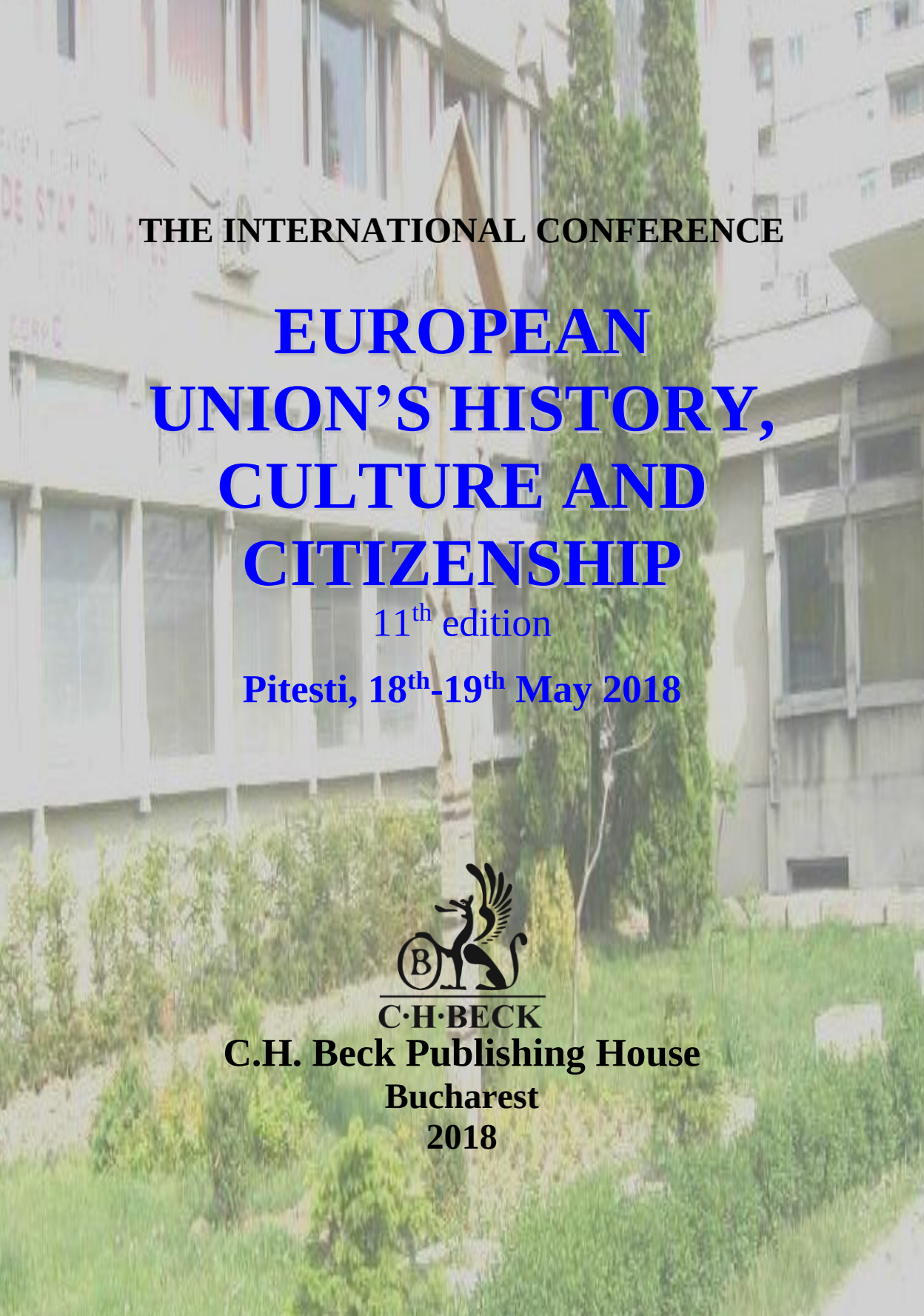


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# THE EUROPEAN PILLAR OF SOCIAL RIGHTS

**Herbert SCHAMBECK**[1]

***Abstract:***

*Right from the beginning, the European Communities and, subsequently, the European Union have sought to improve living and working conditions, foster appropriate social protection, social dialogue and development of human resources with a view to ensuring a lasting high level of employment while combating exclusion. These endeavours were inspired by the European Social Charter of 1961 and found their reflection in the Community Charter on the Fundamental Social Rights of Workers of 1989. The Union recognises and promotes the role of the social partners at Union level while taking into account the diversity of national systems, and facilitates dialogue between the social partners while respecting their autonomy. The EU's aim is to work towards a social Europe and to this end the Heads of State and Government of the EU Member States adopted the European Pillar of Social Rights in the EU Council meeting of 17 November 2017 which is analysed here.*

***Key words****: Community Charter on the Fundamental Social Rights of Workers; European Pillar of Social Rights; Europen Social Charter; European Social Fund; social partners*

## INTRODUCTION

Every order is characterised by preconditions and goals; this principle is applicable to the order that governs every community in general and holds particularly true for the order of states and of the European Union, which the German Federal Constitutional Court described as a union of states[2].

**1.** As is the case with the state, the union of states constituting the EU ultimately focuses on the individual, who is the standard addressee of

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[2]Comp.: The Maastricht decision by the German Federal Constitutional Court (BVerfGE) 89, 155, and the Lisbon decision by the German Federal Constitutional Court (BVVerfGE) 123, 267.

this legal order and who is protected by fundamental rights with respect to his or her position. These fundamental rights are multi-dimensional.

As liberal fundamental rights or freedom rights they are directed at freedom from the state, as democratic rights they are directed at freedom within the state through contribution to policy-forming and decision-making in the state, and as social fundamental rights they are directed at freedom through the state by way of social policy.

This multi-purpose use of the state aims to ensure legal certainty, cultural progress, economic growth and social security; this principle also applies to the multi-purpose use of the union of states constituting the EU and has thus also accompanied the development of an integrating Europe.

As early as 1957, the European Economic Community provided for the European social fund in the Treaty of Rome[1] by positively stipulating under Article 48 the freedom of movement for workers, the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, and under Art. 119 the principle of equal remuneration for equal work between male and female workers.

**2.** This social acquis of the EU dates back to the efforts towards completing the European single (or internal) market[2].

The EU's relevant scope of action was expanded by the Social Chapter (the Protocol on Social Policy and the Agreement on Social Policy) annexed to the Treaty on European Union (Maastricht Treaty) of 1992, which was subsequently integrated into the Treaty of Amsterdam in 1998. Thus being applicable to all EU Member States, these provisions formed the basis for Title X of the Treaty on the Functioning of the EU of the Treaty of Lisbon signed in 2007[3].

The aim of the EU[4] is in particular to promote the well-being of its peoples, the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market

[1] (German) Federal Law Gazette 1957 II, 23.
[2]Note: Directive 80/987/EEC relating to the protection of employees in the event of theinsolvency of their employer, Directive 75/129/EE Crelating to collective redundancies and Directive 77/187/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses and parts of businesses.
[3] See: Rolf Schwartmann, *Der Vertrag von Lissabon (The Treaty of Lisbon)*, 4th edition, (ed.), (Heidelberg, 2011).
[4] Art. 3 TEU.

economy aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.

At the same time, the EU combats social exclusion and discrimination, and promotes social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child.

**3**. Following on from the European Social Charter[1] signed in Turin in 1961 and the Community Charter on the Fundamental Social Rights of Workers of 1989[2], the EU seeks to improve living and working conditions, foster appropriate social protection, social dialogue and development of human resources with a view to ensuring a lasting high level of employment while combating exclusion. The Union recognises and promotes the role of the social partners at Union level while taking into account the diversity of national systems, and facilitates dialogue between the social partners while respecting their autonomy[3]. The EU's aim is to work towards a social Europe and to this end the Heads of State and Government of the EU Member States adopted the European Pillar of Social Rights[4] in the EU Council meeting of 17 November 2017.

In Chapter 1, this European Pillar of Social Rights focuses on equal opportunities and access to the labour market with a view to promoting general education and vocational training, life-long learning, gender equality, equal opportunities and active support to employment.

Chapter II focuses on fair working conditions, calling for secure and adaptable employment, fair wages and salaries, information about employment conditions and protection in case of dismissals, dialogue among social partners while respecting their autonomy and the right to collective action, work-life balance as well as a healthy, safe and well-adapted working environment and data protection.

The final chapter under the Pillar of Social Right is Chapter III, which calls for social protection and social inclusion. It deals with the topics of childcare and support to children, social protection,

[1]See: Herbert Schambeck, *Grundrechte und Sozialordnung, Gedanken zur Europäischen Sozialcharta, Schriften zum öffentlichen Recht*, volume 88 (Berlin, 1969).
[2] (Austrian) Federal Law Gazette 460/1969.
[3] Art. 152 TFEU.
[4] European Parliament, Council and Commission, European Pillar of Social Rights, https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

unemployment benefits, minimum income, old age income and pensions, healthcare, income support for people with disabilities, provision of long-term care, housing and assistance for the homeless as well as access to essential services.

**4**. The European Pillar of Social Rights seeks to make a ground-breaking contribution to the value system of the community of states constituting the EU. It thus continues the social initiatives that go beyond the scope of the single market project[1] - the Social Chapter of 1992 with its preamble, the integration of the Social Chapter into Treaty of Amsterdam in 1997, the Lisbon Strategy in 2000, and the Resolution by the European Parliament on a European Social Model for the future 2005/2248 (INI).

In these efforts towards social responsibility, economic, education, employment and social policies are to complement each other. They are all production factors, while the actual realisation and implementation of the European social model by way of individual social models falls within the Member States' scope of responsibility[2].

## CONCLUSIONS

In this way, European and constitutional law can complement each other, thus promoting the EU as an economic, monetary and legal union based on shared values and contributing to peace.

As was highlighted by EU Commissioner JOHANNES HAHN in the series of events entitled "Rethinking Europe", when he stated, and I quote: "The underlying idea of the European Union is to safeguard peace. In the 1950s, after the two world wars, the focus was placed on avoiding armed conflicts between neighbours and ensuring peace. Today, the focus is on safeguarding social peace. Also when we look beyond the borders of Europe, the principle of peace-keeping – both in the classical sense, namely by countering armed conflict, and also in the figurative

[1]See: Hans F. Zacher, *Der europäische Sozialstaat, Schweizerische Zeitschrift für Sozialversicherung und berufliche Vorsorge*, 52nd year's issue (Bern, 2008), 1 et seq., esp. p. 9 et. seq. and Herbert Schambeck, "Das europäische Sozialmodell", *Studii Juridice si Administrative*, no. 1 (7) VII (2008): 5 et seq.

[2] See: Herbert Schambeck, *Beiträge zum Verfassungs- und Europarecht* (Vienna, 2014).

sense, namely the claim to bring about social peace – still remains valid and is today probably more relevant more relevant than ever before".

## BIBLIOGRAPHY

**Books**

1. Schambeck, Herbert. *Grundrechte und Sozialordnung, Gedanken zur Europäischen Sozialcharta, Schriften zum öffentlichen Recht*, volume 88. Berlin, 1969.
2. Schwartmann, Rolf (ed.). *Der Vertrag von Lissabon (The Treaty of Lisbon)*, 4th edition. Heidelberg, 2011.
3. Schambeck, Herbert. *Beiträge zum Verfassungs- und Europarecht*. Vienna, 2014.
4. Zacher, Hans F. *Der europäische Sozialstaat, Schweizerische Zeitschrift für Sozialversicherung und berufliche Vorsorge*, 52nd year's issue. Bern, 2008.

**Articles in a print journal**

1. Schambeck, Herbert. "Das europäische Sozialmodell", in *Studii Juridice si Administrative*, no. 1 (7) VII (2008): 5.

**Website**

1. https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf.

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# GUARANTEEING THE CLAIMS OF THE CARRIER OF GOODS IN THE NEW ROMANIAN CIVIL CODE

**Sevastian CERCEL** [1]
**Ștefan SCURTU** [2]

***Abstract:***

*By definition, the contract for the carriage of goods is a synallagmatic contract, as the obligations arising from it are mutual and interdependent; the carrier undertakes to transport the goods from one place to another in return for a price which the consignor or the consignee undertakes to pay at the agreed time and in the agreed place. If the price is to be paid by the consignee after the goods arrive at the destination, the carrier has a claim right against him for the price to be paid. As the creditor of the consignee, the carrier has as a guarantee of recovering his debt, on the one hand, the general pledge right of unsecured creditors and, on the other hand, the special guarantees expressly granted to him by the legislature; in this respect, art. 1982 of the Civil Code provides that the carrier has the rights of a pledgee in respect of the transported goods for as long as he has those goods, i.e. he has a right of retention, a right to pursue the debt and a right of preference over the goods carried. The payment of the transport price has the effect of extinguishing the rights of the pledgee (the carrier).*

***Key words:*** *carrier; claim guarantee; general pledge; special guarantees; right of retention; right to pursue a debt; right of preference.*

## PRELIMINARY ISSUES

In the doctrine there are several definitions of guarantees; some express the notion of guarantee in the narrower sense, others extend the scope of the notion beyond what the doctrine calls guarantees proper; thus:

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i) some authors consider that the guarantees of the performance of obligations refer to "the set of legal means, i.e. of rights and actions (...) the exercise of which ensures the fulfillment of the claim rights"[1];
ii) another definition says that the guarantees of the obligations are legal means that either remove the equality of creditors, placing some of them in a privileged position of priority over the others (as is the case of securities), or add to the general pledge, consisting of the debtor's property, another pledge consisting of the property of another person, who undertook to perform the obligation of the debtor, if he did not perform it[2];
iii) in another paper, the notion of the creditor's guarantee is broader, including both the guarantees proper and the legal means that increase the chances of performing the obligations, as it contributes "to the preservation of certain goods for the purpose of enforcement, to the assurance of the secured performance of the obligation or of compensation to the creditor if the secured performance no longer takes place"[3]. Depending on the time when they take effect, the guarantees in the broader sense are classified by the author as follows: a) preventive guarantees (the right of retention, unavailability of some goods), the purpose of which is the preservation of certain goods in view of possible enforcement; b) guarantees of secured enforcement (penalty clause, deposit and co-participation clause) aimed at ensuring the secured performance of the main obligation; c) guarantees proper (suretyship, securities and legal cases of preference), which take effect in the case of enforcement, as exceptions to the principle of equality of creditors[4].

The 2009 Civil Code did not define the notion of guarantee, but regulated personal guarantees (suretyship, guarantee letter and comfort letter), privileges and securities (mortgage, pledge and the right of retention); these were referred to as special guarantees or guarantees proper by the doctrine.

[1] L. Pop, *Drept civil. Teoria generală a obligaţiilor. Tratat. Ediţia a 2-a* (Iaşi: Fundaţia „Chemarea", 1996), 387.
[2] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor, ediţia a IX-a, revizuită şi adăugită* (Bucharest: Hamangiu, 2008), 416; I. Filipescu, *Teoria generală a obligaţiilor* (Bucharest: Actami, 1994), 254.
[3] V. D. Zlătescu, *Garanţiile creditorului* (Bucharest: Academiei, 1970), 31.
[4] V. D. Zlătescu, *Garanţiile creditorului*, 44-45.

## THE CARRIER'S GUARANTEES

In the case of the contract for the carriage of goods, the payment for the carrier's performance may be made either by the consignor at the time of concluding the carriage contract or at a later date agreed to by the parties, or the consignee after the performance of the carriage contract, according to the mutual agreement of the parties. In the event that the contracting parties have failed to specify who will make the payment, art. 1978 of the Civil Code provides that "The price of the carriage and the accessory services provided by the carrier shall be owed by the consignor and shall be paid at the time of delivery of the goods for carriage...".

If the debtor does not voluntarily perform his payment obligation, the carrier has the legal status of an ordinary creditor, so he acquires the status of an unsecured creditor of his debtor and two major inconveniences would affect his interests: the first inconvenience would be that the carrier would be obliged to sue the debtor in order to obtain an enforceable title for the realization of his claim; the second inconvenience would be that the carrier should bear the risk of the debtor's insolvency.

Having as a premise the social importance of the carrier's activity and the legal obligation that the carrier of the goods has as a professional (to accept, as a matter of principle, any demand for transport, an obligation arising from his capacity as a service provider in a state of permanent offer of services addressed to the public), the legislature regulated in favour of the carrier various guarantees for the recovery of his debts; these guarantees have been taken over from the general regulatory framework and adapted to the contract for the carriage of goods[1].

Art. 1982 of the Civil Code, which has the marginal title "Guaranteeing the claims of the carrier", provides that "In order to guarantee his claims arising from the contract of carriage, the carrier enjoys, in respect of the goods he carries, the rights of a pledgee for as long as he holds those goods"; referring to the rights of the pledgee, the doctrine, considering the provisions of the law, recognizes that a pledgee has the following rights: the right of retention (art. 2492 of the Civil

[1] Șt. Scurtu, *Dreptul transporturilor* (Craiova: Universitaria, 2003), 141.

Code); the right to pursue (art. 2486 of the Civil Code) and the right of preference[1].

## THE RIGHT OF PLEDGE IN THE GENERAL REGULATORY FRAMEWORK

Article 2481(1) of the Civil Code defines the pledge as being the security (chattel) "which is constituted by the remission of the property or title (by the debtor - our note) to the creditor or, as the case may be, by its being held by the creditor, with the consent of the debtor in order to secure the claim". The parties to the pledge contract are: the pledgor (the person who conveys property as a pledge) and the pledgee (the creditor who receives property as a pledge)[2].

