parties[1]. Civil obligations do not represent binding effects of the legal act. Even the Draft Common Framework of Reference in European Private Law (DCFR[2]) also makes a distinction between „*binding legal relationship*" (II.-1:101) and „*obligation*" (II.-1:102)[3]. Therefore, it is not always appropriate to abolish the legal act itself (complete and usually retroactive), nullity being a very destructive tool. The defense and valorization of the interests of the participants in civil legal relations requires a much wider palette of remedies and solutions, one of which is the annihilation of certain determined effects of the act and only in relation to certain subjects, thus saving the legal act. In other words, by regulating the relative inefficiency, the legislator pursues other goals that exclude the obligations of mutual restitution of benefits as the main effect of the nullity of the legal act.

Starting from the provisions of § 135 and 136 BGB, German authors have built various theories to explain the legal nature of relative ineffectiveness. In this case, the prohibition is not directed against the

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[1] The rule also applies *mutatis mutandis* in the case of unilateral legal acts. The consent expressed at the conclusion of the legal act is sufficient to establish the legal relationship between the parties and does not need to be confirmed later.

[2] Model rules of European private law. Per. from English; Scientific ed. N.Yu. Rasskazova. Moscow: Statut, 2013, 989.

[3] Sklovsky K. I., *The deal and its action (4th ed., additional). Commentary on Chapter 9 of the Civil Code of the Russian Federation. The principle of good faith* (Moscow: Statute, 2019), 5.

legal act itself, but against the legal effects of the act[1]. The evolution of the views of German jurists on relative inefficiency was a complex one, which is why we will briefly highlight the main theories and their criticism, starting with the period of codification of the BGB[2].

The first attempts to explain the relative inefficiency had as their starting point the theory of the nullity of the civil legal act and the premise that under the contract concluded with the debtor, the third party becomes the owner in relation to the debtor and all other subjects, but not in relation to the creditor, for which the debtor continues to be the owner (as a result of the nullity of the deed only in relation to the creditor).

Consequently, the creditor's action against the third party was explained by resorting to the assignment of the claim, as a prior claim against the debtor and actual claim against the third party (Plank). Another construction, which denies „in two-seconds" the action against the third party, resides in the recognition of a direct action by the creditor against the third party, having as its object the obligation to carry out the necessary actions to satisfy the creditor's right against the debtor (Dernburg)[3].

The internal contradictions of the proposed theories are obvious (the simultaneous existence of two owners cannot be explained even by the legal institution of fiduciary property), which is why an attempt was made to explain the relative inefficiency starting from the premise of the inadmissibility of the concurrent validity and nullity of the legal act concluded by the debtor and third party. Thus, some authors (Mitteis, Fitting) proposed to consider the deed concluded between the debtor and the third party as invalid, but only in the interests of the creditor, the forfeiture of which „cures" the deed. Other authors (Oertmann), on the contrary, proposed to consider the prejudicial legal act as valid, but it becomes null once the creditor contests it[4].

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[1] Genkin, "Relative invalidity of transactions", 213.

[2] The classic theories regarding relative inefficiency (paulian inevitability being a particular case) are reproduced extensively by prof. Genkin, "Relative invalidity of transactions", 200 - 212.

[3] Genkin, "Relative invalidity of transactions", 201.

[4] Genkin, "Relative invalidity of transactions", 201-202.

These theories, admitting the confusion between nullity and ineffectiveness, essentially did not go further than the former. It was additionally noted that the relative inefficiency does not derive exclusively from the regulation of § 135 and 136 BGB, there are situations where the interests of the creditor and those of the third party will not be similar as in the case of competition for the acquisition of ownership of the property successively alienated by the debtor.

The removal of the obvious contradictions of the named theories was attempted by resorting to the mechanism of the resolver's condition (Strohal) with the resumption of the same „in two-seconds" action regarding the assignment of the claim against the debtor and the claim against the third party. Another attempt (Voss) consists in „splitting" the property right into a stronger right (Schutzeigentum) which the debtor retains in the interests of the creditor and passing a weaker right (Verkehrseigentum) to the third party[1].

The artificial character of the theories of Strohal and Voss, doubled by the practical difficulties that they cannot solve, led the German doctrine to recognize another thesis as the foundation of the relative inefficiency, namely that the legal act between the debtor and the third party is effective from the start (therefore valid) *erga omens*, including in relation to the creditor. This results from the goal pursued by the legislator to defend the interests of the creditor, who only has a right of claim, but at the same time avoiding prejudice to the interests of the third party, in the limits of possibility. Therefore, the legal act concluded by the debtor with the third party is effective, both before contestation and afterwards, which implies the idea that it is not the legal act that must be abolished, but its effects (results). But in the case of debt rights, the creditor does not have direct action against the third party, which is why the legislator, in exceptional cases, seeking the protection of the creditor's rights, creates parallel effects on the path of establishing relative inefficiency[2].

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[1] Genkin, "Relative invalidity of transactions", 204-205.
[2] Genkin, "Relative invalidity of transactions", 207.

The thesis of parallel effects constituted the premise of new theories of relative inefficiency, considered modern in the second decade of the 20th century. Thus, some authors (Reichmayr) resorted to legal constructions from old German law, which delimit two elements in the content of the obligation, namely debt (Schuld) and liability (Haftung). The prohibition to dispose determines the „materialization" of the liability of the debtor who follows the asset. Therefore, the third party also assumes responsibility for the non-execution of the debtor's obligation, which justifies the creditor's direct action against the third party. In essence, the creditor's action against the third party presupposes the existence of a new right of the creditor, distinct from the basic right against the debtor, which pre-exists the action against the third party. In essence, the creditor's action against the third party implies the existence of a new right of the creditor, distinct from the basic rights against the debtor, which pre-exists the action against the third party[1].

Other authors (Raape) start from the correct thesis that in the result of signing the legal act before debtor and the third party, the latter becomes the owner in relation to all subjects, including the creditor. The explanation of the relative inefficiency resides in the alleged retention by the debtor of a right of disposal over the asset alienated to the third party, to the extent that this is necessary to satisfy the creditor. The right of disposal retained by the debtor has a real character, which determines the real character and the parallel effects[2].