The 2009 Civil Code regulated only the pledge with dispossession, dispossession pertaining to the pledge; for this reason, art. 2480 of the Civil Code stipulates that only corporeal movables or negotiable instruments issued in materialized form may be the object of the pledge (under the Civil Code of 1865 the pledge without dispossession was possible and therefore all corporeal and incorporeal movables could make the object of the pledge, dispossession pertaining to the nature of the pledge, not its essence).

Both in the case of the privilege (art. 2333 of the Civil Code), the mortgage (art. 2344 of the Civil Code), and in the case of the pledge, the legislature enshrined the rule of indivisibility. Thus, in accordance with art. 2493 of the Civil Code, "The pledge covers all the goods encumbered until the secured obligation has been extinguished in full". Therefore, even if we are in the presence of a divisible obligation, the pledge is not divisible, but it continues to affect the goods in their entirety, even when a great part of the debt has been paid; similarly, each part of the pledged goods, namely the part of partially sold goods, is intended to guarantee the entire debt for which the pledge was constituted.

[1] C. Stanciu, *Dreptul transporturilor. Contracte de transport de bunuri* (Bucharest: Universul Juridic, 2015), 131.

[2] For details on the definition of the pledge, the parties' rights and obligations and indivisibility of the pledge, see Șt Scurtu, *Drept civil. Regimul juridic general al obligațiilor. Garantarea obligațiilor* (Bucharest: C.H. Beck, 2014), 284 sqq.

In the pledge contract one must identify both the goods making the object of the pledge and the claim it guarantees, a requirement that has entitled the doctrine to assert that the pledge right is a specialized guarantee.

The rights and obligations of the parties to the pledge contract are correlative.

*The pledgor has the following obligations:*

a) to convey the goods or title affected by the pledge to the pledgee; he will become an agent of the owner for those goods. The pledgor retains the property of the goods and, as owner, bears the risk of their fortuitous loss (art. 2490 of the Civil Code). As a matter of principle, he cannot ask the pledgee to return the goods before he has performed the obligation;

b) at the time of extinguishing the pledge and the pledgee's returning the goods, the pledgor has the obligation to return to the pledgee all the expenses incurred with the preservation of the goods received in pledge. These expenses give the pledgee a right of retention on the property until the date of their full payment. The claim representing the expenses incurred with the preservation of the goods received in pledge has a privileged character and therefore has priority over other mortgaged and pledged claims.

*The pledgee has the following obligations:*

a) to perform all the necessary acts for the preservation of the property, as well as useful acts so that it can be used according to its usual purpose (art. 2487 of the Civil Code, in conjunction with art. 795 of the Civil Code);

b) not to use the property if he has not been authorized to do so by the debtor (art. 2490 of the Civil Code);

c) not to acquire the fruits/profits of the property received in pledge. The creditor has the obligation to hand over the natural and industrial fruits to the debtor. Civil fruits must not be handed over to the debtor, but if the property belongs to the debtor, they may be kept by the creditor, who first imputes them on the expenses incurred (for example, with the preservation of the property), then on the interest and ultimately on the capital (art. 2488 of the Civil Code);

d) the obligation to return the pledged property after the debtor has performed his obligation (art. 2492 of the Civil Code). If the debtor fails to perform the obligation which has been guaranteed by the pledge, the creditor may proceed to enforcement, in which case the rules prescribed

by the law for the foreclosure and settlement of mortgages are applied (art. 2494 of the Civil Code). In accordance with art. 2490 of the Civil Code, the creditor is not responsible for the destruction of the goods when it is due to force majeure, age or normal and authorized use of the goods; interpreting by a contrario the reasoning of these legal provisions, we can say that the creditor will be liable if the goods have perished or have been damaged by his fault or because of the abnormal use of the goods as well as the unauthorized use of the goods.

The pledgee has, in addition to the right to receive from the debtor the property making the object of the pledge, the following rights:
a) a right of retention on the property until the debtor has fully performed his obligation (art. 2492 of the Civil Code);
b) a right to pursue the pledged property, which means that if he loses possession of the pledged property, the creditor is entitled to request the return of the goods from the person who holds them without a right, in an action for restitution, an action relating to real rights (because it can be brought against any person possessing the goods without a right) and a petitory action (because the court is required to recognize the petitioner's pledge right). However, it is not possible to return the goods to the pledgee when the third party possessing the goods invokes the acquisition of the movable property through possession in good faith (art. 937 of the Civil Code), and when "the property was taken over by a higher-ranking mortgagee or the taking over occurs within the enforcement proceedings. (...) The pledgee cannot oppose the selling of the property, and he shall participate in the distribution of the price in the order given by the rank of his guarantee"[1];
c) a right of preference, i.e. the right to be paid with priority over other creditors in the course of the foreclosure of the debtor's property;

In addition to these rights, which are of interest to us in terms of the specificity of the carrier's guarantees, the pledgee also has the right to claim from the debtor the reimbursement of the expenses for the preservation of the pledge received (art. 2491 of the Civil Code), and in the case of the pledge which has as its object participatory titles to the share capital of a company, in the case of their redemption, the pledgee has the right to impute the price paid, in accordance with the rules provided in art. 2488 of the Civil Code, that is to say, from the amount

[1] L. Pop, and I.F. Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile* (Bucharest: Universul Juridic, 2012), 849.

received after the redemption he will first be able to deduct the expenses incurred with the pledge, then the interest and, finally, the capital (art. 2489 of the Civil Code).

## THE RIGHT OF RETENTION IN THE GENERAL REGULATORY FRAMEWORK

By defining the right of retention, the legislature specifies that it is the security on the basis of which its holder, who has the duty to convey or return the property may retain it as long as the creditor fails to perform his obligation arising from the same legal relationship or, as the case may be, as long as the person entitled to the return of the goods does not pay the holder the debt incurred in connection with that property ("does not compensate him for the necessary and useful expenses he has done for that property or for the damage the property has caused him" - art. 2495 of the Civil Code).

Among the effects of the right of retention one should note, first of all, the right of the holder to refuse the handing over of the goods until the debt arising in relation to the goods has been paid. This right is enforceable against third parties without any formality of publicity (art. 2498 of the Civil Code). The debtor of the guaranteeing obligation, the owner of the goods (when he does not have the capacity of debtor, but he has guaranteed the obligation of another) and the person who dispossesses the holder of the goods subject to the right of retention are interested third-parties under this legal provision.

The holder of the right of retention cannot oppose the foreclosure started by another creditor, irrespective of the fact that he is an unsecured creditor or a creditor who benefits from a security, as the right of retention is not enforceable against the creditors of the same debtor. However, the person exercising the right of retention has the possibility of participating in the distribution of the price of the goods, as provided by law [art. 2498(2) of the Civil Code], since he is the creditor [unsecured creditor, if the goods subject to foreclosure are immovable or privileged, if the goods are movable, the claim being privileged, in this case, under art. 2339(1)(b) of the Civil Code][1].

Lastly, another important effect of the right of retention lies in the fact that the retainer has, as long as he is in possession of the goods, the

[1] Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 856.

rights and obligations of an administrator of the property of another empowered with simple administration, the provisions of art. 795-799 of the Civil Code applying accordingly (art. 2497 of the Civil Code). So the holder of the right of retention has the obligation to collect the fruits of the property and is obliged to return them to the owner only with the pledged goods, as the right of retention extends to them. Instead, the retainer does not have the right to use the goods.

The retainer who has been dispossessed without agreeing to it may request the return of the property from the person detaining it by way of an action in detinue[1], if two cumulative conditions are met: the retainer's right to action for the performance of the debtor's obligation must not have been extinguished by extinctive prescription and the new holder of the goods should not invoke the acquisition of the movable property through possession in good faith, pursuant to art. 937 of the Civil Code [art. 2499(2)].

The extinction of the obligation guaranteed by the right of retention, by any of the extinction methods provided by the law, has the effect of extinguishing the right of retention.

## THE CARRIER'S RIGHT OF RETENTION[2]

The legal regime of the carrier's right of retention is of a legal nature; thus, pursuant to art. 1978(3) of the Civil Code "If the price is paid at the destination, the carrier shall deliver the goods against payment by the consignee", and pursuant to art. 1980(1) of the Civil Code "The consignee cannot take possession of the carried goods unless he pays the carrier the amounts owed under the contract and the possible reimbursements with which the carriage was charged...". So the existence of the right of retention implies the existence of a carrier's claim against the consignee, which is related to the transport. The carrier's right of retention ceases when he has lost detention of the carried goods.

The particularities of the carrier's right of retention are related to the object of the right of retention and its conditions of exercise.

[1] For details regarding this aspect, see S.I. Vidu, *Dreptul de retenţie în raporturile juridice civile* (Bucharest: Universul Juridic, 2010), 94 sqq.
[2] O. Căpăţînă and Gh. Stancu, *Dreptul transporturilor. Partea generală* (Bucharest: Lumina Lex, 2000), 143; Gh. Stancu, *Dreptul de retenţie, gajul şi privilegiul cărăuşului asupra mărfii transportate* (Bucharest: Lumina Lex, 1999), 57 sqq.

The object of the carrier's right of retention is the corporeal movable property (except credit titles), i.e. the goods handed over for transportation; immovable property cannot make the object of the carrier's right of retention, as in the general regulatory framework.

The object of the right of retention are both the goods and their packaging (boxes, crates, drums, containers, barrels, bottles, etc.), separating and fastening materials (embossed paper, wooden cabinets, planks, metal bars, corrugated cardboard, etc.), handling units (crates, pallets, containers, etc.).

The object of the carrier's right of retention are only the goods handed over to the carrier for transport, and not those which he has got possession of under other circumstances[1].

In order to prevent possible abuses of the carrier in the exercise of his right of retention, art. 1980(2) of the Civil Code provides for restrictive measures in the exercise of the carrier's right of retention in the event of misunderstandings between the latter and the consignee regarding the amount of the debt ("In the event of a misunderstanding regarding the amount owed, the consignee may take over the goods carried if he pays the carrier the sum he claims to owe to the latter and records the difference claimed by the carrier at a credit institution"). So, in this case, the carrier has the obligation (under the sanction of damages) to convey the goods to the consignor, even if he initially makes a partial payment.

The carrier's right of retention is extinguished in the following ways: a) by the debtor's payment of debts; b) by the carrier's voluntary conveyance of the goods to the consignee; c) if the goods are destroyed or lost.

Other ways of extinguishing the right of retention are specific to the general regulatory framework; e.g.: a) the retainer creditor becomes the owner of the goods or the universal successor of the debtor; b) the creditor is deprived of the benefit of the right because he used the goods he detained; c) the enforcement of the court order by which the retainer creditor is obliged to leave the goods in the hands of the owner[2].

[1] I.N. Finţescu, *Curs de drept comercial, vol. 1* (Bucharest: 1929), 485.
[2] Scurtu, *Dreptul transporturilor*, 154.

# THE RIGHT OF PRIVILEGE IN THE GENERAL REGULATORY FRAMEWORK

Privilege is defined in the Civil Code as a preference cause for the payment provided for by law to a creditor considering the quality of his claim [art. 2333(1) of the Civil Code].

As a principle, privileges are simple causes of preference which the law recognizes to unsecured creditors because of the quality of their claims. They only give the creditor the right to be paid with priority from the price obtained from the sale of goods, but do not confer a right to pursue the goods, like securities[1];

Privileges are accessory because the purpose of this form of guarantee is to prioritize a particular claim. Therefore, the privileges are extinguished with the secured obligation (art. 2337 of the Civil Code)

The Civil Code divides privileges into two categories: general privileges on all movable and immovable property of the debtor (art. 2338 of the Civil Code) and special privileges on certain movables, determined individually, as to securities (art. 2339 of the Civil Code). In the light of these legal provisions, we can conclude that, depending on the nature of the goods to be sold, in order for the price to cover the privileged claim, general privileges may be movable or immovable, and the special ones may be movable.

General privileges cover all the movable and immovable property of the debtor and are characterized by the fact that the privileged creditor is able to pursue any property of the debtor for the fulfillment of his claim; if there are several creditors, the order in which the debts are paid is the one established by law, and the privilege is exercised over the price obtained from the sale of the goods following foreclosure. For the purpose of identifying general privileges, establishing the preference order and the principles of their exercise, the Civil Code makes reference to the Civil Procedure Code.

Special movable property privileges concern certain movables, as determined by law, which the creditors of certain receivables can sell in order to fulfill their claims with priority.

The Civil Code regulates two special movable property privileges: the privilege of the movable property seller and the privilege of the person exercising a right of retention (art. 2339 of the Civil Code).

[1] Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 801.

# THE CARRIER'S RIGHT OF PRIVILEGE

The carrier's right of privilege is based on his right of retention, and the carrier's right of retention is implicitly enshrined in the provisions of art. 1982 of the Civil Code which stipulates that, in order to guarantee the claims arising from the carriage contract, the carrier enjoys, in respect of the goods transport, the rights of a pledgee while holding the property; or one of the rights of the pledgee is the right of retention.

Pursuant to art. 2339 of the Civil Code, the claim of the person exercising a right of retention is privileged with regard to the goods on which the right of retention is exercised, as long as this right subsists. The justification of the retainer's privilege is based on the idea of pledge or the idea of preservation of the goods: "the privilege of the retainer is the only exception to the rule that privileges are guarantees without dispossession, and to the rule that, in this area, what matters is the cause of the claim favored"[1].

The carrier's privilege affects the transported goods whether or not the consignor or the consignee is the owner.

The privilege regulated under art. 2339 of the Civil Code belongs only to the carrier, not to the owner who has rented a means of transport to a third party for carriage; in this latter case the privilege can only be exercised by the third party[2].

The towing contract does not confer on the performer of the characteristic obligation the right of privilege on the cargo loaded on the means of transport which are towed. The contract for the moving of furniture or other things, usually house-hold, to a new house, shop or workshop, in so far as it excludes the characteristics of a carriage contract proper, does not benefit from the privilege of the carrier[3].

The extinction of the carrier's privilege is regulated by art. 1982(1) of the Civil Code, in accordance with which the carrier enjoys, in respect of the transported goods, the rights of a pledgee as long as he holds them. Consequently, the fact of the voluntary conveyance of the

[1] P. Vasilescu, *Drept civil. Obligaţii* (Bucharest: Hamangiu, 2012), 147.
[2] D. Alexandresco, *Explicaţiune teoretică şi practică a dreptului civil român, tomul X* (Bucharest: Atelierele Grafice Socec & Co. S.A., 1911), 431; E.Cristoforeanu, *Despre contractul de transport, Cartea I, Transportul terestru de lucruri. Analiza lui în cadrul dispoziţiunilor din codul de comerţ* (Bucharest: Tipografia "Curierul judiciar" S.A., 1925), 204.
[3] Căpăţînă, *Contractul comercial de transport* (Bucharest: Lumina Lex, 1995), 183.

goods to the consignee leads to the extinction of the carrier's privilege.

The same article regulates an exception to the stated principle by granting the carrier the privilege even after the thing was delivered to the consignee, but only for 24 hours after the delivery and only if the thing is still in the possession of the consignee.

Thus, in the Civil Code, if the carrier has delivered the thing to the consignee, his privilege is not extinguished if two conditions are fulfilled: i) to exercise it within the 24-hour period following the delivery of the thing to the consignee; ii) the consignee must have retained the possession of the transported thing, i.e. not having disposed of it in favour of a third party (this is the consequence of the principle that the furniture passes into the hands of third parties free of any privileges)[1].

If the consignee has sold the goods, the carrier may claim them after the 24-hour period from any possessor, provided that he can prove that both the consignee seller and the buyer were in bad faith, namely the alienation was made in order to remove the thing from the effect of the carrier's privilege[2].

## THE PRIVILEGE OF THE CARRIER IN CASE OF CONCURRENT PRIVILEGES

In the light of the provisions of art. 2339 of the Civil Code, the privilege of the carrier in respect of the transported goods is a special privilege. This privilege may be concurrent with both general privileges and special privileges of other creditors of the consignor or the consignee. In these cases, the following rules are considered: i) If the carrier's claim is concurrent with unsecured debts, the privileged creditor is preferred to the other creditors (art. 2335 of the Civil Code). ii) If there is a conflict between general and special privileges, special privileges prevail. iii) In the case of concurrent special movable property privileges [stipulated in art. 2339(1) of the Civil Code], the privilege of the seller for the payment of the price prevails, as to the retainer's privilege; any contrary stipulation is considered unwritten [art. 2339(2) of the Civil Code]. (iv) The privileges governed by the Civil Code (both general and special privileges) shall be preferred, if they come in concurrence with privileges created by special laws, if they do not specify the rank of the

[1] Alexandresco, *Explicaţiune teoretică şi practică a dreptului civil român,* 433.
[2] Cristoforeanu, *Despre contractul de transport, Cartea I,* 202.

privilege they create, since, in the absence of an exception to the general provisions on the order of privileges, the general provisions shall apply [art. 2336(2) of the Civil Code].

## GUARANTEED CLAIMS OF THE CARRIER

In accordance with art. 1982 of the Civil Code, the carrier enjoys, in respect of the transported goods, the rights of a pledgee in order to guarantee his claims arising from the contract of carriage, and art. 1978 of the Civil Code provides that the beneficiary of the carriage owes "The price of the carriage and accessory services provided by the carrier". It follows from these legal provisions that there are three categories of guaranteed claims, namely[1]:

a) Actual carriage expenses, which include: the cost of carrying the goods to the destination, the percentage of the amortization of the invested capital (infrastructure, means of transport, technical devices, signaling or transmission devices, etc.), personnel expenses and expenses regarding the maintenance of the carrier's service (also called the cost of the carrier's service operating) and the carrier's benefit.

b) Accessory carriage expenses, which include the expenses which the carrier may incur in transport-related operations such as loading, unloading, trans-shipment, weighing, temporary storage, packing, costs caused by the discharge of customs duties (in particular due to the fines paid by the carrier as a result of incorrect declarations made by the consignor), storage expenses covered by the carrier due to the cancellation of the shipment because of the issuance of a counter-order (the storage expenses cannot be included in the amount of the guaranteed claim if the interruption of the transport was determined by the carrier's fault), the cargo preservation expenses to the extent that these operations were the responsibility of the carrier under the carriage contract, the damage suffered by the carrier and any claim arising out of the material act of transport.

c) Expenses resulting from successive or combined carriage.