A more well-argued construction was proposed by the German author Knoke. It starts from the premise of the effectiveness of the legal act between the debtor and the third party, which acquires the right of ownership over the object of the benefit received from the debtor. The creditor has a personal (compulsory) action against the third party, accessory to the basic action against the debtor. The content of the claim against the third party consists in receiving the consent of the third party for the alienation of the asset by the debtor. The third party's agreement is necessary because the realization of the creditor's right by the debtor

[1] Genkin, "Relative invalidity of transactions", 208-209.
[2] Genkin, "Relative invalidity of transactions", 209-210.

involves the disposal of the asset that is no longer in the debtor's patrimony[1].

Disagreeing with the reviewed German theories, Prof. Genkin D. M., developed his own theory of relative inefficiency. It is stated that the so-called relatively ineffective legal acts are effective in relation to all subjects, including the creditor. The prohibition of alienation generates the appearance of the obligation relationship between the creditor and the third party, under which the creditor is entitled to request from the third party the execution of the basic obligation towards the debtor to the extent that the legal act between the debtor and the third party prevents the execution. The source of the third party's obligation is the filing by the creditor of the litigation regarding the contestation of the harmful legal act (obligation *ex lege*). In fact, the legislator grants the creditor only the right to challenge, and the relative ineffectiveness and the obligation of the third party to the creditor represents the consequences of contesting. Thus, Prof. Genkin D. M., considers that the creditor's subjective right arises under the law, as a result of the debtor's violation of the prohibition to dispose his assets, consists not in the claim against the third party, but in the right to create this obligation through a unilateral legal act - the appeal the legal act. The right to challenge the harmful act is a potential right. Its exercise can be done both by way of filing the action (including by way of exception), and extrajudicially, by unilateral declaration, depending on the option of the legislator. The argument brought in support of the theory of the potestative right relates specifically to the paulian action, namely that § 9 of the German law on the out-of-court challenge of the debtor's acts (AnfG) provides that in the summons request will be indicated the amount and method of restitution of the benefit by the acquirer third party[2].

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[1] Genkin, "Relative invalidity of transactions", 210-211.

[2] Reference is made to the German Law on the out-of-court challenge of the debtor's documents (Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens) in the version in force on the date of publication of the article prof. Genkin D. M., (1914). Subsequently, the said Law underwent a series of amendments. Currently, the legal provision indicated in the text can be found at § 13.

An important consequence resulting from the construction shown is the legal nature of the term provided by law for appeal. Given the fact that the unilateral legal act is a source of obligations (in the present case the civil action is considered in terms of material law as being a unilateral legal act), it follows that the term established by the law is not of prescription but of forfeiture. In other words, the deadline granted to the creditor for contesting the debtor's harmful act concluded with the third party is a deadline for exercising the subjective, optional right, and failure to exercise it leads to the extinguishment of the right. Under this aspect, the legal regulations regarding the statute of limitations remain inapplicable.

The creditor's obligation towards the third party is created only for the purpose of executing the basic obligation, being accessory to the latter. The content of the creditor's obligation towards the third party resides in the execution of the basic obligation to the extent that the legal act signed between the debtor and the third party makes it impossible to realize the creditor's rights. The creditor's claim is limited to the amount of the basic claim and the value of the debtor's performance against the third party under the harmful act. In the case of the third party's insolvency, the creditor only has the options of an unsecured creditor, not having any right of preference or separation of the asset from the debtor's mass[1].

The legal nature of relative ineffectiveness (unenforceability) remains to be highly controversial. There is no unanimously accepted theory in German doctrine[2], but some trends can be highlighted. We note from the start the fact that contemporary German doctrinal views (at least those accepted quasi-unanimously) did not go much further than the classical ones outlined *above*. The „new" theories are essentially, as we

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The original text of the Law can be accessed at http://www.gesetze-im-internet.de/anfg_1999/.

[1] Genkin, "Relative invalidity of transactions", 212 - 220.

[2] German civil law (especially the BGB) rightly represents a benchmark for many contemporary laws, including the civil law of the Republic of Moldova. Therefore, German law and doctrine can be considered as a primary source.

will see below, only adjustments of the classical theories, taking into account the evolution of jurisprudence.

For the study of the „new" theories in German law regarding the legal nature of the paulian action and in particular the relative inefficiency as the main effect of the admission of this action, the article by the Austrian professor Helmut Koziol regarding the institution of contesting by the creditor of the debtor's acts digned in the detriment for the former[1].

In contemporary German doctrine, three theories have crystallized mainly intended to explain the legal nature and the mechanism of the creditor's right to contestation (the creditor's action against the third party contractor) of the debtor's acts. These are the so-called theory of real effect, the obligation theory and the theory of collateral inefficiency [of the creditor's interests][2].

The theory of real effect is based on the thesis of the effectiveness of the harmful legal act towards all subjects except the creditor, towards whom the act is ineffective. As a result, from the perspective of the creditor, the property remains with the debtor. Thus, the theory of real effect essentially represents an update of the first classical theories, which start from the duplication of legal reality[3] and the division of property rights, without proposing anything new.

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[1] H. Kotsiol, „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (beginning)", *Bulletin of Civil Law. No. 3* (2017): 205–294 (I); Kotsiol, „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (end)." *Bulletin of Civil Law, No. 4* (2017): 199–261 (II).

[2] K. A.Usacheva, „Fundamentals of out-of-competition challenging in German and Austrian law", in *Bulletin of economic justice of the Russian Federation. No. 11* (2017): 135. La rândul său, autoarea face referire la articolul precitat al prof. Кциоль Х. și la Nunner-Krautgasser B., Haftungsrechtliche Unwirksamkeit infolge Insolvenzanfechtung und ihre Tragweite in der Insolvenz des Anfechtungsgegners. Insolvenzrecht und Kreditschutz 2015. 22 Beiträge führender Insolvenzrechtsexpert/-innen. Hrsg. von A. Konecny (LexisNexis).