In accordance with art. 2001 of the Civil Code "(1) In successive or combined carriage, the last carrier shall represent the others in respect

[1] Scurtu, *Dreptul transporturilor*, 144-145; Stancu, *Dreptul de retenţie*, 30-32; Cristoforeanu, *Despre contractul de transport, Cartea I*, 206; Căpăţînă, *Contractul comercial de transport*, 183-184.

of the collection of the amounts they are entitled to under the contract of carriage, as well as the exercise of the rights provided for in art. 1995. (2) The carrier who fails to perform the obligations provided for in paragraph (1) shall be liable before the previous carriers for the amounts they are entitled to". Pursuant to this provision, the last carrier is the agent of the previous carriers for the collection of the amounts owed to them under the contract of carriage.

The carrier's claims representing transport expenses and accessories are guaranteed only if they result from the unpaid transport. Debts arising from previous transports are not guaranteed because the guarantees are only acknowledged to the carrier as long as the cargo is in his detention. An exception to this rule is where a quantity of the cargo is carried to the destination in smaller batches by successive journeys, but on the basis of a single carriage contract in which case the carrier may exercise his right of privilege on the last load and for the amounts owed from cargo shipments previously carried, since there is only one legal relationship between the parties, the effects of which affect all the goods transported[1].

## CONCLUSIONS

The Romanian legislature has regulated in favour of the carrier various guarantees for the recovery of his claims resulting from the performance of the carriage contract; these guarantees have been taken over from the general regulatory framework and adapted to the contract for the carriage of goods, having particularities provided by the specific nature of the carrier's activity. Thus, the carrier has at his disposal effective legal instruments such as the right of retention on the goods making the object of the carriage contract, the right to pursue the debt in the event of losing possession of the pledged goods (the carrier being entitled to request the return of the goods from the person holding them without a right), the right of preference, namely the right to be paid with priority over other creditors in the course of the foreclosure of the debtor's property.

These guarantees recognized by the Romanian legislature to the carrier are also covered by international conventions on carriage, such as:

[1] Cristoforeanu, *Despre contractul de transport, Cartea I,* 206; Căpăţînă and Stancu, *Dreptul transporturilor. Partea generală*, 153.

i) the Convention on the Contract for the International Carriage of Goods by Road (CMR), concluded in Geneva, 1956; ii) the Convention concerning International Carriage by Rail (COTIF), adopted in Berne in 1980; iii) the Convention for the Unification of Certain Rules for International Carriage by Air, adopted in Montreal on 28 May 1999, commonly referred to as the "Montreal Convention"; iv) the 1978 United Nations Convention on the Carriage of Goods by Sea (also known as the "Hamburg Rules"), signed in Hamburg in 1978.

## BIBLIOGRAPHY

### Books

1. Alexandresco, D. *Explicaţiune teoretică şi practică a dreptului civil român, tomul X*. Bucharest: Atelierele Grafice Socec & Co. S.A., 1911.
2. Căpăţînă, O. *Contractul comercial de transport*. Bucharest: Lumina Lex, 1995.
3. Căpăţînă, O. and Gh. Stancu. *Dreptul transporturilor, partea generală.* Bucharest: Lumina Lex, 2000.
4. Cristoforeanu, E. *Despre contractul de transport, Cartea I, Transportul terestru de lucruri. Analiza lui în cadrul dispoziţiunilor din codul de comerţ*. Bucharest: Tipografia "Curierul judiciar" S.A., 1925.
5. Filipescu, I. *Teoria generală a obligațiilor*. Bucharest: Actami, 1994.
6. Finţescu, I.N. *Curs de drept comercial, vol. 1*. Bucharest: 1929.
7. Pop, L. *Drept civil. Teoria generală a obligaţiilor. Tratat. Ediţia a 2-a*. Iași: Fundaţia "Chemarea", 1996.
8. Pop, L. And I.F. Popa I.F. and S.I. Vidu. *Tratat elementar de drept civil. Obligaţiile.* Bucharest: Universul Juridic, 2012.
9. Scurtu, Șt. *Dreptul transporturilor*. Craiova: Universitaria, 2003.
10. Scurtu, Șt. *Drept civil. Regimul juridic general al obligațiilor. Garantarea obligațiilor*. Bucharest: C.H. Beck, 2014.
11. Stanciu, C. *Dreptul transporturilor: Contracte de transport de bunuri*. Bucharest: Universul Juridic, 2015.
12. Stancu, Gh. *Dreptul de retenţie, gajul şi privilegiul cărăuşului asupra mărfii transportate*. Bucharest: Lumina Lex, 1999.

13. Stătescu, C. and C. Bîrsan. *Drept civil. Teoria generală a obligaţiilor, ediţia a IX-a, revizuită şi adăugită.* Bucharest: Hamangiu, 2008.
14. Vasilescu, P. *Drept civil. Obligaţii*. Bucharest: Hamangiu, 2012.
15. Vidu, S.I. *Dreptul de retenţie în raporturile juridice civile*. Bucharest: Universul Juridic, 2010.
16. Zlătescu, V. D. *Garanţiile creditorului*. Bucharest: Academia, 1970.

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# FISCAL FEDERALISM IN GERMANY - STRUCTURES AND REFORM

**Rainer ARNOLD** [1]

***Abstract:***

*Fiscal Federalism is one of the core issues in German constitutional law. As the 16 Member States of the Federation are considered to be States, they must dispose of a sufficient amount of money for fullfilling their own tasks. The current system of financing, which is in reform and will be in part different from 2020 on, is based on the principles of solidarity, loyal cooperation and efficiency in the Federation. The main finance resources resulting from the income tax, the corporation tax and the VAT are divided between Federation and Member States by 50 % (as to the two first named taxes) and distributed in a rather flexible system as to VAT. This vertical distribution is complemented by the horizontal distribution between the 16 Member States. This is based on the principles of domicile (as to the income and corporation taxes) and, for VAT, on the number of Member States' inhabitants. The finacial perequation compensates to a great extent fiscal power divergences. This last step is in refom being*

***Key words:*** *financial perequation; vertical and horizontal distribution of tax revenues; principle of solidarity; fiscal power; loyal cooperation in the federal state.*

## 1. THE PRINCIPLES OF FISCAL FEDERALISM

Federalism is the most dynamic part of a constitutional order. If a constitution can be called a living instrument, the provisions on territorial organization in regional and in particular in federal state systems have a vital active life. The German constitution, the Basic Law (BL), has been reformed more since 60 times during its existence of nearly 70 years. The most frequent reform subject has always been federalism, and within federalism, its core matter, the finances. The great reform of the German federalism took place in 2006 which did not fundamentally modify the system (how could it be really modified as it has proved during decades to be an efficient and well accepted system?) but made important

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corrections of some of the dysfunctional developments which had occurred.[1] The subsequent reform of 2009 focused on fiscal modesty introducing the (relative) prohibition for the state (Federation as well as member states) to make debts.[2]

The financial system of the Federation is of highest importance for the maintenance of the basic federal concept which is characterized by the fact that not only the Federation but also the 16 member states have the quality of states,that means that they have own tasks to be fulfilled by basically own financial means. Fiscal autonomy is therefore a fundamental requirement for the German federal idea. Autonomy in this sense means principally that the member states of the Federation should not be essentially dependent from financial help of the Federation but have their own resources which enable them to survive as states. Furthermore, in a complex system as a federal state the mutual acceptance of the conditions for the existence of all the members of the Federation is an important sociological element of coherence.

It can be easily seen that various basic principles are involved in the field of fiscal federalism: first of all as a general idea the principle of loyalty, loyal cooperation, which is the crucial code of behavior of all the members of the Federation[3], unwritten principle which has been elaborated by the jurisprudence of the Federal Constitutional Court (FCC)[4]. Furthermore, the principle of solidarity [5]is relevant specifically for fiscal relations in the Federation which requires mutual help if there is a serious need.

A third principle is of particular functional importance: the principle of efficiency is indeed crucial for a fiscal system which depends from the developments in the economy, exposed to potentially rapid changes. A rapid and adequate reaction is necessary and can only be obtained if the system is flexible and easily adaptable to the changes. However, the principle of stability and legal certainty is important on the other hand. If the constitution as well as legislation (that means federal

[1] J. Blumenthal and St. Bröchler, *Föderalismusreform in Deutschland* (2010).

[2] R. Arnold, "Costituzione tedesca e finanze pubbliche. Le strutture fondamentali", *Il federalismo fiscale in Europa*, a cura di Silvio Gambino,Giuffrè Editore, (Milano 2014): 145–154; R.Arnold and F.Michl, *Le "frein à l'endettement" de l'État dans la Loi fondamentale allemande Constitutions 2012*, 7 -16

[3] P. Egli, *Die Bundestreue* (2010)

[4] FCC (vol. 42): 103; (vol. 95): p. 250, etc.

[5] See FCC http://www.bverfg.de/e/fs19991111_2bvf000298.html/ 216, 292, etc.

legislation for being uniform in the whole territory) clearly indicate the conditions and consequences of the fiscal processes no attempt for particular negotiations will be made from one of the members of the Federation in order to get exceptional advantages. Equality guaranteed by normative prescriptions as well as mutual acceptance and confidence reinforces the idea of the Federation as a community with common finalities.

Finally, the idea of autonomy is reflected by the normative construction of the fiscal system which is, as a whole, oriented on the maintenance of the state quality of the Federation's members. An example for preserving autonomy and preventing the interference of the Federation into the areas of the member states through financial intervention is that financial helps by the Federation directed to the member states is only allowed in an exceptional and very restricted way.[1] We can state that these basic principles are at the very foundation of fiscal federalism in Germany. The legislator has the task to build up the fiscal system on this foundation and to maintain its efficient functioning. If deficits appear for intrinsic reasons or for changes in the economic situation the system has to be promptly restructured and adapted.

## 2. THE DIFFERENT STAGES OF FISCAL FEDERALISM IN FUNCTION

There are five major sections of the fiscal federalism system in Germany:
the process of fiscal legislation, the attribution of tax revenues, the vertical distribution of tax revenues between Federation and member states, the horizontal distribution of tax revenues between the 16 member states, and the compensation of fiscal power deficits of a member state.

a) Legislation in the field of taxes is nearly totally up to the Federation. Article 105 BL establishes the rule that the Federation has the concurrent legislation competence for all taxes the revenues of which accrue wholly or in part to the Federation (these are the most important taxes, in particular the so-called the joint taxes! ) or, otherwise , if one of the conditions of article 72.2 BL is fulfilled. These conditions are the necessity to make a federal law for the reason of unity of law or of unity

[1] See Art. 107.2 BL

of the economy or for creating equivalent living conditions in the whole territory of Germany.[1]

All the tax laws, even those on taxes the revenues of which accrue to the member states, are federal laws. This guarantees equality of the tax conditions in the whole Federation. However, it must be mentioned that the federal laws on taxes with revenues which accrue, in total or in part, to the member states or to the municipalities or associations of municipalities require, according to article 105.3 BL, the consent of the Federal Council. This means that the member states could block the federal law on taxes if it is against the member states interests.

As to the exclusive tax legislation competences of the member states it can be said that they are minimal: this is legislation on local consumption and expenditure taxes, which often authorizes, as for example in Bavaria, the municipalities to establish taxes by local bylaw. These taxes have to a great extent been abolished as so-called bagatelle taxes which need much administrative efforts but have only minimal revenues.

Furthermore, the member states have the competence to determine the rate of the tax for the acquisition of real estate.[2]

b) The question whether Federation or member states has the legislation competence is quite different from the question whether the revenues accrue to one of them or jointly to both.

Article 106 BL, a very detailed provision, regulates the vertical distribution of the tax revenues. Most important and the core of the fiscal system is that article 106.3 BL attributes the revenues of the three most yielding taxes, of the income tax, the corporation tax and the VAT jointly to the Federation and the member states. [3]

The Federation and the 16 member states as a total share equally the revenues of the income tax (42,5 % : 42, 5 %, 15% to the municipalities) and corporation tax (50:50 %).

[1] The terminology widely follows the English translation of the BL by Chr.Tomuschat/ D.Currie, http://www.wipo.int/edocs/lexdocs/laws/en/de/de227en.pdf

[2] Maunz/Dürig/Seiler GG Art. 105 Rn. 178-181 (81st. Suppl., Sept. 2017), also for the critiques.

[3] The revenues resulting from these three taxes are equivalent to approximately 75% of all tax revenues; Gröpl, Art. 106 ibid.

*As to the VAT revenues, the federal legislation determines the shares of the Federation (53,2%) and the member states' total (44,6%), while municipalities get 2,2%.*

*This legislation has to correspond to various important principles relevant for the German federal system. As the Federation as well as each of the member states are conceived as real states they have own tasks to fulfill and, corresponding to this, determined needs for financial means. Federation and member states have, as the BL expresses, an "equal claim" for being financially covered, from the current revenues, in all their necessary expenditures. The legislation to be made with the consent of the Federal Council reflects, by this, the statehood of the member states. Furthermore, the financial requirements of the Federation and of the member states have to be balanced by this legislation in an adequate way; however, an excessive burden for the taxpayer shall be avoided. It remains a basic finality to obtain equivalence of the life conditions in the whole of Germany.*

It can be seen that the constitution establishes, by use of general terms, a framework for the legislative implementation. This increases the discretionary power of the legislator but does not exclude the constitutional review by the FCC. The distribution of the VAT must be based on a system which is flexible in order to react adequately to the ongoing economic changes. The constitution therefore provides in its article 106.4 the revision of the existing VAT distribution law if the relation between tax revenues and expenditures of the Federation as well as of the member states change. The principle of flexibility is of great importance in this context. Article 106.1 BL enumerates which tax revenues accrue exclusively to the Federation. They are not really important except the energy tax (a consumption tax) introduced by EU law replacing the petroleum tax[1]. The tax revenues which accrue to the member states are the inheritance tax, the beer tax, etc. It is evident that the amount of the revenues resulting from these taxes is modest as well.[2]

[1]Gröpl, Art. 106/2. See also in Federal Ministry of Finance https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Weitere_Informationen/steuern.html

[2] The tax on property (Vermögenssteuer) has no longer been levied since 1997 after the decision of the FCC stating that the property tax in the then existing form was unconstitutional. See FCC http://www.bverfg.de/e/rs19950622_2bvr055291.html

c) As the municipalities which enjoy autonomy and therefore need well determined finance resources are taken into consideration by the constitution itself, a certain part of the income tax and a certain part of the VAT is attributed to them. It is up to the member state's legislation to determine which percentage of the revenues of the three joint taxes accruing to the member states shall flow to the municipalities and municipality associations. It can be seen from this system that the financial welfare of the local level is guaranteed by the federal constitution but that a concrete implementation of this guarantee is up to the member states which are regarded as responsible for their municipalities and other local or regional entities.

Furthermore, legislation of the member state determines if and to which extent the member states tax revenues (that means the revenues resulting from the taxes accruing exclusively to the member states) flow to the municipalities and their associations. We can see that the local autonomy which comprises the need for financial means is well considered by the BL which lays down the principles as well as by member state legislation which shall regulate the dimensions of the financial participation by the local entities. The BL provides a framework guarantee which has to be filled up by the member states as this is a genuine competence not of the Federation but of the member states themselves.[1]

The particular concern which the federal constitution attributes to the local communities and their financing is also demonstrated by article 106.6 BL. This constitutional provision attributes the revenues of the real property tax as well as of the trade tax to the local entities. The constitution attributes to the municipalities the competence to determine the rate for the tax levy for these taxes, in the framework of the existing legislation. The local taxes on expenditure and consumption also accrue to the municipalities or, in accordance with member state legislation, to the associations of municipalities. This already mentioned type of taxation which requires considerable efforts and costs of administration but is not a source of considerable financing means has been abolished to a large extent.

[1] As to special facilities to be established in certain member states or municipalities or associations of municipalities on the requirement of the Federation which cause specific expenses for these entities, the Federation has to compensate according to article 106.8 BL.

d) The next important question is to know how the horizontal distribution of the revenues of the 16 member states takes place.

There are different principles which apply: of great importance is the principle of domicile. This means that the member states' share of the income tax is distributed according to the *domicile* of the taxpayer. The member state of the taxpayers domicile gets the income tax share because the fiscal authority of this member states is competent for the levy of this tax.

In a comparable way the member state in which the tax paying company has its seat obtains the corporation tax share. However, the legislator must correct some inconveniences resulting from the fact that the professional work of an income taxpayer may be made outside the member state in which the domicile is. Similarly, the company often has various manufacturing locations situated in different member states. Here the above-mentioned principle is not applicable. The legislator has therefore introduced rules for the allotment of the revenues in question (*Zerlegungsgesetz*).

Furthermore it must be stressed that the VAT is not connected with the principle of domicile. The share to be attributed to a member state results from the *number of its inhabitants*.[1]

e) The financial perequation, that means the "adequate" equalization of the finance power of each of the member states takes place, according to article 107.2 BL, if the finance power of one of the member states is inferior to the reference level which is regarded as necessary for the fulfillment of the member state's own tasks.

How this perequation goes on is specified by legislation whilst the BL only prescribes the basic finality of equalization. There are two types of law, the law in the *general criteria* of the perequation (*Maßstäbegesetz*)[2] and the law on the concrete finance the equation.[3] [4]

The jurisprudence of the FCC has clarified that fiscal federalism does not require fiscal "leveling" nor does it allow that the compensation

[1] Complementary VAT shares, up to one fourth of the member state's total VAT share can be granted to the member state whose revenues from own member state taxes, from the income and corporation taxes or from the tax on real estate acquisition are inferior per inhabitant to the average revenues of the member states(article 107.1,4 BL

[2] https://www.gesetze-im-internet.de/ma_stg/Ma%C3%9FstG.pdf; see also FCC http://www.bverfg.de/e/fs19991111_2bvf000298.html

[3] Gröpl, ibd., Art. 107/7.

[4] https://www.gesetze-im-internet.de/finausglg_2005/index.html

process from rich to poor member states should make poor the rich member states which give financial means to those which are inferior to the average level.[1]

This system of mutual help which is based in the principle of solidarity inherent to federalism will be replaced by the current reform which will come into effect in 2020. Instead of help contributions from rich to poor member states there will be installed a system of complementary VAT shares to the poor member states in order to increase their fiscal power[2].

The so-called "Advance VAT revenue adjustment mechanism" will be merged with the perequation mechanism itself.[3] Section 2 of the Financial Equalisation Act (FAG) details the system of horizontal VAT distribution between the member states. Paragraph 1 of section 2 specifies the requirements for complementary VAT share (Ergänzungsanteile) for a member state the tax revenues of which (income, corporation, trade and revenues according to s. 7 FAG) is inferior per inhabitant to the average revenues amount of the member states. Financial perequation will be realized in the future by the VAT distribution, in correspondence with the difference between the financial capacity index[4] and the equalization index[5] of this member state.[6]

The equalization rate is established at 63% of the financial capacity difference between a member state and the average member state's financial capacity[7]

f) It shall also be mentioned that financial help from side of the *Federation* to a poor member state can only be effectuated in a very restrictive way. The financial intervention of the Federation could

[1] FCC vol.116, p. 158, 224; Gröpl, Art. 107/6.

[2]https://www.bundesregierung.de/Content/DE/Artikel/2016/12/2016-12-14-bund-laender-finanzausgleich.html

[3] Federal Ministry of Finance, Financial relations between the Federation and Länder on the basis of constitutional financial provisions, March 2018, https://www.bundesregierung.de/Content/Infomaterial/BMF/2018-03-28-financial-realations-federation-pdf_93544.html;jsessionid=96A8FF69772A15B40376582CA8CF6820.s5t1?nn=670290, p. 41 (=5.3.5)

[4] See ibid., p. 41 (= 5.3.1): the sum of the tax revenue of a member state including the local entity tax revenue (ibid.)

[5] For the composition of the equalisation index see ibid.,5.3.2

[6] Ibidem.

[7] Ibidem.

endanger the autonomy of the member state and its quality as a state which has to fulfill, by its own, the state tasks. Financial support from the Federation could make the member state dependent from the will and wishes of the Federation and therefore threaten the separation of the areas of Federation and member states. The constitution therefore allows, by its article 107.2,3,complementary financial contributions of the Federation to a member state only in case of a particularly problematic relation between the own financial revenues and the particularly important expenditures. The complementary financial help for the East German member states which have joined the federal republic in 1990 is a significant and understandable example. [1]If there is, in one of the member states, a budgetary crisis of great extent the Federation can grant a specific complementary financial contribution.[2]

## BIBLIOGRAPHY

**Books**

1. Arnold, R. and Michl, F. *Le "frein à l'endettement" de l'État dans la Loi fondamentale allemande Constitutions 2012*
2. Blumenthal, J. and Bröchler, St. *Föderalismusreform in Deutschland*

**Articles in a print journal**

1. R. Arnold, "Costituzione tedesca e finanze pubbliche. Le strutture fondamentali", *Il federalismo fiscale in Europa*, a cura di Silvio Gambino,Giuffrè Editore, (Milano 2014): 145–154;
2. R. Arnold, "Costituzione tedesca e finanze pubbliche. Le strutture fondamentali", *Il federalismo fiscale in Europa*, a cura di Silvio Gambino,Giuffrè Editore, (Milano 2014): 145–154

**Websites**

3. https://www.bundesregierung.de/Content/DE/Artikel/2016/12/2016-12-14-bund-laender-finanzausgleich.html
4. https://www.gesetze-im-internet.de/ma_stg/Ma%C3%9FstG.pdf

[1] Gröpl, Art. 107/8
[2] See FCC http://www.bverfg.de/e/fs20061019_2bvf000303.html

5. https://www.bundesregierung.de/Content/Infomaterial/BMF/2018-03-28-financial-realations-federation-
6. https://www.bundesregierung.de/Content/Infomaterial/BMF/2018-03-28-financial-realations-federation-pdf_93544.html;jsessionid=96A8FF69772A15B40376582CA8CF6820.s5t1?nn=670290, p. 41 (=5.3.5)
7. https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Weitere_Informationen/steuern.html
8. http://www.bverfg.de/e/fs20061019_2bvf000303.html
9. http://www.wipo.int/edocs/lexdocs/laws/en/de/de227en.pdf
10. http://www.bverfg.de/e/fs19991111_2bvf000298.html/ 216, 292, etc

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# THE EUROPEAN MIGRANT OR REFUGEE CRISIS – REVIEW AND OUTLOOK

**Heribert Franz KOECK** [1]

***Abstract:***

*The paper deals with the notion of migration, illegal migration and its effects in general and in Europe, in particular. Reference is made to migration experience outside Europe, especially in the United States. The notion of the "European migrant/refugee crisis" is analysed and its reasons are explored. The official reaction of the European authority is dealt with, as well as the perception of the crisis in public opinion. Integration is pointed out as one of the means to alleviate fears and cope with resentments. In this context, the issue of integration or "absorption" capacity of a society is discussed. The need to accept the European values as an inalienable basis for living together in the European Union is stressed.*

***Key words:*** *migrants and refugees; legal and illegal migration; European migrant/refugee crisis; integration; European values*

## 1. TERMINOLOGY

"European migrant crisis" or "European refugee crisis" denotes a situation that began in 2015 with the rising numbers of people arriving in the European Union, coming across the Mediterranean Sea or overland through Turkey and South Eastern Europe.

## 2. BACKGROUND

The situation was due to ongoing conflicts and refugee crises in several Asian and African countries, which increased the total number of forcibly displaced people worldwide at the end of 2014 to almost 60 million, the highest level since World War II.

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Most of the migrants came from countries with Muslim majority of regions south and east of Europe, including Western Asia, South Asia and Africa.

The majority of entrants were (usually Sunni) Muslim), with a small component of non-Muslim minorities including Chaldean and other Christians, Yazidis, and Mandeans.

Of the over one million Mediterranean Sea arrivals between January 2015 and March 2016, 46,7 per cent were Syrian, 29,9 per cent Afghan and 9,4 per cent Iraqi.

58 per cent were adult males over 18 years of age, 17 per cent were adult females over 18 years of age and 25 per cent were minors under 18 years of age.[1]

Since April 2015 the European Union has struggled to cope with the crisis, increasing funding for border patrol operations in the Mediterranean, devising plans to fight migrant smuggling and launching Operation Sophia with the aim of neutralising established refugee smuggling routes in the Mediterranean.

## 3. SCHENGEN AREA

The Schengen system is intended to implement the idea of free movement of persons within the European Union.[2] It is no open door for illegal migration.

A new quota system was adopted both to relocate asylum seekers among EU states for processing of refugee claims to alleviate the burden on countries on the outer borders of the Union, and to resettle asylum-seekers who have been determined to be genuine refugees.

Individual countries have at times reintroduced border controls within the Schengen Area, and rifts have emerged between countries willing to allow entry of asylum-seekers for processing of refugee claims and others countries trying to discourage their entry for processing.

Over 1.2 million first-time asylum applications were registered with EU Member States in 2015, more than double that of the previous

[1] Cf. News. European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017, http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.

[2] See Ettore Recchi, *Mobile Europe: The Theory and Practice of Free Movement in the EU*, (London: Palgrave Macmillan, 2015).

year. Four states (Germany, Hungary, Sweden and Austria) received around two-thirds of the EU's asylum applications in 2015, with Hungary, Sweden and Austria being the top recipients of asylum applications per capita.

**3.1. Dublin Regime**

According to the so-called Dublin regime, each EU Member State is responsible to examine an asylum application to prevent asylum applicants in the EU from "asylum shopping" where applicants send their applications for asylum to numerous EU member states to get the best "deal," instead of just having "safety countries", or "asylum orbiting", where no Member State takes responsibility for an asylum seeker.

The first Member State that an asylum seeker entered and in which they have been fingerprinted is responsible. If the asylum seeker then moves to another Member State, they can be transferred back to the member state they first entered. This has led many to criticise the Dublin rules for placing too much responsibility for asylum seekers on Member States on the EU's external borders (like Italy, Greece and Hungary), instead of devising a burden-sharing system among EU states.

**3.2. Reform of the Dublin Regime**

In June 2016, the Commission to the European Parliament and Council acknowledged "inherent weaknesses" in the Common European Asylum System and proposed reforms for the Dublin Regulation.

According to the Commission's proposal, when absorption capacity in a Member State exceeds 150 per cent of its reference share, a "fairness mechanism" would distribute the excess number of asylum seekers across less congested Member States. If a Member State chooses not to accept the asylum seekers, it would contribute $250,000 per application as a "solidarity contribution".

These reforms have been discussed in European Parliament since its proposal in 2016, and were included in a meeting on "The Third Reform of the Common European Asylum System - Up for the Challenge" in 2017.[1]

[1] Cf. A.A. Lozano et *al.,* "Revisiting the European Union framework on immigrant integration: The European integration forum as a technology of agency", *Ethnicities*, Vol. 14 (4): 556–576.

## 4. REASONS FOR THE EUROPEAN MIGRANT/REFUGEE CRISIS

People arriving in Europe came for a variety of reasons. Many were asylum seekers, others economic migrants and some just hostile agents, including Islamic State militants disguised as refugees or "innocent" migrants.

### 4.1. Global refugee crisis

The number of forcibly displaced people worldwide reached 59.5 million at the end of 2014, the highest level since World War II, with a 40 per cent increase taking place since 2011.

Of these 59.5 million, 19.5 million were refugees (14.4 million under UNHCR's mandate, plus 5.1 million Palestinian refugees under UNRWA's mandate), and 1.8 million were asylum seekers.

The 14.4 million refugees under UNHCR's mandate were around 2.7 million more than at the end of 2013 (an increase of 23 per cent), the highest level since 1995.

Among them, Syrian refugees became the largest refugee group in 2014 (3.9 million, 1.55 million more than the previous year), overtaking Afghan refugees (2.6 million), who had been the largest refugee group for three decades. Six of the ten largest countries of origin of refugees were African: Somalia, Sudan, South Sudan, The Democratic Republic of Congo, the Central African Republic and Eritrea.

Wars fuelling the crisis were (and partly still are) the Syrian Civil War and the Iraq War, the War in Afghanistan, the War in Somalia and the War in Darfur. Refugees from Eritrea, one of the most repressive states in the world, flee from indefinite military conscription and forced labour. Some ethnicities or religious groups coming from a particular country are more represented among the migrants than others, for instance Kurds make up 80 to 90 percent of all Turkish refugees in Germany.

Refugees coming specifically from the Middle East have been attempting to seek asylum in Europe rather than in countries surrounding their own neighbouring regions. In 2015, over 80 per cent of the refugees who arrived in Europe by sea came from Syria, Iraq and Afghanistan. Routes by which refugees try to come to Europe are most often extremely dangerous.

### 4.2. "Real" and economic refugees

Refugees comprise both "real" ones and "economic" refugees. Ascertaining motivation is complex, butthe United Nations has made shocking claims in 2017 that the majority of migrants are not refugees but are in fact economic migrants searching for a better life.[1]The UN High Commissioner for Refugees (UNHCR) has said seven in 10 people found crossing the Mediterranean are not legitimate refugees but are economic migrants, while the rest are in genuine "need of protection".[2]

Migrants from the Western Balkan (Albania, Serbia, Kosovo) and parts of West Africa (Gabia, Nigeria) are even more likely to be economic migrants, fleeing poverty and lack of jobs, many of them hoping for a better lifestyle and job offers, without valid claims to refugee status. The majority of asylum applicants from Serbia, Macedonia and Montenegro are Roma people who feel discriminated against in their countries of origin.

### 4.3. Refugees and asylum seekers

Authorities make a distinction between refugees and asylum seekers.

#### *a. Refugees*

Refugees are defined as people who have a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, forcing them to seek safety in a different country. One of the most fundamental principles laid down in international law is that refugees should not be expelled or returned to situations where their life and freedom would be at risk.[3]

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[1] Cf. Nick Gutteridge, EU admits hardly any migrants reaching Europe are refugees as it toughens deportation talk, *Express*, 21 June 2017, https://www.express.co.uk/news/politics/819670/Migrant-crisis-EU-admits-hardly-any-people-arriving-Italy-refugees-deportations; Rebecca Flood, Shock figures: Seven out of 10 migrants crossing to Europe are not refugees, UN reveals, *Express*, 5 July 2017, https://www.express.co.uk/news/world/824794/migrant-crisis-refugee-Italy-Libya-UN-figures-Mediterranean-boat-crossing.

[2]This is in strong contrast to the allegation that according to the United Nations High Commissioner for Refugees, most of the people arriving in Europe in 2015 were refugees, fleeing war and persecution in countries such as Syria, Afghanistan, Iraq and Eritrea.

[3] This *prohibition of refoulement* is contained in Article 33 of the 1951 Convention Relating to the Status of Refugees.

***b. Asylum seekers***

Asylum seekers are people who apply for the right to be recognised as a refugee and receive legal protection and material assistance. Asylum seekers must prove to the authorities that their fear of persecution in their home country is well founded.

## 5. EU OFFICIAL REACTION TO THE EUROPEAN MIGRANT CRISIS

The European Union had to react to the European migrant crisis, starting from the realisation that the problem could not be tackled by individual Member States alone and that solidarity was called for.

### 5.1. Reforming the Common European Asylum System

Starting on 6 April 2016, the European Commission began the process of reforming the Common European Asylum System and creating measures for safe and managed paths for legal migration to Europe.

The European Commission identified five areas that needed improvement in order to successfully reform the Common European Asylum System, namely establishing a sustainable and fair system for determining the Member State responsible for asylum seekers,achieving greater convergence and reducing asylum shopping,preventing secondary movements within the EU, drawing up a new mandate for the EU's asylum agency (to allow the Asylum Support Office to have a role in implementing policy and have an operational position),and reinforcing the Eurodac[1] systemin order to support the implementation of a reformed Dublin System.

On 13 July 2016, the European Commission introduced the proposals to complete the reform of the Common European Asylum System. The reform sought to create a just policy for asylum seekers, while providing a new system that was simple and shortened.

[1]Eurodac, officially European Dactyloscopy, is the European Union (EU) fingerprint database for identifying asylum seekers and irregular border-crossers. It enables authorities to determine whether asylum seekers have already applied for asylum in another EU member state or have illegally transited through another EU member state ("principle of first contact"). The Automated Fingerprint Identification System is the first of its kind on the European Union level and has been operating since 15 January 2003. All EU member states currently participate in the scheme, plus three additional European countries: Norway, Iceland and Switzerland.

The European Commission's outline for reform proposed a replacement of the Asylum Procedures Directive with a Regulation, seeking to create a fair and efficient common EU procedure for simplified, clear and short asylum procedures, ensuring common guarantees for asylum seekers, containing stricter rules to combat abuse, and harmonizing rules on safe countries.

***a. Border patrol operations***

Frontex, the European Border and Coast Guard Agency, has the mission to promote, coordinate and develop European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management. Its most important task is coordinating and organising joint operations and rapid border interventionstoassist Member States at the external borders, including in humanitarian emergencies and rescue at sea.[1]

So far, Frontexhas not been able to stop illegal crossings of EU external borders. It appears from the data collected by Frontex on illegal crossings of the EU's external borders that in 2015 and 2016, more than 2.3 million illegal crossings have taken place. Since a person can go through a border more than once, the number of people coming to Europe may be lower; nevertheless, Member States have been under an enormous amount of pressure. Some people – usually economic migrants coming from North Africa – are stopped at the border and refused entry. In 2016 alone, 388,000 people were denied entry at the EU's external borders.[2]

***b. Relocation and resettlement of asylum seekers***

The escalation in April 2015 led European Union leaders to reconsider their policies on border control and processing of migrants. On 20 April the European Commission proposed a 10-point plan that included the European Asylum Support Office deploying teams in Italy and Greece for joint processing of asylum applications. Also in April 2015, German chancellor Angela Merkel proposed a new system of quotas to distribute non-EU asylum seekers around the EU member states.

[1] See Frontex, Mission ans tasks, http://frontex.europa.eu/about-frontex/mission-and-tasks/

[2] Cf. News. European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017, http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.

In September 2015, as thousands of migrants started to move from Budapest to Vienna, Germany, Italy and France demanded asylum-seekers to be shared more evenly between EU states. Commission President Jean-Claude Juncker proposed to distribute 160,000 asylum seekers among EU states under a new migrant quota system to be set out.

Leaders of the Visegrád Group (Czech Republic, Hungary, Poland, Slovakia) declared in a September meeting in Prague that they would not accept any compulsory long-term quota on redistribution of immigrants.

On 22 September 2015, European Union interior ministers meeting in the Justice and Home Affairs Council approved a plan to relocate 120,000 asylum seekers over two years from the frontline states Italy, Greece and Hungary to all other EU countries (except Denmark, Ireland and the United Kingdom which have opt-outs).