[3] The legal act cannot be simultaneously effective in relation to certain persons and ineffective in relation to others.

The obligation theory in turn also represents a continuation of the theses of the classical German authors who tried to explain the direct action of the creditor towards the third party through the existence of an *ex lege* obligation of the third party towards the creditor. According to this theory, the contracting third party has the obligation to bear the forced execution of the creditor on the object of the benefit received from the debtor as if it continued to be in the debtor's patrimony[1]. The current German doctrine, although it recognizes its dominant character, brings a series of criticisms to the obligatory theory[2]. We note that Prof. Генкин Д. М.[3] exposed himself in the sense of accepting this theory only in its conceptual part, as an explanation of the parallel effects generated by relative inefficiency. However, the concrete mechanism for the emergence and operation of the *ex lege* obligation (which depends on the legal fact generating the obligation[4]) was (and remains) a controversial subject.

Recently, a new theory, supported by prestigious authors, is gaining more and more ground, namely the theory of the ineffectiveness of the guarantee [of the creditor's interests][5] (Paulus), which is based on the idea that the creditor's right to challenge the debtor's legal acts concluded in own damage[6], represents a consequence of the creditor's

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[1] Usacheva, „Fundamentals of out-of-competition challenging in German and Austrian law", 136.

[2] Broadly in Kociol, „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (beginning)", *(I)*: 259 – 261.

[3] Genkin, "Relative invalidity of transactions", 217.

[4] The theory proposed by prof. Genkin, regarding the relative inefficiency starts percisely from the point of recognizing the *ex lege* obligation.

[5] The theory of collateral inefficiency [of the creditor's interests] represents a „modernization" of the classical theories proposed by Menzel, Reichmayr, Lehman. For details see Kociol., „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (beginning)"*(I)*: 261.

[6] Art. 895 par.(1) Civil Code names the right of appeal in other terms, namely: „the creditor may request that the legal acts concluded by the debtor to the detriment of the creditor be declared unenforceable against him...".

right to the execution of the obligation (the right of access)[1]. To the creditor's access right corresponds the liability of the debtor with all his patrimony for the assumed obligations. At the same time, a distinction is made between the right of disposition of the debtor and the patrimonial guarantee regarding his obligations. The paulian action concerns only the patrimonial guarantee (the so-called general pledge), and as a consequence it follows to deny the effectiveness of fraudulent acts only in the part of guaranteeing the interests of the injured creditor. In other words, in cases where his patrimony decreases below the necessary minimum due to the legal act signed with the third party, the debtor's right of disposal is limited to the extent that the acquiring third party (provided the conditions required by law are met) it can not longer be recognized the protection against the action of the creditor to realize his right[2] (opposability)[3]. The criticism of Reichmayr's theory remains essentially relevant also in relation to the theory of collateral inefficiency [of the creditor's interests][4].

In French law, the category of relatively ineffective (unenforceable) acts, although known to positive law, does not enjoy a doctrinal elaboration similar to the German one. From the perspective of our research theme, we note that following the recent reform of contract law, art. 1167 of the French Civil Code[5], it was replaced by a slightly

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[1] For the analysis of the right to the execution (realization) of the obligation (Befriedigung Recht) or, in other words, the right of access [to the debtor's patrimony] (Zugriffsrecht) see Kociol, „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (beginning)"*(I)*: 215 – 216. Civil Code recognizes this right even through the name of the 3rd Section, Capter IV, Title I from the 3rd Book – „Protection of the right to the execution of the obligation". The legal nature of the right to enforce the obligation is controversial.

[2] Kociol, „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (beginning)" *(I)*: 262-263.

[3] We note that in essence the analyzed theory proposes to base relative inefficiency (unenforceability) on the idea of the third party's lack of legal protection. The idea is fertile especially from the perspective of the principle of good-faith.

[4] Genkin, "Relative invalidity of transactions", 208-209.

[5] The „entire" regulation of the common law Pauline action in French law is limited to art. 1167 of the French Civil Code. That is why, with good reason, prestigious French

broader regulation, namely the art. 1341-2, which also speaks of unenforceability[1].

Prestigious French authors define unenforceability as the ineffectiveness of an act or a right vis-à-vis third parties, at the same time stating that the imperfection of the unenforceable act does not affect the relations between the parties; only third parties or certain third parties can ignore it. In their view, the difference between nullity and unenforceability should not be exaggerated[2]. In the matter of unenforceability as a result of the admission of the paulian action, the same authors state that the pursuer (i.e. the plaintiff creditor) will be able to seize the property in the hands of the complicit third party, the adjudicator receiving it free of any rights, i.e., as if the third party had not acquired the real right or litigious personnel[3]. Therefore, the views of the French authors are similar to the first theories on relative inefficiency in German law, which admit the doubling of legal reality by simultaneously recognizing the effectiveness of the unenforceable act in relation to the parties and other subjects, and its inefficiency in relation to the creditor. The same visions on unenforceability in general are also found in Romanian doctrine[4].

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authors stated that the authors of the French Civil Code were limited only to the proclamation of the principle contained in art. 1167, without regulating any practical matter - see M .Plagnol, *A course in French civil law. Part 1: Theory about obligations. Translation from French [and preface],* V. Yu. Hartman, a member of the Petrokovsky District Court (Petrokov: Edition of the printing house of S. Pansky, 1911), 63.

[1] „Le créancier peut aussi agir en son nom personnel pour faire déclarer inopposables à son égard les actes faits par son débiteur en fraude de ses droits, à charge d'établir, s'il s'agit d'un acte à titre onéreux, que le tiers cocontractant avait connaissance de la fraude". For the current version of the French Civil Code, see https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070721/.

[2] Ph. Malaurie, L Aynes and Ph.Stoffel-Munck, *Drept civil. Obligațiile*. Trad.: de Diana Dănișor (Bucharest: Wolters Kluwer, 2009), 350-351.

[3] Malaurie, Aynes and Stoffel-Munck, *Drept civil. Obligatiile,* 676. For developments on paulian action in reformed French law see K.A. Usacheva, „Out-of-competition contestation in French law: before and after the reform", in *Bulletin of economic justice. No. 12* (2017).

[4] M. David, *Eseu asupra cunoașterii în dreptul civil: aparență, opozabilitate, formalism, publicitate* (Bucharest: Universul Juridic, 2017), 243 – 251. It should be

In our view, there is another possible explanation of the relative inefficiency (unenforceability), at least relevant for the paulian action, which cannot be neglected if emerging from the system of regulations of the modernized Civil Code. It is unanimously recognized in the doctrine that one of the fundamental conditions for the admissibility of the paulian action is the bad-faith of the debtor and of the contracting third party (beneficiary). Moreover, it can even be said that the paulian action is by definition a legal remedy against bad faith. Therefore, some observations on bad faith are in order.

The Civil Code of the Republic of Moldova, following the example of other reference codes, expressly proclaimed the fundamental principle of good-faith[1], which includes the entire private law[2]. From the art. 11 par. (1) Civil Code results that „good-faith is a standard of conduct". The main characteristic of good-faith resulting from the wording of art. 10, 11, 14 and 775 of the Civil Code reside in the licit[3] character of the conduct related to its standard. Thus, art. 10 par. (1) Civil Code states about the exercise of rights and the execution of obligations, art. 11 par. (2) refers to statements and behavior that the other party relied on, and art. 775 par. (1) of the Civil Code states that the behavior of the parties to the obligation relationship at the time of birth, during its

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noted that the quoted author talks about parallel legal realities, an idea from which one can glimpse, independently of the author's exposition, the theory of parallel effects elaborated by the German doctrine.

[1] For the monographic study of the principle of good faith in Romanian civil law, see D. Gherasim, *Buna-credință în raporturile juridice civile* (Bucharest: Editura Academiei Republicii Socialiste România, 1981), 254.

[2] In fact, from civil law, the concept of „good-faith" has been taken over by other branches of law. For example, the concept of good-faith in administrative law (art. 24 Administrative Code) represents a transposition, in the sphere of administrative law relations, of the theory of good-faith elaborated in civil law. For developments related to German law see K. V. Nam, *The principle of good faith: development, system, problems of theory and practice* (Moscow: Statute, 2019), 45-48.

[3] The thesis that bad faith (as well as good faith) can only be approached in relation to lawful conduct is supported and argued in the Russian doctrine by prof. Sklovsky K. I. – Sklovsky, *The deal and its action*, 231, 23.

existence, at the time of execution and at the extinguishment of the obligation.

The thesis of the applicability of good faith only in relation to licit conduct also results from the „new" art. 14 of the Civil Code, which establishes the prohibition of invoking one's own illegal or bad faith behavior. The phrase „illicit or in bad faith" specifically denotes the conceptual opposition between illicit conduct (in relation to which good-faith or bad-faith is irrelevant) and bad-faith conduct (which is always licit). Another essential conclusion that results from the content of art. 14 par. (2) Civil Code is that bad faith involves obtaining an advantage at the expense of another legal subject[1]. Therefore, starting from the legal provisions, bad-faith represents a lawful conduct (from a formal point of view) that affects a third person. But in this case, from the same art. 14 par. (2) of the Civil Code results that no person can obtain an advantage from his bad-faith behavior. This means that whenever the court, in a concrete case[2], qualifies a certain behavior (which formally corresponds to strict law) as bad-faith, the effects of such behavior are to be deprived of legal protection (and in consequently the affected third party will be protected).

By means of the qualification by the court of a certain behavior as bad-faith, judicial precedents were firstly created, which were afterwards even codified, becoming rules of law[3]. This is how the legal regulation of the paulian action appeared. Even starting with Roman law, it was „created„ in the Praetorian way.

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[1] Kociol, „Fundamentals and controversial issues of challenging the actions of the debtor, committed to the detriment of his creditors (I), 215. The author points out that bad faith involves harming/damaging another person's legally protected position.

[2] For the technical mechanism for applying the principle of good faith, see M. W. Hesselink, *The Concept of Good Faith*, in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E. Du Perron (eds.), *Towards a European Civil Code*, 4th ed., (Amsterdam: Kluwer Law International, 2011), 622. To see also Sklovsky, *The deal and its action*, 234.

[3] The process of praetorian creation of legal institutions that later became traditional (e.g. pre-contractual liability) is widely reflected in K. B. Nam, *The principle of good faith: development, system, problems of theory and practice*.

The mentioned allows us to conclude that the paulian unenforceability represents the reaction of the legal order to the bad-faith behavior of the bad-paying debtor and his accomplice (third party contractor/beneficiary). In other words, paulian unenforceability is the technical mechanism by which the legislator, determining *a priori* the formula of bad-faith behavior, deprives the bad-faith third party of the „advantage" obtained (at the expense of the creditor) by signing the legal act with the debtor. Taking into account the fact that bad-faith involves legal actions, the legal act concluded between the debtor and the third party remains valid and effective, but the competing right of the creditor to realize his claim by pursuing the asset that came out of the debtor's patrimony is legally protected at the expense of the right to property (other right) of the contracting third party or the beneficiary. From this point of view, we can say that unenforceability (relative ineffectiveness) also represents a mechanism for resolving the „conflict" between two competing rights.

CONCLUSIONS

The unenforceability of the legal act concluded between the debtor and the contracting third party to the detriment of the creditor, established in art. 898 paragraph (1) Civil Code, represents an innovative solution for our civil law. At the same time, unenforceability represents the solution in the matter of the Pauline action adopted by the quasi-majority of reference legislations for us. The goal pursued by the legislator by regulating the non-enforceability as a result of the admission of the Pauline action is to identify a balance between the interests of the creditor and the third party contracting (which in essence is also a creditor). The accuracy shown by the legislator is dictated by the insufficiency of the debtor's patrimonial asset and therefore the competition for the last elements of this patrimony. Thus, the solution of unenforceability reduces the risk of the wrong resolution of the dispute between the creditor and the third party contractor, which essentially represents a competition between the two for the debtor's limited patrimonial asset.