The relocation plan applies to asylum seekers "in clear need of international protection" (those with a recognition rate higher than 75 per cent, i.e. Syrians, Eritreans and Iraqis) – 15,600 from Italy, 50,400 from Greece and 54,000 from Hungary – who will be distributed among EU states on the basis of quotas taking into account the size of economy and population of each state, as well as the average number of asylum applications.

The decision was taken by majority vote, with the Czech Republic, Hungary, Romania and Slovakia voting against and Finland abstaining. Since Hungary voted against the relocation plan, it was decided that its 54,000 asylum seekers would not be relocated for now, and a comparable number could be relocated from Italy and Greece instead.

## 6. THE EFFECTS OF THE EUROPEAN MIGRANT CRISIS

### 6.1. Statistics on the EU's foreign-born population prior to 2015

The foreign-born population residing in the EU in 2014 was 33 million people, or 7 per cent of the total population of the 28 EU countries (above 500 million people). By comparison, the foreign-born population is 7.7 per cent in Russia, 13 per cent in the United States, 20 per cent in Canada, 27 per cent in Australia, but only 1.63 per cent of the total population in Japan. Between 2010 and 2013, around 1.4 million non-EU nationals, excluding asylum seekers and refugees, immigrated

into the EU each year using regular means, with a slight decrease since 2010.

**6.2. Statistics on the EU's foreign-born population after 2015**

In 2015 the scale of arrivals increased beyond all expectations. The International Organization for Migration (IOM) reported in excess of one million arrivals, with migrants arriving from more than 100 countries. Alone 362,753 people fled to the EU by crossing the Mediterranean. Of these 5,022 are reported missing or dead. Most of the refugees arriving in Europe – 38 per cent – came from Syria.

The media and EU governments were and are clear that this is a "crisis" but vacillate between terming it a migration, refugee, or humanitarian crisis. It is considered to be the greatest crisis since World War II. Italy and particularly Greece have encountered the majority of arrivals – many of whom then continued to Germany, Sweden, and Austria to claim asylum. Others, generally with relatives in the UK, waitedin makeshift camps at and around Calais for an opportunity to cross the English Channel.

**6.3. Number of illegal migrants exploded**

According to a study presented by the European Parliament, the number of migrants illegally present in the EU was, and still is, high.

"Being illegally present" can mean a person failed to register properly or left the member state responsible for processing their asylum claim – this is not, on its own, a sufficient ground for sending them away from the EU.

In 2015, 2.2 million people were found to be illegally present in the EU. In 2016, the number had dropped to 984,000.

A number of people are, however, expelled, from the EU (e.g. because their asylum claims were refused). In 2015 533,000 people were ordered to return, but only 43 per cent actually left. In 2016, half of the 494,000 ordered to do so, returned home.[1]

**6.4.Asylum decisions in the EU**

In 2015 and 2016 alone, more than 2.5 million people applied for asylum in the EU.

Only about a quarter of these applications could be dealt with by the authorities of the Member States in a final way. Almost 600,000

[1] Cf. News. European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017, http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.

asylum decisions were rendered in 2015, half of which were positive. Those which were negative were often appealed. That means that only one eighth of all applications were definitely decided. Most people who applied for protection at the height of the refugee crisis in 2015 had to wait until 2016 to receive their ruling. That year 1.1 million asylum decisions were made. 61 per cent of those were positive with one third of applicants granted refugee status, the highest level of international protection.[1]

## 7. EU PUBLIC PERCEPTION OF THE EFFECTS OF THE EUROPEAN MIGRANT CRISIS

What Europeans are thinking about this problem appears from surveys and polls. Migration was seen to be a top priority in the 2016 Eurobarometer survey results.[2]

According to the 2017 Eurobarometer poll, 73 per cent of Europeans still want the EU to do more to manage the situation. 58 per cent of respondents think the EU's actions regarding migration are inadequate, eight percentage points less than last year. Opinions are, however, divided about what would constitute a satisfactory management.

### 7.1. **Public opinion**

The mass influx of migrants into Europe was not seen favourably in many European Union countries. Many citizens disapproved of the EU's handling of the migrant crisis, with 94 per cent of Greeks and 88 per cent of Swedes disapproving of the measures taken, among other countries with similar disapproval rates.

This contributed to the creation and implementation of the EU-Turkey Refugee Agreement, which was signed in March 2016. From that point on, the numbers of refugees entering Greece decreased.

While there is no direct connection to the implementation of the EU-Turkey deal, the number of migrants arriving in Italy in that same

[1] Cf. News. European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017, http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.
[2] Cf. News. European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017, http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.

time period increased. From March 2016 to October 2016, 140,358 migrants arrived in Italy via the sea, which averages out to roughly 20,051 migrants per month. Overall the number of migrants arriving into the EU has dropped, but the EU still is creating agencies and plans to mitigate the crisis. In addition to the EU-Turkey Refugee Agreement, the European Border and Coast Guard Agency was launched on 6 October 2016.

Migration has been an EU priority for years. Since 2015 the EU has taken several measures to manage the migration crisis as well as to improve the asylum system. According to the latest Eurobarometer poll, 73 per cent of Europeans still want the EU to do more to manage the situation. However, 58 per cent of respondents think the EU's actions regarding migration are inadequate, eight percentage points less than last year. "Doing more" does not mean, however, "doing more in favour of refugees"; rather, it means doing more to stem the food of the refugees ("doing more against refugees").[1]

## 8. FUTURE OF THE CRISIS

### 8.1. Present decrease of number of immigrants

While data recorded by various bodies and organizations including the UNHCR, IOM and Frontex shows that the overall numbers of immigrants entering Europe has significantly decreased, suggesting that the peak of this crisis has been passed, it is far from over.

The growing number of migrants from the Sub-Saharan and Sahel regions, along with several West African countries, is a cause of concern for the EU. Ease of access via the West Mediterranean route has boosted migrant numbers from Africa, with preference being given to Spain over Italy or Greece, as a landing point.

### 8.2. No return to the pre-crisis situation

This development indicates that any hope for a return to the pre-crisis situation would be in vain.

### 8.3. Decrease a temporary phenomenon?

Rather, the decrease in the number of refugees has to be regarded a temporary phenomenon unless decisive steps are taken to improve the overall situation. If the agreement with Turkey would break down, the

[1] Cf. Gabriella Lazaridis, *International Migration into Europe: From Subjects to Abjects* (London: Palgrave Macmillan, 2015).

situation would immediately change dramatically. And Turkey under Erdoğan has become an unreliable partner, given the differences in principle concerning the rule of law and human rights.

In August 2017, various world leaders, including Angela Merkel and Emmanuel Macron, met in Paris to devise policies that would combat this situation. Since poverty and lack of education are the biggest push factors prompting migration from Africa to the EU, obstacles like perilous journeys and harsh living conditions at the destination are unlikely to deter African migrants. The crisis is experiencing a lull after the first explosion, and is likely to soon head toward the next stage of illegal immigration.

**8.4. Word-wide action necessary**

An immigration and security agenda that focuses only on national-level concerns is incomplete at best. International cooperation is a key to ensuring that security in this arena is maximized.[1] There needs to be a strong linkage to aid the source countries to reduce the pressure for emigration. Migration is not only a complex topic, but also transnational and closely interrelated with foreign policy as well as domestic and international economies. Politicians will need the foresight and courage to take on the issue in a manner which will maximize benefits for all.

***a. The role of the EU***

The European Union as a whole and each of its Member States has to take responsibility for the future. This does not mean that the EU can shoulder the world-wide migrant and refugee crisis alone.

It is not helpful to cover up the problem with flowery speeches and unctuous talks, like "What we do now in relation to the millions who have arrived and will arrive affects future opportunity for all of us. We can genuinely welcome people, accept them as part of our world, support them to have the same opportunities as us, and adapt to our increased diversity, or we can exclude them and await the social and economic consequences." Just to shift the problem from (in particular) Africa to Europe is no workable solution. The only viable option is to solve the problems where they arise.

[1] Cf. Gabriella Lazaridis & Khursheed Wadia (eds.), *The Securitisation of Migration in the EU: Debates since 9/11* (London: Palgrave Macmillan, 2015).

***b. The role of the UN***

The humanitarian crisis that sends millions of refugees from Africa to Europe has to be fought directly at the spot. In order to make this possible, two preconditions have to be fulfilled.

First, the rich countries of this world will have to make available the necessary financial and other resources. This is a question of international solidarity which cannot be evaded. Second, the African countries concerned have to be prepared to undertake the necessary reforms.

Such reforms are necessary, because the crisis is not only an economic and social one; it is also a political crisis. Often, those in power are unable or unwilling to make the necessary reforms. But this cannot be the end of the matter.

In 2005, the General Assembly of the United Nations, convened as a World Summit, recognised the responsibility of the international community to protect civilians against the threats to their life and liberty deriving from war or civil strife, even without the consent or against the wish of the respective governments. The same responsibility to protect exists with regard to people who suffer from a government that is either incompetent or unwilling to work for the common good.

The necessary measures for the carrying out of the required reforms will probably include the use of force, because past and present history tells us that some regimes will not cede their power readily; and the worse they are, the less ready they will be.

In principle, removal of a rotten regime and imposition of an order under a government able and willing to carry out the necessary reforms could be done by any state or group of states powerful enough to carry out the necessary enforcement measures. However, the present state of the international community with its ideological differences and its hegemonic rivalries makes it unlikely that any such unilateral approach and course of action would be well received, even tolerated, by competing powers. It is therefore imperative that the international community becomes active as such.

The appropriate political framework for doing so is the UN. And the qualified body to supervise its actions under the principle of protecting people against misgovernment is the Security Council. Unfortunately, it will not be easy to formulate concrete goals and to

devise effective measures that will be acceptable to all permanent members of the Council.

## CONCLUSION

Given the low likelihood of common measures for reforms in Africa, the European Union will have to consider second-best solutions, e.g. addressing those African countries whose governments show a sufficient readiness to cooperate for reforms. However, such an approach cannot be more than an interim measure in the hope that other countries will follow suit and/or that the United Nations will overcome its internal political disagreement.

## BIBLIOGRAPHY

**Books**

1. Lazaridis, Gabriella. *International Migration into Europe: From Subjects to Abjects*. London: Palgrave Macmillan, 2015.
2. Lazaridis Gabriella & Wadia Khursheed (eds.). *The Securitisation of Migration in the EU: Debates since 9/11*. London: Palgrave Macmillan, 2015.
3. Recchi, Ettore. *Mobile Europe: The Theory and Practice of Free Movement in the EU*. London: Palgrave Macmillan, 2015.

**Article in a print journal**

1. Lozano, A.A. et *al.* "Revisiting the European Union framework on immigrant integration: The European integration forum as a technology of agency", *Ethnicities,* Vol. 14 (4): 556–576.

**Articles in a online journal**

1. Gutteridge, Nick. "EU admits hardly any migrants reaching Europe are refugees as it toughens deportation talk", *Express*, 21 June 2017, https://www.express.co.uk/news/politics/819670/Migrant-crisis-EU-admits-hardly-any-people-arriving-Italy-refugees-deportations;
2. Flood, Rebecca. "Shock figures: Seven out of 10 migrants crossing to Europe are not refugees, UN reveals", *Express*, 5 July

2017, https://www.express.co.uk/news/world/824794/migrant-crisis-refugee-Italy-Libya-UN-figures-Mediterranean-boat-crossing.

3. Frontex, Mission ans tasks, http://frontex.europa.eu/about-frontex/mission-and-tasks/
4. News. European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017, http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures.

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# FEMALE GENITAL MUTILATION FROM INTERDISCIPLINARY PERSPECTIVE

**Cristina HERMIDA DEL LLANO[1]**

***Abstract:***

*Female genital mutilation encompasses all acts that intentionally alter or cause lesions to the female genital organs without medical reasons to justify them. Currently, female genital mutilation is a reality that affects more than 200 million women across the world and to which around 2 million girls and adolescents are subjected every year. The practice of female genital mutilation is considered a crime in all member States of the European Union. To combat female genital mutilation through the power of legislation in Spain, within the wider context of eliminating the different forms of discrimination against women and in response to specific contractual international obligations incurred by Spain, two laws have been passed. The first of these, L. O. 11/2003, approved September 29th, amends the Criminal Code, such that a new crime of female genital mutilation is defined, which modifies article 149 of the Criminal Code. The second law, L. O. 3/2005 of July 8th, amends theOrganic Law on the Judiciary (Ley Orgánica del Poder Judicial), to permit the extraterritorial prosecution of the practice of FGM. Here we analyze the existing legal protections to put a stop to this practice, which violates the right to personal and physical integrity of girls and women, constituting a violation of human rights based on the victims belonging to the female sex and to the social role assigned to them. These breaches demand new instruments aimed at preventing any discrimination, among which gender violence is one of the most extreme forms.*

***Key words:*** *Female genital mutilation; violence against women; human rights; multiculturalism; principle of non-discrimination.*

## INTRODUCTION

Female genital mutilation constitutes a hideous ancient practice, which even Western countries must now confront as a result of migratory movements or due to girls and women spending time in their countries of origin during holiday periods[2]. The World Health Organisation (WHO)

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[2] Please see Judgment of the Provincial Court of Barcelona of 13.05.2013. Roj [Spanish Official Repository of Jurisprudence]: SAP B 4991/2013 - ECLI: E: APB: 2013:4991. Cendoj [Spanish Centre of Judicial Documentation]Id: 08019370092013100024. Organ:

estimates that more than 200 million women and girls worldwide have undergone genital mutilation; around 2 million girls and adolescents every year are subjected to it[1]. It is a practice that transcends borders by nature and is carried out in disparate countries, although it is more common in the Western, North-eastern and Eastern regions of Africa[2], it being recorded that it is a regular practice in approximately 30 countries belonging to that continent. Likewise, the practice also occurs in some countries of Asia and the Middle East including Indonesia, Malaysia, and Yemen, and among the migrant and refugee communities from these regions in Europe, Australia, New Zealand, Canada, and the United States. According to a resolution of the European Parliament in 2012, at least half a million women living in the European Union have been victims of genital mutilation and 180,000 more were at risk of suffering it. Precisely for this reason, every year thousands of women and girls request asylum in Europe from countries in which female genital mutilation is carried out.

Despite being a practice that clearly breaches human rights, it remains a deeply ingrained tradition in certain communities and in their social, economic, and political structures. Spine-chilling statements come from men and women who declare in their own defence before the judge that "mutilating female genitals is an ancestral practice going back more than three thousand years in their country; it does not seek to undermine the physical integrity of women, but constitutes a custom enabling the child's integration into her community"[3].

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Provincial Court. Based in:Barcelona. Section: 9. Appeal no.: 3/2012. Decision number: 42/2013. Proceedings: Summary. Rapporteur: JOSÉ MARÍA TORRAS COLL.

[1] Vid. Amnesty International Report, pp. 2-16. *What is female genital mutilation?* http://www.es.amnesty.org/nomasviolencia/sabermas10mgf.php.

[2] Countries where female genital mutilation is practised include Benin, Burkina Faso, Cameroon, Chad, Congo, Côte d'Ivoire, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Republic Central African, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Yemen, and Djibouti. According to a MICS survey of 2011, the rate of prevalence of female genital mutilation in Iraq is 8.1%, but it increases by 42.8% in the region of Kurdistan (Sulaymaniyah: 54.3%, Erbil: 57.5%, Kirkuk: 19.9%). Please see *Iraq - Multiple Indicator Cluster Survey, 2011, Final Report,* Central Statistics Organisation, Kurdistan Regional Statistics Office, Ministry of Health, UNICEF, September 2012, available at: http://goo.gl/qKyUJ.

[3]Judgment of the Criminal Chamber of the Supreme Court of 31.10.2012.Roj: Supreme Court Judgement 7827/2012-ECLI: E:TS: 2012:7827. CendojId:

In fact, the origin of female genital mutilation is not completely clear since "it is an old custom which predates Christianity and Islam in the countries where it exists. In the older days, it is believed to have existed in pre-Islamic Arabia, ancient Rome and Tsarist Russia. In England, it was practised in the nineteenth and twentieth centuries to treat psychological disorders…"[1].

In this paper, we will address the gravity of this practice. We cannot remain indifferent to this reality which contravenes the basic rules of human rights, violating the right to physical and psychological integrity of all those girls and women who are forced to endure it, in many cases by custom or cultural norms, which prevent them from escaping this brutal tradition.

## 1. CONCEPTUAL APPROACH TO FEMALE GENITAL MUTILATION

To avoid misunderstandings, there is a need to clarify what female genital mutilation encompasses[2]. Generally, this practice consists of the partial or total removal of the external female genitalia or other wounding of the same organs for cultural or religious reasons or for other non-therapeutic ends[3]. In other words, female genital mutilation covers all acts that intentionally alter or cause injury to the female genital organs without medical justification. There can be no doubt that ablation causes serious and irreversible physical and psychological health problems, the extent of which depends on how the practice in question has been carried out for every woman[4]. This is because there are three variants of female genital mutilation[1]:

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28079120012012100900. Body: Supreme Court. Criminal Division.Based in: Madrid. Section: 1. Appeal no.: 3/2012. Decision number: 835/2012. Proceedings: APPEAL IN CASSATION. Rapporteur: JOAQUÍN GIMÉNEZ GARCÍA.

[1] Susan Deller Ross, *Women's Human Rights. The International and Comparative Law Casebook* (Philadelphia: University of Pennsylvania Press, 2008), 464.

[2] Official term used to refer to this practice by WHO (World Health Organisation).

[3] http://www.amnistiainternacional.org/revista/rev667articulo8.html

[4] Basically, the World Health Organisation distinguishes different forms relating to the same:

Type I, removal of the prepuce, with or without partial or total removal of the clitoris.

Type II, excision of the clitoris accompanied by partial or total excision of the labia minora.

a) The total or partial removal of the clitoris - known as clitoridectomy-;
b) the removal of the clitoris and part or all of the labia minora, which is known as excision;
c) infibulation, through the ablation of the labia majora to create raw surfaces that are then sewn together in order to cover the vagina, leaving a small opening to allow the passage of urine and menstrual flow.

It causes consternation to learn that older women, who act as primary community caregivers during child birth, are the ones who carry out female genital mutilation on other women even though they have been victims of this practice themselves in the past. This fact, I believe, should give us pause.

The instruments used to carry out the ritual are varied, but it is horrifying to learn that sharp knives, razor blades, or pieces of glass are used to carry out female genital mutilations, while blends of plants, earth, ashes, manure, cow dung, etc. are employed to heal the wounds[2]. It matters little to the practitioners that female genital mutilation, far from ensuring purity or fertility, often leads to female sterility, in addition to infections.

Unfortunately, the fact that such practices are officially banned by the criminal laws of the countries of origin[3] does not rule out the real

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Type III, excision of the clitoris, together with that of the rest of the external genitalia and suturing of the vagina, leaving a minimum orifice for expelling urine and menstrual flow. This form, called *Sudanese* or *pharaonic circumcision* (infibulation), is the most traumatic and poses the most serious consequences for the health of the woman.
Finally, a type IV is usually included, covering a greater variety of injurious practices such as pricking, perforation, incisions and stretching of the clitoris and/or labia, burning the clitoris and surrounding tissue, the introduction of corrosive substances or herbs into the vagina causing rashes and burns; abrasion of the skin surrounding the vaginal opening and cutting the vagina.
Accessed at http://www.who.int.

[1] Please see Judgment of the Provincial Court of Barcelona of 13.05.2013.

[2]Deller Ross, *Women's Human Rights. The International and Comparative Law Casebook*, 465.

[3] The fact that many African and Middle Eastern countries have enacted or adopted legislation prohibiting female genital mutilation does not mean that it is genuinely effective. Among them, we have the examples of Sudan (1941); Sierra Leone (1953); Guinea (1965, updated in 2002); The Central African Republic (1966); Somalia (1978);

danger of its practice. It should not be forgotten that female genital mutilation takes place in private and, in most cases, with the acquiescence of the family and social environment surrounding the woman enduring it. Government agencies are, therefore, on many occasions unable to provide effective protection against this form of abuse, because the women are strongly entrenched to the social environment, to the extent that the victims feel bound to keep quiet, neverreporting acts of female genital mutilation for fear of familial and social rejection[1].

The pressure to subject girls to female genital mutilation comes from families and communities both in Europe and the countries of origin in equal measure. The age at which female genital mutilation is practiced is not fixed and varies from one country to another. In some regions it is carried out during early childhood (in some cases, only a few days after birth), in others during childhood, on the occasion of marriage, during the woman's first pregnancy or following the birth of her first child. Indeed, some asylum seekers in Spain claim to be victims of this last practice[2]. Most frequently, however, female genital mutilation is carried out between childhood and the age of 15, according to the United Nations High Commissioner for Refugees (UNHCR).

In my view, the reasons why this brutal practice is maintained are often to be found in the innocence and ignorance of the women undergoing it, as well as their vulnerability in economic and social terms, given that, for most women who are forced to endure this terrible experience, marriage is regarded as the only socially acceptable destiny.

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Kenya (1982/2001); Liberia (1984); Republic of Guinea (1985); Ghana (1994); Djibouti (1995); Burkina Faso (1996); Egypt (1996, by Ministerial Decree); Tanzania (1998), Togo (1998); Côte d'Ivoire (1998); Senegal (1999); Mauritania (2001); Benin (2003); Niger (2003); Eritrea (2007); Egypt (2008); Uganda (2010); Nigeria (2015).

[1]This served as a justification for the appellant not reporting the act to the competent authorities at the time and also led to the recognition of her right to asylum and status as a refugee in the decision of the Litigation Chamber of the National Court of 21.06.2006.Roj: SAN 2734 / 2006 - ECLI: ES: AN: 2006:2734. CendojId: 28079230032006100403. Body: National Court. Litigation Chamber.Based in: Madrid. Section: 3. Appeal no.: 1076 / 2003. Proceedings: CONTENTIOUS. Rapporteur: Diego Cordoba Castroverde.

[2] Please see Appeal judgment of 23.06.2010. Roj: SAN 3185/2010 - ECLI:ES:AN:2010:3185. Cendoj Id: 28079230042010100400. Body: National Court. Litigation Chamber. Based in: Madrid. Section: 4. Appeal no.: 176/2010. Proceedings: LITIGATION - APPEAL. Rapporteur: Ana Maria Cabezudo Sangüesa.

## 2. INTEGRAL AND MULTIDISCIPLINARY PERSPECTIVE OF FEMALE GENITAL MUTILATION

The spread of female genital mutilation to Western countries initiated the process of addressing and fighting this practice. The international community has traditionally understood that this practice violates the rights of women and girls and, as a consequence, reacted against this outrage socially, politically, and, most importantly, legally. Only since the 1990's have the international organisations who, at present, lead the human rights movement and the international community, paid sufficient attention to this particular issue. Activists, physicians, teaching professionals and international organisations, among other experts on the issue believe that the lack of action arose out of fear and trepidation that one would commit an unwarranted cultural intrusion by criticising the practice, or, perhaps, it was due to simple apathy towards an issue that was relegated to the privacy sphere, which implies a mistaken understanding of privacy.

It was the institutions and bodies of the United Nations (UN) such as UNICEF and the World Health Organization (WHO), who among others, took the lead in denouncing the barbarity of female genital mutilation, not only promoting information and education to eradicate the practice[1], but also urging states and international bodies to adopt all kinds of measures (legal and social) in order to contribute to the fight against female genital mutilation internationally[2].

The international community, through the European Union and various UN agencies (WHO, UNICEF, UNFPA[3]...), gradually began to speak out in different forums, conventions, and declarations against female genital mutilation, understanding that it is a practice that violates the human rights of women and girls. While so far, the impact of the legislation aiming to combat female genital mutilation has been limited[4],

[1]Juana Vázquez Torres, Interview with Simona Galvati, "Mutilación Genital Femenina, cuestión de género", *Meridiam* no. 50(2009): 35, Council for Equality and Social Welfare, Andalusian Institute of the Woman.
[2]Julia Carrasco Ropero, *El Derecho Penal Español ante la Mutilación Genital Femenina*, *Diario La Ley*, 26 September 2001, Madrid.
[3]United Nations Population Fund.
[4]For example, in the case of Ethiopia, there is a prevalence of 85% even if the constitution itself prohibits the practice. Likewise, the Republic of Guinea was the first

there can be no doubt that the normative process is an important step forward in the recognition of fundamental rights, allowing the creation of a legal framework for action.

It is true, as many courts have been recognising[1], that there are many and varied reasons that tend be invoked to defend the ancient and ancestral practice of female genital mutilation. We find that some of these alleged reasons have a social component, others a traditional bias; the practice is used as an indicator of gender, promoting femininity, and as a sign of a girl's initiation into adult society, with the corresponding assignment of a predetermined role and function within marriage. It is also considered a sign of docility, obedience, and submission to the male. This practice is also justified by referring to the strictly reproductive role assigned to women, which encourages that it should be carried out in the pre-pubescent period in girls, between the ages of six and twelve. Without a doubt, this brutal practice reduces the victim's sexual libido (in many cases, this will be an intended effect, to minimise the chances of infidelity), restricting the autonomy and sexual freedom of women, and ultimately, having an impact on the free development and exercise of sexuality.

## 3. DEFINING THIS PRACTICE AS A CRIME WITHIN SPANISH CRIMINAL LAW

In the course of criminal law reform in Spain, the Organic Law on the Judiciary, art. 23.4, paragraph g was amended to expressly categorise female genital mutilation as a crime within the context of offences of criminal injury. This amendment confers jurisdiction to Spanish courts to adjudicate crimes related to female genital mutilation, regardless of where the practice was performed, whenever the perpetrators are apprehended on Spanish territory, thereby enshrining the principle of universal or worldwide jurisdiction with respect to crimes committed on foreign soil[2]. As is stated in the *Preamble to Law 3/2005, of 8 July,*

African country to pass legislation against female genital mutilation in 1985, but 93% of women and girls are still being mutilated there.

[1] As an example, please refer to the judgment of the Provincial Court of Barcelona of 13.05.2013, op. cit.

[2] Please see Judgment of the Criminal Chamber of the Nacional Court of 14.05.2014. Roj: AAN 114/2014 - ECLI: E:AN: 2014:114ª. CendojId: 28079220022014200002.

*amending the Organic Law on the Judiciary*, the fact that genital mutilation is a traditional practice in some countries of origin for immigrants to the European Union cannot be used as a justification for failing to prevent, prosecute and punish such breaches of human rights.
The criminalisation of this aberrant practice, which seriously undermines the dignity of women under the pretext of ritual initiation, relegating them and reducing them to mere chattel in the hands of men, is clearly praiseworthy. Without exaggeration, by compromising women's physical integrity, this practice infringes on one of the most basic human rights and dehumanises women.

I concur with authors such as Torres Fernández[1] that there is not a single, definitive way to combat female genital mutilation. The question cannot be reduced to a mere conflict of cultural values, between immigrants and the host society, the easy and simplistic solution of which would be to annihilate minority's cultural values. As the author explains: "Likewise, the possibilities of providing solutions through the legal system, and in particular through criminal law, are limited by the very features of criminal law itself, which represents the last resort *(ultima ratio)*. Therefore, the criminal policy debate about the desirability of criminally intervening in this kind of behaviour is not limited to its express criminalisation in internal criminal legislation, nor to the sphere of the national jurisdiction in order to prosecute these crimes when they are committed abroad, rather it extends to the broader treatment that cultural diversity deserves within the criminal legal system"[2].

To address the problem of cultural diversity, it is necessary to analyse the role of criminal law norms to assess correctly their scope, according to relevant Spanish judicial decisions, such as the following:

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Body: National Court. Criminal Division.Based in: Madrid. Section: 2. Appeal no.: 2/2014. Decision number: 26/2014. Proceedings: CRIMINAL - APPEALS PROCEDURE ABBREVIATED. Rapporteur: JULIO DE DIEGO LÓPEZ. Judgment of the Criminal Chamber of the Supreme Court of 31.10.2012.Roj: Supreme Court Judgement 2046/2015 - ECLI: E:TS: 2015:2046. CendojId: 28079120012015100266. Body: Supreme Court. Criminal Division. Based in: Madrid. Section: 1. Appeal no.: 1682 / 2014. Decision number: 296/2015. Proceedings: Criminal - Procedure Abbreviated/Summary. Rapporteur: Candido Conde-Pumpido Touron.

[1] Torres Fernández, María Elena, „La mutilación genital femenina: un delito culturalmente condicionado", *Cuadernos Electrónicos de Filosofía del Derecho*, no. 17(2008).

[2] Torres Fernández, "La mutilación genital femenina: un delito culturalmente condicionado".

"First, the function of evaluation, the norm evaluates the specific acts in a negative sense, because the criminal legislation include them within a catalogue of negative behaviours which prevent social coexistence. From the perspective of harm to legal values, this catalogue is the required minimum for living together. Secondly, the function of punishment, the criminal code obliges the judge to apply the penal consequences according to the norm. Thirdly, the criminal norm has a motivating function, urging citizens to perform a certain action or refrain from it. This function encourages citizens to follow the law, organising their behaviour in accordance with general normative standards of coexistence"[1].

In my view, according to our jurisprudence, the State cannot accept, under the alleged cloak of freedom of conscience, or the protective cover of tradition, or in the wake of custom, all acts that, according to individual criteria, are in conformity with the dictates of conscience, since that would mean, on occasion, denying legal principles of fundamental importance and significance, such as the right to life, physical integrity or the protection of sexuality. It should be clear that these long-standing and secular customs or traditions cannot prevail or be placed above the principle of respect for personal dignity and fundamental rights, which are universally recognised and supported. This practice is even more reprehensible when one considers that the persons affected are underage girls, and the defendants are their parents, in other words, those subjects whose primary calling should be to preserve the dignity, integrity and to ensure the free development of the personality (including sexuality) of their daughters. Behind the arguments aimed at defending a series of traditional customs that are characteristic of some cultures, including female genital mutilation, there lurks the desireto uphold the hegemony of men by perpetuating the submission of women[2]. Not by chance, the most striking cultural conflicts tend to arise relating to

[1]Judgment of the Provincial Court of Teruel 15.11.2011.Roj: SAP TEA 197/2011 - ECLI:ES:APTE:2011:197. Cendoj Id: 44216370012011100195. Body: Provincial Court. Based in: Teruel. Section: 1. Appeal no.: 12/2011. Decision number: 26/2011. Proceedings: CriminaL - Abbreviated/summary procedure. Rapporteur: Maria Teresa Rivera Blasco.

[2]Carlos Vázquez Gonzalez, *Inmigración, diversidad y conflicto cultural. Los delitos culturalmente motivados cometidos por inmigrantes (especial referencia a la mutilación genital femenina)*, (Madrid: Dykinson, 2010), 98.

the social treatment of women[1]. We cannot ignore that in the case of female genital mutilation, "many women sink into silence, unable to express their fear, while the rite becomes entrenched and becomes very difficult to eradicate"[2].

It does not seem appropriate to develop the so called "Theory of the mistake of prohibition" based on the cultural background of the subjects, because any respect for tradition and culture must be bounded unconditionally by a respect for human rights, which act as a minimum common denominator for all cultures, traditions, and religions. In the words of Bosch: "Only if we accept that there is a common ethic for all, and that human rights can be their most globally accepted expression, can we build a society with a different culture and tradition, but with the same moral rules and principles that permit living together in a globalised world"[3]. Ultimately, respect for human rights should serve as a filter between what is tolerable and intolerable[4]. This position should, in no case, be intended to support xenophobic discourses that project a negative and destructive image of certain cultures and contribute to the automatic exclusion of their members when they attempt to integrate into another society[5].

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[1] "Prenatal sex selection, female infanticide, polygamy, ablation of the clitoris, forced marriages, inheritance discrimination when compared to males, banning women from practising sports and attending sports events, or the use of the Islamic veil, these are some of the examples basically entangling women in the most fraught cultural traditions". Vazquez Gonzalez, *Inmigración, diversidad y conflicto cultural. Los delitos culturalmente motivados cometidos por inmigrantes (especial referencia a la mutilación genital femenina)*, 99. Please see Benhabib, Seyla, „Otro universalismo: Sobre la unidad y diversidad de los derechos humanos", *ISEGORÍA. Revista de Filosofía Moral y Política*, no. 39(2008): 175-203. See also Pujol, A., „Derechos humanos y multiculturalismo", *Enrahonar* 40/41(2008): 79.

[2] Vázquez Torres, „Mutilación Genital Femenina, cuestión de género", *Meridiam*, 35.

[3] Joaquim Bosch Barrier, „La mutilación genital femenina y el aborto: dos dilemas éticos con dos enfoques resolutivos distintos", *Cuadernos de Bioética* XVII, 2(2006): 211.

[4] Vázquez González, *Inmigración, diversidad y conflicto cultural. Los delitos culturalmente motivados cometidos por inmigrantes (especial referencia a la mutilación genital femenina)*, 207.

[5] In the same vein, please see Alfonso Serrano Maíllo, Reviewing V. Barungi and H. Twonggyerwe (eds.), *Beyond the dances. Voices of women on female genital mutilation*, review posted on *Revista de Derecho, UNED*, no. 7(2010): 654.

## 4. BY WAY OF CONCLUSION

It should be clearly understood that ablation of the clitoris, in other words, female genital mutilation, is not culture, it is a "mutilation" not only of the body but also of the rights of women[1] and, as a result, discrimination against women. Hence, in educational programs aimed at combating female genital mutilation it is necessary to involve men and women linked directly or indirectly with this practice, making them clearly aware of the physical, emotional, social and sexual complications that this practice can cause[2]. Let us not forget that respect for native cultures is limited by respect for universally recognised human rights, which act as an intercultural lowest common denominator. As Serrano Tarraga explains: "The limit to multicultural tolerance is set at respect for the fundamental rights of the person. In no case can respect for their own culture breach those fundamental rights recognised as universal, nor should they breach or infringe all citizens' rights and freedoms recognised in the Spanish Constitution. Cultural diversity and the freedom to carry out one's own cultural practices must be respected, provided they do not pose a breach of human rights. Therefore, respect for cultural diversity will be determined by human rights and the fundamental freedoms recognised for every citizen"[3].

I would like to encourage the European Commission to consider the need to adopt interpretative guidelines on female genital mutilation and asylum allowing Member States to better harmonise national practices in accordance with the spirit of the Common European Asylum System. Insofar as the national asylum authorities are concerned, it would be suitable to sensitise those working on female genital mutilation and to highlight the importance that this issue has within the framework of their work, be it as health professionals, interviewers, decision-makers, policymakers or administrators. As has rightly been highlighted: "We are

[1] Vázquez González, *Inmigración, diversidad y conflicto cultural. Los delitos culturalmente motivados cometidos por inmigrantes (especial referencia a la mutilación genital femenina)*, 100.

[2]Ismael Jiménez Ruiz, Pilar Almansa Martínez and María Del Pilar Pastor Bravo, „Percepciones de los hombres sobre las complicaciones asociadas a la mutilación genital femenina", *Gaceta Sanitaria*, Vol. 30, no. 4(July/August 2016), Barcelona.