The paulian unenforceability does not affect the validity of the deed concluded between the debtor and the contracting third party. Moreover, the effectiveness of the fraudulent act is not affected either, or the creditor goes with the paulian action against the third party contractor precisely because he received the performance from the debtor and thus became the owner of the alienated asset (so the act produced its effects). Among all the theories and legal constructions that propose to explain the legal nature and the technical mechanism of operation of unenforceability, the most elaborate and well-argued, in our view, is the theory of the Russian professor Genkin D. M., which consists in recognizing the potential right of the creditor to create the parallel effect (a new binding relationship) through a unilateral declaration of will.

The consequences of the declaration of indefeasibility exceed the research object of this article, they will be analyzed separately due to the deep practical implications.

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DURATION OF WORKING TIME, A SENSITIVE SUBJECT FOR THE PUBLIC POLICY MAKER

Manuela NIȚĂ[1]

Abstract:

Working time is an essential element of the labor relationship that is the subject of negotiations between the social partners, unions, employers and government factors, through which the harmonization of the employer's interests with those of the employees is sought. The interests of the parties are different: on the one hand, employees aim for increased quality of life and social protection through reduced working time, and on the other hand, employers aim for economic growth, supported by long and quality working time.

In the present study, we carry out an analysis of working time highlighted at the level of 33 states, differentiated by category women, respectively men, but also regarding the preferences of employees regarding the reconsideration of working time. We will make assessments regarding Romania's situation in all the analyzed states in order to outline a clear picture of the position we have on the labor market, being a working tool for public policy makers.

Key words: *working time; quality of life; social policy; labor market.*

INTRODUCTION

In Romania, working time is carefully regulated by the legislator[1] mainly through the provisions contained in the Labor Code art. 111-119,

[1] **Lecturer PhD, Faculty of Law and Administrative Sciences; Valahia University of Târgoviște, Law Department, e-mail: manuela_nita74@yahoo.com; ORCID: https://orcid.org/0000-0002-8838-5990**

but this subject is often discussed in the negotiations between the social partners, considering the regulatory differences from one state to another, but also the demands of employees, in the sense of reducing working time.

The modification of the legislative framework that regulates this aspect, as is natural in any public policy, is based, among other criteria, on the analysis of statistics that highlight the current situation and the evolution of the market in a certain direction. Thus, in our study we will use the European Quality of Life Survey (EQLS), which provides theorists and practitioners with an extensive database through which various studies and analyzes can be carried out to highlight tendencies and trends at the European level regarding the quality of life.

I. THE LEGAL FRAMEWORK IN ROMANIA

According to art 111, para. 1 of the Labor Code "Working time represents any period during which the employee performs work, is at the disposal of the employer and fulfills his tasks and duties, according to the provisions of the individual labor contract, the applicable collective labor contract and/or the legislation in force"[2]. We corroborate this text with the provisions of art 112 para. (1) and (2), which establish that "For full-time employees, the normal duration of working time is 8 hours per day and 40 hours per week", "In the case of young people aged up to 18 the duration of working time is 6 hours per day and 30 hours per week". The

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[1] To be seen Maria-Irina Grigore-Rădulescu, **„**The meanings of the concept of responsability“, *Suplement of Valahia University LAW STUDY* (2021): 107.

[2] Directive 2003/88/EC of the European Parliament and the Council of November 4, 2003 regarding certain aspects of the organization of working time, by art. 2 point 1 defines working time as any period during which the worker is at the workplace, at the disposal of the employer and performs his activity or functions, in accordance with national laws and practices; http://data.europa.eu/eli/dir/2003/88/oj, accessed on 14.12.2022

working time can be distributed evenly or unequally depending on the specifics of the unit or the work performed[1].

Also, taking into account overtime, working time cannot exceed 48 hours per week. The legislator provides the possibility of derogating from this provision, when the maximum duration of working time can be extended beyond 48 hours per week, provided that the average working hours, calculated over a reference period of 4 calendar months, does not exceed 48 hours per week, respectively not to exceed 6 months, for certain activities or professions established by the collective labor contract[2].

Collective labor contracts can provide derogations from the duration of the reference period established above, under certain conditions (the Labor Code calls them objective, technical or regarding the organization of work) but for reference periods that in no case exceed 12 months[3], according to art. 114 paragraph (4) of the Labor Code.

Exceptionally, O.U.G. 132/2020[4], establishes the cases in which the working time can be reduced and the work schedule resized, during the state of emergency/alert/siege, as well as for a period of up to 3 months[5] from the date of the end of the last period in which the state of

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[1] For a complete analysis, see Alexandru Țiclea, *Treaty on Working Time and Rest Time* (Bucharest: Universul Juridic, 2020), 19 et seq., Alexandru Țiclea, *Labor Law. University course* (Bucharest: Universul Juridic, 2008), 341 et seq.; Dan Țop, *Labor Law Treaty, Doctrine and jurisprudence., 4th edition, revised and added* (Bucharest: Universul Juridic, 2022), 453-470; Radu Răzvan Popescu, *European labor law: legislation, doctrine, jurisprudence* (Bucharest: Hamangiu, 2021), 285-291; Ion Traian Ștefănescu, *Theoretical and Practical Treatise on Labor Law, 3rd Edition Revised and Added* (Bucharest: Universul Juridic, 2014), 572-587.

[2] Art. 114 paragraph (1)-(3) of the Labor Code

[3] The provisions of art. 114 para. (1)-(4) do not apply to young people who have not reached the age of 18

[4] Emergency ordinance no. 132/2020 regarding support measures intended for employees and employers in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus, as well as for stimulating employment growth, published in Official Gazette no. 720/10.08.2020

[5] Emergency ordinance no. 73/2022 extends this term by art. 31 "The provisions of art. 1 and 3 also apply after the expiration of the period provided for in art. 1 paragraph (1), starting from June 8, 2022, but no later than December 31, 2022"

emergency/alert/siege was instituted. We will not dwell on these derogatory provisions in our study, as they are operable in special situations, which do not represent the rule (in the sense of normality) in the conduct of labor relations.