[3]Serrano Tarraga, Mª Dolores, „Violencia de género y extraterritorialidad de la ley penal. La persecución de la mutilación genital femenina", *Revista de Derecho UNED*, no. 11(2012): 870.

faced with a very complex reality that is deserving of a comprehensive approach by the administrations involved. It is a health problem that transcends purely medical and judicial boundaries, where the violation of human rights and the need for an approach to cross-cultural issues are closely linked to personal identity, and the commitment to prevent certain traditional practices involving the discriminatory, violent, degrading, and painful treatment of women.

This is why the use of criminal law as a sanctioning mechanism cannot be dissociated from adequate information and prevention work through schools, health professionals, social services, intercultural mediators and educators; only in collaboration will one arrive, together, at an effective resolution of the problem"[1]. Therefore, it is necessary to work with the entire community, develop educational programs based on the local values and cultures where female genital mutilation takes place, making sure that the Government also supports these initiatives together with the associations that work directly at the community level through legislation against mutilation[2].

I consider it especially important that every effort be made in order to encourage the legislators of the European Union, as well as at national and regional levels, and service providers, to fully include women and girls, both asylum seekers and refugees, in their multidisciplinary and global plans of action for the elimination of female genital mutilation in the European Union, in line with the resolution of the General Assembly of the UN in 2012[3].

Just like the experts in criminal or constitutional law, the philosophers of law cannot remain on the side-lines when confronting the problems surrounding how to address cultural diversity, knowing that it is necessary to make a "moral" control of the Law, which should be realized always from critical moral principles and not from a merely positive morality[4]. In short, as philosophers of law, we cannot remain

[1]Gallego, MA - López MI, „Mutilación genital femenina. Revisión y aspectos de interés médico legal", *Cuadernos de Medicina Forense*, Vol. 16, no. 3(2010), July/September.
[2] Interview with Simona Galvati Vázquez Torres, Juana, „Mutilación Genital Femenina, cuestión de género", 36.
[3] General Assembly of the United Nations, resolution "Intensifying global efforts for the elimination of female genital mutilation", sixty seventh period of sessions, on 16 November 2012, 3/67/L.21/Rev.1.
[4] Laporta, Francisco J., *Entre el Derecho y la Mora*l, (Fontamara, México: D.F., 1993 y 1995) 53.

silent when confronted with cases of female genital mutilation, rather from within our discipline we must delve into this sensitive topic for the sake of eradicating it, providing answers to the challenge posed by cultural conflicts in the 21st century.

## BIBLIOGRAPHY

**Books**

1. Deller Ross, Susan. *Women's Human Rights. The International and Comparative Law Casebook.* Philadelphia: University of Pennsylvania Press, 2008.
2. Laporta, Francisco J. *Entre el Derecho y la Mora*l. Fontamara, México: D.F., 1993 y 1995.
3. Vázquez Gonzalez, Carlos. *Inmigración, diversidad y conflicto cultural. Los delitos culturalmente motivados cometidos por inmigrantes (especial referencia a la mutilación genital femenina)*. Madrid: Dykinson, 2010.

**Articles in a print journal**

1. Benhabib, Seyla, „Otro universalismo: Sobre la unidad y diversidad de los derechos humanos", *ISEGORÍA. Revista de Filosofía Moral y Política*, no. 39(2008): 175-203.
2. Bosch Barrier, Joaquim. „La mutilación genital femenina y el aborto: dos dilemas éticos con dos enfoques resolutivos distintos". *Cuadernos de Bioética* XVII, 2(2006): 211.
3. Carrasco Ropero, Julia. „El Derecho Penal Español ante la Mutilación Genital Femenina". *Diario La Ley*, Madrid, (26 September 2001).
4. Gallego, MA - López MI. „Mutilación genital femenina. Revisión y aspectos de interés médico legal". *Cuadernos de Medicina Forense*, Vol. 16, no. 3(July/September 2010).
5. Jiménez Ruiz, Ismael, Almansa Martínez, Pilar and Pastor Bravo, María Del Pilar. „Percepciones de los hombres sobre las complicaciones asociadas a la mutilación genital femenina". *Gaceta Sanitaria*, Vol. 30, no. 4(July/August 2016).
6. Pujol, A. „Derechos humanos y multiculturalismo". *Enrahonar* 40/41(2008): 79.

7. Serrano Maíllo, Alfonso. Reviewing V. Barungi and H. Twonggyerwe (eds.). "Beyond the dances. Voices of women on female genital mutilation*"*. *Revista de Derecho UNED,* no. 7(2010): 654.
8. Serrano Tarraga and Mª Dolores. „Violencia de género y extraterritorialidad de la ley penal. La persecución de la mutilación genital femenina". *Revista de Derecho UNED*, no. 11(2012): 870.
9. Torres Fernández, María Elena, „La mutilación genital femenina: un delito culturalmente condicionado", *Cuadernos Electrónicos de Filosofía del Derecho*, no. 17(2008).
10. Vázquez Torres, Juana. Interview with Simona Galvati, "Mutilación Genital Femenina, cuestión de género", *Meridiam* no. 50(2009): 35, Council for Equality and Social Welfare, Andalusian Institute of the Woman.

**Case Law**

1. Judgment of the Provincial Court of Barcelona of 13.05.2013. Roj [Spanish Official Repository of Jurisprudence]: SAP B 4991/2013 - ECLI: E: APB: 2013:4991. Cendoj [Spanish Centre of Judicial Documentation]Id: 08019370092013100024. Organ: Provincial Court. Based in:Barcelona. Section: 9. Appeal no.: 3/2012. Decision number: 42/2013. Proceedings: Summary. Rapporteur: José María Torras Coll.
2. Judgment of the Criminal Chamber of the Supreme Court of 31.10.2012.Roj: Supreme Court Judgement 7827/2012 - ECLI: E:TS: 2012:7827. CendojId: 28079120012012100900. Body: Supreme Court. Criminal Division.Based in: Madrid. Section: 1. Appeal no.: 3/2012. Decision number: 835/2012. Proceedings: APPEAL IN CASSATION. Rapporteur: Joaquín Giménez García.
3. Judgment of the Provincial Court of Barcelona of 13.05.2013.
4. Decision of the Litigation Chamber of the National Court of 21.06.2006.Roj: SAN 2734 / 2006 - ECLI: ES: AN: 2006:2734. CendojId: 28079230032006100403. Body: National Court. Litigation Chamber.Based in: Madrid. Section: 3. Appeal no.: 1076 / 2003. Proceedings: CONTENTIOUS. Rapporteur: Diego Cordoba Castroverde.

5. Appeal judgment of 23.06.2010. Roj: SAN 3185/2010 - ECLI:ES:AN:2010:3185. Cendoj Id: 28079230042010100400. Body: National Court. Litigation Chamber. Based in: Madrid. Section: 4. Appeal no.: 176/2010. Proceedings: LITIGATION - APPEAL. Rapporteur: Ana Maria Cabezudo Sangüesa.
6. Judgment of the Criminal Chamber of the Nacional Court of 14.05.2014. Roj: AAN 114/2014 - ECLI: E:AN: 2014:114ª. CendojId: 28079220022014200002. Body: National Court. Criminal Division.Based in: Madrid. Section: 2. Appeal no.: 2/2014. Decision number: 26/2014. Proceedings: CRIMINAL - APPEALS PROCEDURE ABBREVIATED. Rapporteur: Julio de Diego López.
7. Judgment of the Criminal Chamber of the Supreme Court of 31.10.2012.Roj: Supreme Court Judgement 2046/2015 - ECLI: E:TS: 2015:2046. CendojId: 28079120012015100266. Body: Supreme Court. Criminal Division. Based in: Madrid. Section: 1. Appeal no.: 1682 / 2014. Decision number: 296/2015. Proceedings:Criminal–ProcedureAbbreviated/Summary. Rapporteur: Candido Conde-Pumpido Touron.
8. Judgment of the Provincial Court of Teruel 15.11.2011.Roj: SAP TEA 197/2011 - ECLI:ES:APTE:2011:197. Cendoj Id: 44216370012011100195. Body: Provincial Court. Based in: Teruel. Section: 1. Appeal no.: 12/2011. Decision number: 26/2011.Proceedings:Criminal-Abbreviated/Summary Procedure. Rapporteur: Maria Teresa Rivera Blasco.

**Websites**

1. Amnesty International Report, pp. 2-16. *What is female genital mutilation?* http://www.es.amnesty.org/nomasviolencia/sabermas10mgf.php.
2. *Iraq - Multiple Indicator Cluster Survey, 2011, Final Report*, Central Statistics Organisation, Kurdistan Regional Statistics Office, Ministry of Health, UNICEF, September 2012, available at: http://goo.gl/qKyUJ.
3. http://www.amnistiainternacional.org/revista/rev667articulo8.html
4. http://www.who.int.

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# SEVERAL ASPECTS OF COLLECTIVE REDUNDANCIES. SELECTION CRITERIA

**Magda VOLONCIU**[1]

***Abstract:***

*Objective or subjective? Abolition of posts or dismissal of a number of employees? How to determine the numerical criterion according to which collective redundancy exists or not? Cessation of activity or restriction of activity. Subjective selection criteria in a dismissal determined by objective causes. Interpolating the provisions of art. 69 par. (3) of the Labor Code.*

***Key words:*** *dismissal; downsizing; cancelation of a position; objective/subjective selection criteria*

## 1. WHY COLLECTIVE LEAVE ?

By OUG no. 55/2006, European Directive 59/98 was implemented on the protection of employees in the event of collective redundancies.

Basically, we can say that Romanian law, respectively art. 68 and following of the Labor Code have taken over the text of the Directive, little is the issue of inconsistency that could have been mentioned, especially when the provisions of the Directive were taken over into the Labor Code. In the meantime, however, due to a relatively low tradition in the field of collective redundancies, or, by a more traditional tradition based on normative acts called upon to solve specific situations in the field, both social and jurisprudential, revealed a series of inadvertencies to be taken into account.

Collective redundancy has been written a lot, and probably from now on, it will be written as much. It is an exciting institution especially for the many aspects that social practice brings out and will always

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highlight. We propose to analyze only two issues, both with connotations both conceptual and, in particular, practical.

## 2. OBJECTIVE AND SUBJECTIVE CRITERIA FOR DETERMINING THE CONCEPT OF "COLLECTIVE TERMINATION"

The first challenge in the realization of this study was the analysis of the provisions of art. 68 of the Labor Code, provisions laying down the assumptions under which collective redundancy may be referred. The Romanian law sets criteria for time and number of redundant employees in relation to the total number of employees present in the unit.

Art. 68 of the Labor Code is not without controversy. Thus, a first problem which has lately assumed the intervention of practice and doctrine is in line with par. final of art. 68. Thus, if in para. (1) of the text refers to the number of employees to be dismissed in relation to the total number of employees in the unit, the provision of art. 68 par. (2) of the Labor Code, rather, has the value of a general text, which starts from the idea that, as long as at least one employee is dismissed at the level of a unit, a collective redundancy may occur.

It was appreciated that the number of employees specified in art. 68 par. (2) of the Labor Code, based on the total number of employees, is formed not only of the persons to be dismissed, but also of those whose individual employment contract ceases, for example as a result of the parties' agreement under art. 55 of the Labor Code, if the initiative to terminate the contract belongs to the employer. The solution was first demonstrated in practice and then taken up by doctrine, with supportive, subjective orientation.

At first glance, analyzing the text of art. 68 par. (2) of the Romanian law, there may be a contradiction between the provisions of art. 68 par. (1) and those of art. 68 par. (2). It is the reason why, some authors have appreciated that, in fact, the provisions of art. 68 par. (2) are not producing legal effects, the determination of a collective redundancy according to the number of redundant employees in relation to the total number of employees being made exclusively on the basis of art. 68 par. (1) of the Labor Code[1].

[1] See in this regard the comment published in the *Labor Code commented and annotated with related legislation and relevant jurisprudence* - authors Alexandru

In reality, however, the provision contained in art. 68 par. (2) of the Labor Code is not at all accidental. We believe that essential to solving the problem is to understand the dismissal under art. 65 of the Labor Code, as an objective dismissal. Under these circumstances, any Collective Redundancy Project is kept in the area of an objective analysis. Thus, what leads to the effect of several redundancies for which the procedures regulated under art. 69 et seq. of the Labor Code, consists of the objective need for reorganization / restructuring of the employer. Such a cause must, in its essence, be objective. The employer is not interested in the employee, at least at the time of his initiative, but is interested in removing positions within his organizational structure, basically removing some "boxes" from the Organigram. Insofar as the changes are of a magnitude and involve the elimination of several positions, relative to the total number of employees, one can speak of the necessity of intervention of complex procedures, specific to collective dismissal. Instead, if changes are of minor importance, they will result in an individual dismissal. At the same time, in order to be able to talk about collective redundancies, the premise imposed by the European legislator as well as the national one presupposes the existence of a minimum number of 5 employees who will be directly affected by the organizational measure that the employer understands to adopt. In other words, the subjective element is determined by the condition of dismissal under art. 65 of the Labor Code of at least 5 employees, in order to have a collective redundancy.

That this would be the only normal interpretation of the law results and analyzes the steps that follow after the adoption of the intention of dismissal by the competent body of the employer, determined according to its constitutive documents. It is noted that the selection of employees to be affected by the collective redundancies only occurs after the employer has sent the second Notification (ie the submission to the Territorial Employment Agency (hereinafter AJOFM)

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Ticlea, Laura Georgescu (Bucharest:Universul Juridic, 2017). It is expressly stated that only employees dismissed under art . 65, "*there are not taken into account the employees who have terminated their employment relations for other reasons: by law (Article 56), the parties' agreement (art. 55 lit. b)], resignation (Article 81).*

Under these circumstances, the text of para. (2) of art. 68, *seems unnecessary, its provisions being absorbed in those of par. (1). Indeed, it is found in Directive 98/58 / EC but is applicable according to the specific national legislation of the Member States."*

and the Territorial Work Inspectorate (Hereinafter referred to as ITM) and copies of the Collective Redundancy Plan, trade unions and / or employees 'representatives, following the conduct of information and consultation procedures with trade unions and / or employees' representatives). Practically, the application of selection criteria leads to the individualisation of redundancies, after which the procedures run the same as in the case of individual redundancy. Under these circumstances, **what should be taken into account by the employer when he indicates his intention to carry out a reorganization refers to the number of posts to be dismantled and not to the number of employees to be redeployed terminate individual employment contracts for reasons beyond the employee's job.** Given that whenever we are talking about a dismissal based on the provisions of Art. 65 of the Labor Code we refer to **an objective redundancy**, unlike redundancies based on the provisions of Art. 61 of the Labor Code, which appear as subjective redundancies, the same objective concept should be fully maintained when dealing with collective redundancies. This would mean that **starting collective redundancies should intervene whenever the question of the abolition of a number of posts is taken, taking into account the values specified in art. 68 par. (1) of the Labor Code**.

However, although this objective conception, must be taken into account, both Romanian law and European law "forget" that we should refer to positions and not to employees, especially when the numerical criteria for a dismissal is considered to be collective. Thus, the Romanian law refers to the number / percentage of employees of the total number of employees in the unit. However, when the collective redundancy process is initiated, the employer can not know the number of employees to be "fired". On the one hand, it may be possible, following consultations with the trade union and / or employee representatives, that the number of redundancies drops, and on the other hand it is possible that other causes may arise in the course of the proceedings, leading to the vacancy of the positions aimed at be abolished. Moreover, the way in which the text of art. 68 of the Labor Code leads to the idea that redundancies are first put into practice and only then are the "calculations" necessary to determine, according to the redundancies made, whether or not collective redundancies were involved. However, the rationale of any legal norm is that the hypothesis (determining the conditions under which the collective redundancy can be made) may intervene first, and only then

the provision, namely the intervention of collective redundancy proceedings. The provisions of art. 68 par. (1) of the Labor Code could lead to the idea that only after all the stages of a collective redundancy can be determined the number of employees to be disposed of from the total number of employees in the unit, thus determining whether or not it is about a collective redundancy.

To the extent that the total number of posts to be disbanded under the Redundancy Plan would be accepted, there would be no discussion as to how the provisions of Art. 68. To the same extent, this element (the number of posts to be abolished) **is an absolutely objective element that can be determined from the outset.**

It would also be normal for the reporting of the disbanded posts to be made, not to the total number of employees, but to the total number of existing positions in the unit. Because the reference value (total number of employees) is a value that will not give rise to other discussions. Thus, it may be questionable whether only individual active labor contracts or those of employees whose contracts are suspended are envisaged. We consider that, in the silence of the law, as long as the legislator refers to the "total number of employees", it would be irrelevant whether or not they have the suspended individual employment contract. However, since the reference would be made to the total number of posts in the unit (ie taking into account vacant posts), there would be no further question mark.

**In conclusion, we consider that a solution of law window, in order to remove the ambiguities of the current text (Article 68 of the Labor Code), would imply taking into account the total number of posts in respect of which there is an intention to abolish the total number of posts existing in a unit, provided however that the abolition of posts will involve at least 5 redundancies for reasons not related to the employee[1].**

[1] This condition is essential, as is also emerging from European case-law. Thus, in the judgment of the European Court of Justice (hereinafter referred to as CJEU), Case C 422/14 Pujante Rivera of 11 Nov. 2015,( Judgment quoted in the Labor Code, Law on Social Dialogue and 12 Common Laws, Carefully edited and annotated by Marius Eftimie, Hamangiu Publishing House, p. 36) stated that "*in order to establish the existence of collective redundancy within the meaning of Art. 1 par. (1), first subparagraph, point a) of the Directive no. 98/59, which implies the application of the latter, the condition of 'the existence of at least five redundancies' in the second paragraph of that provision must be interpreted as meaning that it does not concern the*

Such an approach would also not be against European rules. Thus, according to art. Article 5 of Directive 98/59 states: 'This Directive shall be without prejudice to the right of Member States to apply or to adopt laws, regulations or administrative provisions more favorable to workers, or to promote or permit the application of collective agreements which are more favorable to workers. But , as the reference criterion would be the number of disbanded jobs out of the total number of jobs in the unit, practically the solution would be favorable for employees.