II. EUROPEAN TRENDS IN CHANGING WORKING TIME. STATISTICAL ANALYSIS.

The present study has in mind the achievement of a perspective on the actual working time currently achieved by comparison with the working time appreciated by the employee as optimal. The analyzed indicators are provided by Eurofound[1] (the European Foundation for the Improvement of Working and Living Conditions) as an expertise center for monitoring and analyzing labor market developments, using the European Quality of Life Survey (EQLS)[2] as a tool.

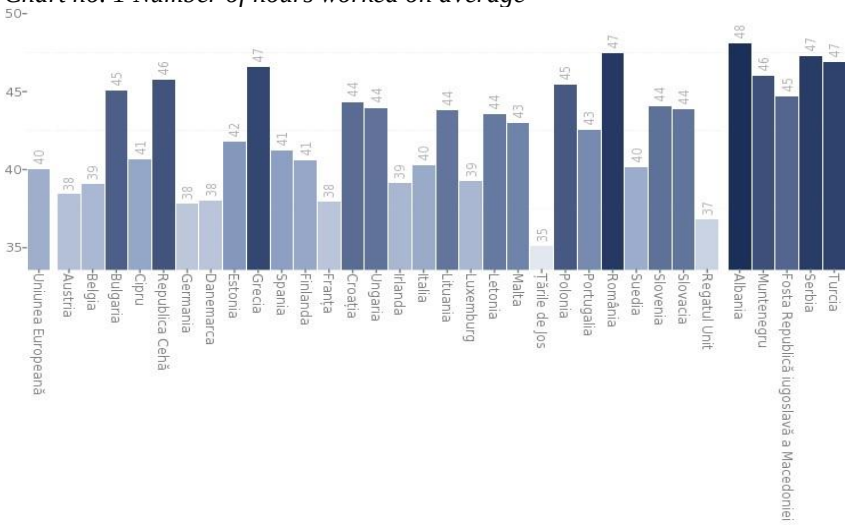
The interpretation of the statistical data concerns the answers given by the respondents to the questions: What is the number of hours worked in total? How many hours per week would you prefer to work? The analysis takes into account both the number of hours worked on average and a presentation broken down by category: women, men.

[1] The European Foundation for the Improvement of Living and Working Conditions (Eurofound) is a tripartite agency of the European Union whose role is to provide knowledge to support the development of better informed social, employment and work policies, according to Eurofound | (europa.eu), accessed on 14.12.2022

[2] Sondaje europene privind calitatea vieții (EQLS) | Eurofound (europa.eu) accessed on 14.12.2022. Given the withdrawal of the United Kingdom from the European Union on January 31, 2020, it should be noted that the data published on the Eurofound website may refer to the 28 EU member states, as the United Kingdom participated in previous research. Changes will be made gradually to reflect the current composition of the EU with 27 member states.

2.1. Analysis of the answers to the question: *What is the total number of hours worked?*

Chart no. 1 Number of hours worked on average



The analysis of the answers to this question resulted in the following aspects:

- the highest value related to this indicator is 48 hours per week (related to Albania). In the same value area are other countries such as: Romania, Serbia, Turkey, Greece (47 hours per week);

- the lowest value related to this indicator is 35 hours per week (related to Netherlands). In the same range of values are other countries such as: the United Kingdom (37 hours per week) and Austria, Denmark, France and Germany (38 hours per week);

- the average value at the level of the European Union is 40 hours per week;

Romania with 47 working hours per week (17.5% higher than the EU average) is among the countries with a large number of hours worked per week, which determines less time allocated for private life.

Regarding the number of hours worked per week by women/men, a significant difference can be observed at the European level between the values related to women/men, in the sense that the number of hours worked by women is lower than that worked by men.

Chart no. 2 Number of hours worked for women:

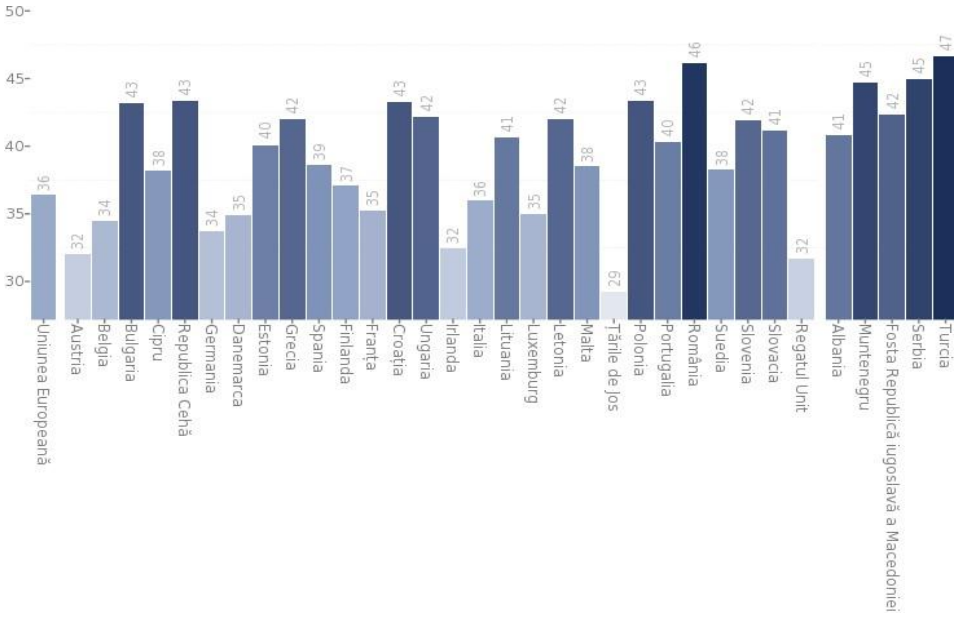
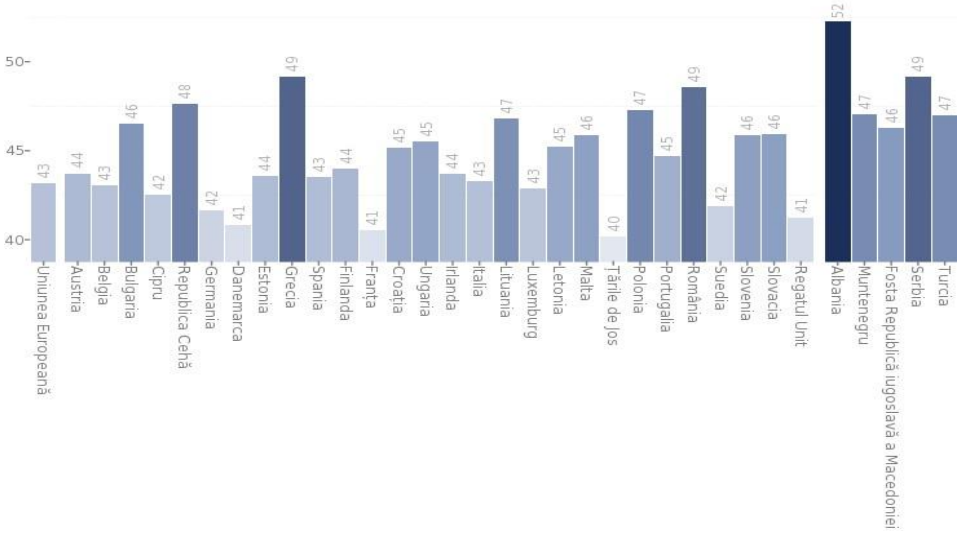


Chart no. 3 Number of hours worked by men



Thus we can observe that:

- the highest value related to this indicator is 47 hours per week for women (related to Turkey), respectively 52 hours per week for men (related to Albania);

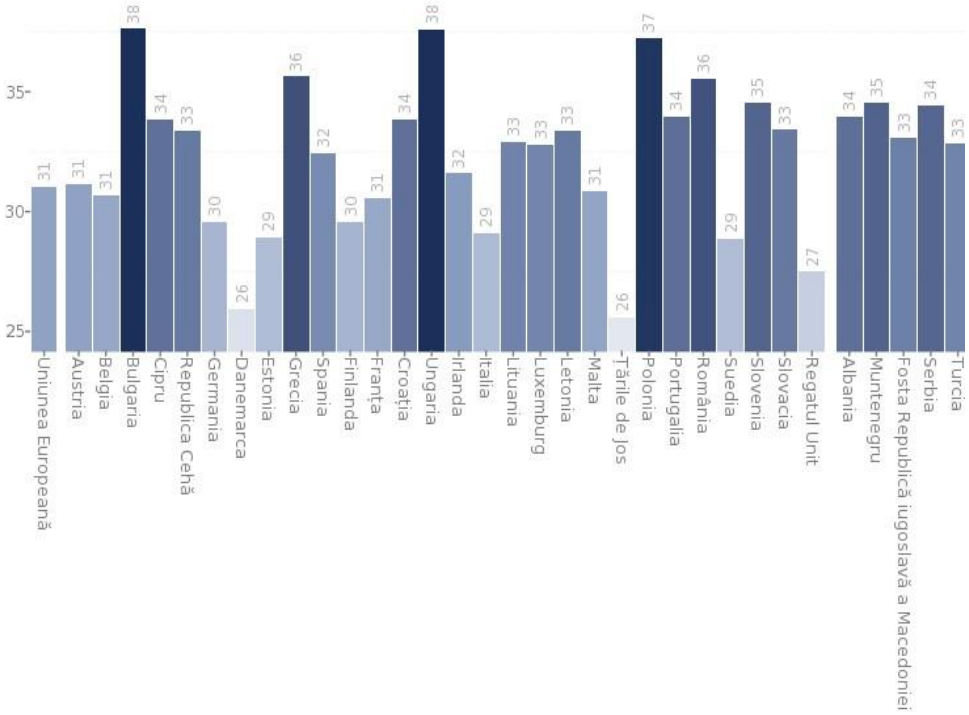
- the lowest value related to this indicator is 29 hours per week for women (related to the Netherlands), respectively 40 hours per week for men (related to the Netherlands);

- the average value at the level of the European Union is 36 hours per week for women (10% less than the average at the general level of the EU), respectively 43 hours per week for men (7.5% more than average at the general level of the EU);

Romania is among the countries with a large number of hours worked per week, 46 hours per week for women, respectively 49 hours per week for men.

2.2. Analysis of the answers to the question: *How many hours per week would you prefer to work?*

Chart no. 4 Number of hours to be worked, average



The analysis of the answers to this question resulted in the following aspects:

- the highest value related to this indicator is 38 hours per week (related to Bulgaria, Hungary). Other countries such as: Poland (37 hours per week), Romania and Greece (36 hours per week);

- the lowest value related to this indicator is 26 hours per week (related to the Netherlands and Denmark). In the same range of values are other countries such as: United Kingdom (27 hours per week) and Estonia, Italy, Sweden (29 hours per week)

- the average value at the level of the European Union is 31 hours per week;

Romania with 36 working hours per week (16.1% higher than the EU average) belongs to the group of countries with a large number of hours preferable to be worked per week.

Chart no. 5 Number of hours preferable to be worked by women

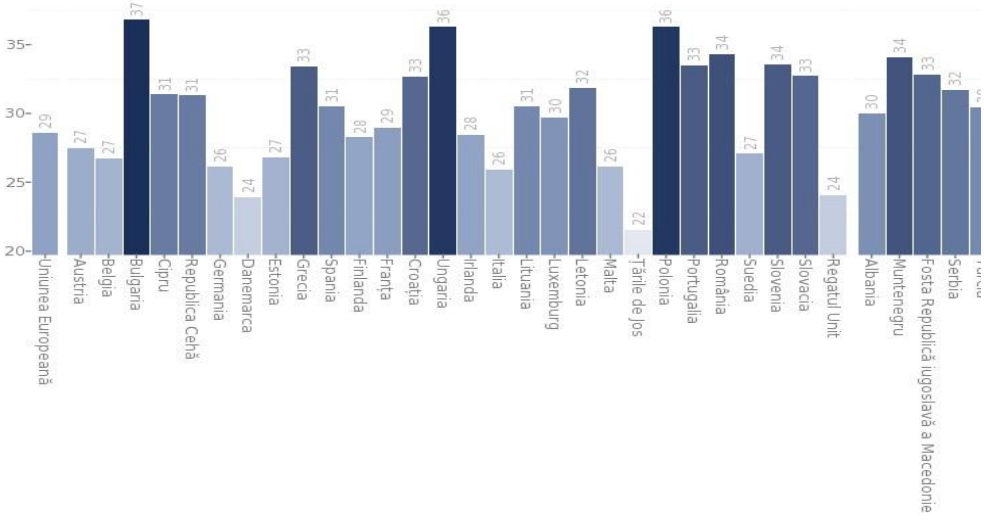
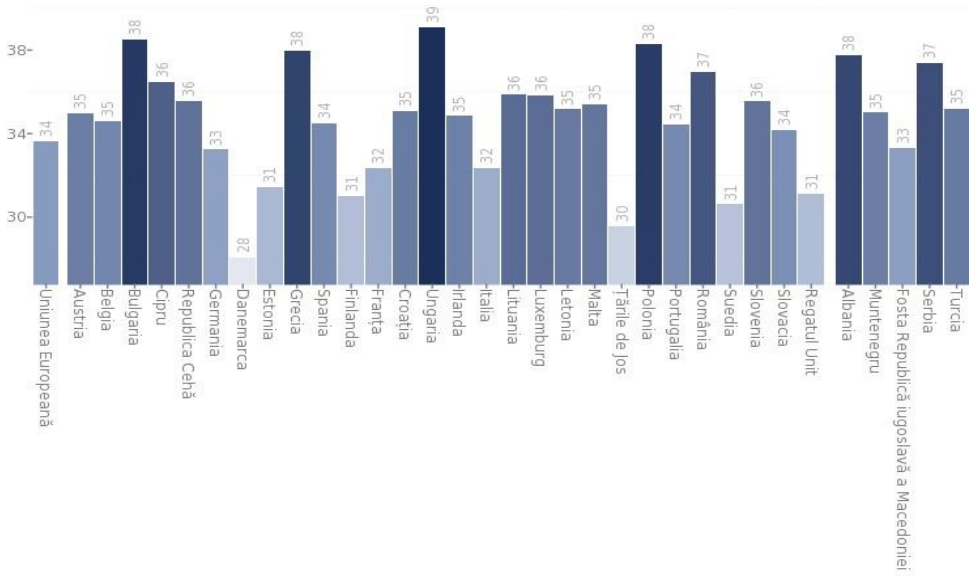


Chart no. 6 Number of hours preferable to be worked by men



Regarding the number of hours worked per week by women/men, a significant difference can be observed at the European level between the values related to women/men, in the sense that the number of hours preferred to be worked by women is lower than that preferred to be worked by men.

Thus we can observe that:

- the highest value related to this indicator is 37 hours per week for women (related to Bulgaria), respectively 39 hours per week for men (related to Hungary);

- the lowest value related to this indicator is 22 hours per week for women (related to the Netherlands), respectively 28 hours per week for men (related to Denmark);

- the average value at the level of the European Union is 29 hours per week for women (6% less than the average at the general level of the EU), respectively 34 hours per week for men (9.6% more than average at the general level of the EU);

Romania is among the countries with a large number of hours proposed to be worked per week, 34 hours per week for women, respectively 37 hours per week for men.

III. COMPARATIVE ANALYSIS BETWEEN CONCRETE DATA AND THE TREND (DEMANDS) OF EMPLOYEES.

Analyzing by comparison the results obtained for the 2 questions, we can find that both the average at EU level and the maximum and minimum values of the number of hours worked are higher than the number of hours preferable to be worked, with a significant difference between them:

- As an average, the number of hours preferred to be worked is 22.5% lower than the number of hours worked. As for women, the number of hours preferred to be worked is 19.4% lower than the number of hours worked. Regarding men, the number of hours preferred to be worked is 20.9% lower than the number of hours worked;
- As a maximum value, the number of hours preferred to be worked is 20.8% lower than the number of hours worked. As for women, the number of hours preferred to be worked is 21.2% lower than the number of hours worked. Regarding men, the number of hours preferred to be worked is 25% lower than the number of hours worked;
- As a minimum value, the number of hours preferable to be worked is lower by 25.7%, than the number of hours worked. As for women, the number of hours preferred to be worked is 24% lower than the number of hours worked. Regarding men, the number of hours preferred to be worked is 30% lower than the number of hours worked;
- In Romania, the number of hours preferable to be worked is lower by 23.4%, than the number of hours worked. As for women, the number of hours preferred to be worked is 26% lower than the number of hours worked. Regarding men, the number of hours preferred to be worked is 25% lower than the number of hours worked. Thus, it can be observed that Romania also keeps the general trend of a negative difference in terms of the number of hours preferable to be worked both as an absolute value and as a percentage.

CONCLUSIONS

Without denying the importance of working time in professional life, which is why it is a central topic in the debates of decision-makers, we must recognize that it is an element that directly influences the quality of life of individuals, regardless of gender. The fact that in all EU countries the desire for a smaller number of hours preferable to work, reflects the need to allocate more time to private life, especially in the case of women, for whom the time dedicated to family activities occupies a larger interval , to the detriment of the professional one.

The quality of private life is closely related to the quality of professional life, with the satisfaction of the individual for the work he performs.

Based on the analyzed statistical data, we find that countries with shorter working hours have a high standard of living. Obviously this standard is influenced by several factors, but we cannot deny based on concrete data, that working time must be reanalyzed and included on the work agenda of the authorities.

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