It is true that, according to Romanian law, the wide-ranging solution is different, referring to the number of employees and not to the number of posts. The same is the solution in European law, but unlike Art. 68 of the Labor Code, in art. 1 par. (1) the final sentence of Directive 98/59 states expressly that:*" For the purposes of calculating the number of redundancies referred to in point (a) of the first subparagraph, the termination of the employment contract which occurs on the employer's initiative for one or more reasons unrelated to the worker's person shall be treated as dismissal provided that there is at least five redundancies."* The concept of dismissal for reasons not related to the employee means any termination of an employment contract that is determined by the employer's initiative, even if the ground of termination of the individual employment contract is other than that of dismissal for reasons not related to the employee[1].

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*termination of an employment contract as a dismissal, but only the redundancies strictly.* "

[1]In the doctrine, it was also considered that in the event of a resignation, one whose individual labor contract should cease to be resigned should be taken into account when calculating the total number of employees whose contract ends at the initiative of the employer, as in if the employer attempts and obtains the employee's agreement for a conventional termination of the employment contract (see in this respect, *The Commented Labor Code, Ion Traian Stefanescu, Ezer Marius, Gheorghe Monica, Irina Sorica, Teleoacă - Vartolomei Brânduşa, Uluita Aurelian Gabriel, Voinescu Veronica, The Universul Juridic, - 2017 Comment - art. 68 pt.).* Instead, calims the same source, if the initiative to reach an agreement belongs to the employee, then it can no longer be taken into account in determining the number of employees dismissed from the total number of employees in the unit.

On the other hand, it has been considered in the case-law practice that the calculation of the number of employees dismissed for the purpose of determining the dismissal of an individual or collective redundancy can not be considered as termination of contract under Art. 55 lit. b) of the Labor Code. It was considered that the provisions of art. 55 lit. b) truncated because, upon termination of the contract in this way, the mere will of the employer would not have had effects without the will of the employee in the same

In fact, what the European legislator had in mind in drafting the text of art. 1 par. (1) the final sentence of Directive 98/59 is the situation of "voluntary departure". In such a case, the employer has the initiative, in that it intends to reduce the number of employees or categories of employees, but any employee of the unit / of that category nominated by the employer will be entitled to opt for the termination of his individual employment contract. The termination of the contract will be done with the agreement of the parties, but it is obvious that the "project" is initiated by the employer. So, the initiative to terminate individual labor contracts, without being relevant, the person of the employees who join the Collective Redundancy Project belongs to the employer. **Even if the institution of voluntary departure is not legalized in Romania, it is often used in practice and, for such a situation, the provisions of Art. 68 par. (2) of the Labor Code, understood from the perspective of the provisions of art. 1 par. (1) final sentence of the European Directive become incidents.**

## 3. HOW TO INTERPRET THE PROVISIONS OF ARTICLE 69 ALIN. (3) LABOR CODE

According to art. 69 par. (3) of the Labor Code: *" The criteria set out in paragraph (2) lit. d) (the criteria negotiated by the parties for the*

sense (see, in this respect, *the Timişoara Court of Appeal, Labor and Social Security Litigation Division, Civil Decision no. 514/2012, portal.just.ro*). We believe that these issues are much more sensitive and do not allow clear solutions to large categories of hypotheses. If the broad-based solution were to be accepted, then only the initiative of the employer should be considered, and not necessarily his intent to break the labor relations. Thus, if a resignation occurs, in the sense of "forcing" the employee to unilaterally denounce the individual labor contract, in practice the employee's will manifest was attacked, and as a consequence, the employee may request the annulment of his will. Under these circumstances, the employer's decision to terminate the employment relationship would be abolished and the employee would be reintegrated with the appropriate compensation. In the event of a resignation, the employer is interested in getting rid of a certain employee and not in the vacant posts in order to abolish them. In any case, whenever an employer's pressure is put on a particular employee to agree to the termination of employment relations, there is in fact no "hidden" objective redundancy, but a subjective redundancy, determined by the qualities of a person.

*prioritization - nn) apply for the salaries of the employees after the evaluation of the achievement of the performance objectives."*

As with the collective redundancy concept in terms of the number of redundant employees relative to the total number of employees in the unit, and in the determination of the criteria considered for the order of priority of the dismissal, there may be various interpretations.

As a general idea, the spirit of the provisions on the selection criteria is in the sense that it must first be taken into account the proven competence of the employee, which is appreciated more by the legislation than the social situation. Such an approach seems logical: the employer has had serious reasons that have led to the need for a profound reorganization with significant labor force effects. Consequently, in order for such reorganization to be profitable for the employer, it is normal for it to retain the most competent workforce.

**3.1. What is meant by evaluating performance goals.**

According to art. 40 par. (1) lit. f) of the Labor Code, the employer, among other key rights, has the right to set "*the individual performance objectives, as well as the criteria for evaluating their achievement*". On the other hand, art. 17 par. (3) lit. e) of the Labor Code refers to: "*the criteria for assessing the professional activity of the employee applicable at the level of the employer"*. Finally, art. 242 lit. i) of the Labor Code establishes among other minimum and mandatory elements to be included in the internal regulation and: *the criteria and procedures for professional evaluation of employees.*[1]

Corroborating the abovementioned texts, there must be general criteria for the assessment of all employees and a clear evaluation procedure at the level of each employer, these elements being determined by the employer on the basis of its regulatory prerogative through the Internal Regulation. However, the general criteria applicable at the level of the unit must also be found in the individual employment contracts and they will be functional only if they are accepted by the employee at the conclusion of his individual labor contract.

[1] Ion Traian Stefănescu and Ezer Marius and Gheorghe Monica and Irina Sorica and Teleoacă - Vartolomei Brânduşa and Uluitu Aurelian Gabriel, Voinescu Veronica, *The Commented Labor Code* (Bucharest: Universul Juridic, 2017*),* comment no. 11 from art. 242

However, there is a discrepancy between the provisions of the law. Thus, on the one hand, the assessment criteria applicable at the employer's level must be found in the individual employment contract and are therefore subject to the will of the contracting parties. On the other hand, the criteria make speech and art. 242 lit. i) of the Labor Code, as a mandatory element in the internal regulations. However, the internal regulation is a source of law, at the level of the unit, therefore having a normative character.

Any newly employed employee is subject to the internal regulation by signing the individual labor contract by obliging himself to comply with the provisions of the internal regulation. So, on the one hand, the employee's consent is required, on the employment on the evaluation criteria, and on the other hand they are imposed on that employee, according to the internal regulation. It might even be a question of what would happen if the only element that an employee would not accept from the offer for the conclusion of the individual employment contract is precisely the evaluation criteria. Could the parties to the individual labor contract negotiate on the evaluation criteria and, depending on such individual negotiation, deviate from the rules imposed by the Internal Regulation? Clearly, there is a clear contradiction[1]!

From our point of view, **we consider that the two concepts of evaluation criteria have completely different meanings: thus, art. 17 par. (3) lit. e) of the Labor Code must take into consideration specific criteria for the employee with whom the individual labor contract is to be concluded, but taking into account the general criteria applicable to all the employees in the unit and established by the internal regulations.** If the specific criteria for a particular job are negotiable with the holder of the respective post, the general criteria specified by the Internal Regulation are binding. Obviously, the specific criteria for each post, taking into account the personality of the employee occupying that post, can not be outside the general rules established by the internal regulation. Only such an interpretation could ensure the normal correlation between the provisions of Art. 17 par. (3) lit. e) with art. 242 lit. i) of the Labor Code.

[1] I.T. Ştefănescu, „Concrete remarks from the recent amendment and completion of the Labor Code", *Romanian Journal of Law*, no. 2 (2011): 15-17. Similarly, I.T. Ştefănescu, „Answers to the Challenges of Practice", *Romanian Journal of Labor Law*, no. 8 (2011)

Art. 69 para. (3), however, refers to the assessment of the achievement of the performance objectives set by the employer, on the basis of its prerogative, as recognized by Art. 40 par. (1) lit. f) of the Labor Code[1]. The assessment of the performance objectives is carried out by the employer on the basis of the evaluation procedures established by the internal regulation. Such procedures are of a regular nature and are usually conducted annually. It follows **that the employer should take into account the results of the periodic assessment of the achievement of the performance targets set for that employee as assessed in accordance with the rules of the Internal Regulation.**

**3.2. When are the criteria for selecting employees to be affected by redundancy implemented?**

It should be emphasized from the outset that the use of selection criteria for collective redundancies should only intervene in the event of a restriction of activity, so that a number of other positions will be abolished, while others will continue to function. If an activity is completely abolished, the issue of selection can no longer be questioned, practically all posts of that type being abolished.

In the case-law, the question arises as to whether, in such a situation, any reference to the selection criteria in the dismissal decision is required, as that reference is required by the provisions of Art. 76 c) of the Labor Code. It should also be noted that the provisions of Art. 76 have not been updated after the changes occurred following the adoption of Law no. 40/2011 amending the Labor Code. Thus, the formal requirement imposed by art. 76 lit. c) of the Labor Code, takes into consideration the criteria for ordering priorities as they are provided by art. 69 par. (2) lit. d) of the Labor Code. But what happens if such criteria

[1] See as criticism of such a prerogative acknowledged exclusively by the employer - Şerban Beligrădeanu, „The main theoretical and practical aspects resulted from the Law no. 40/2011, for amending and completing the Law no. 53/2011, the Labor Code (II)", *RRDM* , no. 3 (2011): 32-35.
Also, in the specialized doctrine it was also considered that the employer "*could not, unilaterally, modify the individual performance objectives and / or the evaluation criteria already established by the existing contract (or by the additional act or the job description). Such change is only possible with the agreement of the parties, pursuant to art. 41 par. (1) of the Labor Code"* (see in this respect - Alexandru Ticlea, „Establishing the individual performance objectives - the prerogative of the emplo*yer", the Romanian Labor Law Review*,no. 7 (2011).

do not exist because the social partners believe that the assessment of how to achieve the performance targets ensures a correct and complete selection? Normally, according to the law, there should be no such statement in the dismissal decision. In fact, it is obvious that the legislator considered the selection criteria in general, and not only the ones to determine the order of priorities referred to in art. 69 par. (2) lit. d) of the Labor Code. Consequently, in such situations, reference should also be made to the way selection was made on the basis of the assessment of the performance objectives.

We consider that, **in view of the excessive formalism of labor law in Romania, in the dismissal decision there should be a reference to the selection criteria used, for any hypothesis, even if a single job has been abolished or abolished a whole activity. In such a situation a mere reference to the fact that the selection criteria do not apply would be sufficient.**

**By law, however,** it would be implied that in the art. 76 lit. c) to express an explicit specification in the labor code for the situation where the selection criteria are not required, as follows: the selection criteria used in the dismissal, if a selection is required between the holders of identical posts. If any such expression (perhaps puerile but extremely clear) is used, any discussion of a possible nullity of the dismissal decision would be avoided because it does not include all the elements specified in art. 76 of the Labor Code.

The selection required by the provisions of art. 69 par. (3) of the Labor Code may intervene only at the time of finalization of the "objective" procedures imposed by collective redundancies, respectively after the employer has notified the ITM and AJOFM the dismissal project. Practically, the selection occurs before the time of the notice of the employees to be affected by the dismissal. **In practice, the question was asked as to what extent a selection could be allowed prior to the submission of the completed redundancy project to ITM and AJOFM.** In particular, would it be possible for selection to be carried out in the framework of information/consultation procedures with trade unions / employees' representatives?

Regarding the profoundly subjective character of the collective redundancies, we do not believe there could be a ban on the nomination of employees to be laid off in the consultation / information phase with trade unions / employees' representatives. But what I have emphasized is

that the role of information / consultation procedures with trade unions / employees in a collective redundancy is to determine whether such a drastic measure is necessary and how its negative effects and consequences can be reduced. In other words, by analyzing the provisions of art. 69 par. (1) of the Labor Code, as well as the corresponding provisions of Directive 98/59, it can be observed once more that the desire of the European and national legislators was to make the objectification even at the level of the dialogue between the social partners, through their discussions, they must mainly find general solutions to the situation. To the extent that employees' representatives have punctual interventions for an employee or others with special situations, they must be analyzed in the light of the role of the union to defend the specific interests of certain members. Insofar as trade unions intervene in collective redundancies (through information and consultation), this intervention should be seen at the collective level in the social dialogue. We believe that the latter is the function set by the European legislator and the national union / elected representatives of employees in specific collective redundancy proceedings.

3.3. **Could the employer ensure the selection of collective redundancies only on the basis of a specific assessment made on the occasion of the dismissal?**

Faced with the express provisions of Art. 69 par. (3) of the Labor Code, we believe that the answer can only be negative. The very idea of selection in case of dismissal for reasons not related to the employee must be an exception. Selection implies taking into consideration some aspects related to the employee, given that the dismissal under art. 65 of the Labor Code is disposed for reasons not related to the employee. Under these circumstances, **the legal provisions relating to a possible selection in the case of collective redundancies are strictly interpreted**. As long as the law refers to the assessment of how performance objectives are met, only such an assessment is likely to lead to discrepancies when it comes to the restriction of activity and the diminishing of the number of identical posts.

However, there are also exceptional situations in which the selection of those who are to be laid off can be done differently than according to the rules established by the internal regulation. Thus, if several employees who have been selected have achieved the same results in assessing the achievement of performance objectives, according

to the procedure established by the internal regulation, and the number of positions of the same type to be abolished still requires a selection, then the employer would have the possibility that, to the extent that it is understood in this respect with the social partner, to resort to a special selection for that redundancy project, and will also determine the concrete way in which the new evaluation will take place[1]. It is intended to separate only those employees who, in the general assessment previously carried out under the provisions of the Internal Regulation, have obtained the same result.

It is worth noting that the call to a new specific selection and run under new rules is based on the provisions of art. 69 par. (2) lit. d) of the Labor Code, which refers to: "*the criteria envisaged, according to the law and / or collective labor agreements, for the prioritization of the dismissal.*" Consequently, if there is explicit provision in the collective labor agreement for the possibility of duplicating the assessment of the performance objectives with a new assessment carried out in the dismissal procedure, the collective agreement must be respected as such, taking into account the above mentioned conditions, being perfectly legal. Even though there is no such rule in the collective labor agreement to allow for an additional assessment of equal outcomes, nothing prevents the social partners from agreeing to the collective bargaining consultations.

Furthermore, even if the internal regulation itself states that the assessment in the case of a collective redundancy procedure involves specific rules in relation to the general evaluation procedure, rules to be negotiated in the consultations with the unions / elected representatives of the employees in collective redundancy, means that it has been considered from the outset that the specificity of the selection in the case of collective redundancies also requires a specific assessment, specifically agreed upon by the social departments, even in the context of collective redundancy proceedings. In fact, **it is essential that, more or**

[1] In the case-law it was considered that a dismissal decision is null in the absence of references to the selection criteria, according to art. 76 lit. c) of the Labor Code, even if the defendant employer has proved that such criticisms have been discussed in a concrete and real way during the consultations with the trade unions. The lack of the formal element could not be complied with, so the solution of the court was in the sense of admitting the appeal of the dismissal decision, formal, but imperative of art. 76 lit. c) of the Labor Code. (see, *Appeal Court of Bucharest, Section VII Civil regarding labour disputes and social security, decision nr. 5241/2012, portal.just.ro).*

**less detailed, the rules on how to make selections in collective redundancies must be predetermined**. It would be difficult to admit that new rules, which were strictly laid down at the time of the collective redundancy procedure, and which do not take account of the pre-established valuation rules as they are operating in the internal rules, could operate. Such derogations would be possible only with the agreement of both social partners, having regard to the specific provision specified in Art. 69 par. (2) lit. d) of the Labor Code. By imposing the principle of predetermining the valuation rules, any bias in the selection that would be made in a collective redundancy could be removed.[1].

We also point out that art. 69 par. (2) lit. d) of the Labor Code does not only address additional social criteria that the social partners could agree to either through collective labor agreements or even in the context of collective redundancy consultation procedures. Probably references from practice and doctrine to social criteria have in view the tradition in the field, dictated by former collective agreements at national level. Obviously, taking into account the social character of labor law, the social criteria may be taken into account after overcoming the criterion of competence. This does not mean, however, that the social partners, as we have shown above, could not develop competence criteria beyond those imposed by art. 69 par. (3) of the Labor Code.

## 4. INSTEAD OF AN ENDING

In the above, only two exciting problems have been reached and the nature of the contrary, both theoretical and practical solutions. Essentially, however, there is only one thing: the institution of collective redundancy and the procedures it imposes are not just a "thing" to be analyzed for law theorists. Collective redundancy is an increasingly important reality today. It is sometimes a necessity for saving the employer and an impact with severe negative consequences for the employee. Therefore, every aspect it assumes should be carefully considered, especially by tracking the effects it causes. The best solutions must be found for this extremely ugly institution to be functional, to combine the interests of capital with those of the social, because it is

[1] See, *Appeals Court Ploiesti, Section 1 Civil, civil decision nr. 4064/2012, Relevent Decisions, Trimestre IV 2012, portal.just.ro*

useful both for the patron's good work and the protection which an employee must have.

## BIBLIOGRAPHY

**Books**

1. Eftimie, Marius. *Codul muncii , Legea dialogului social si 12 legi uzuale*. Bucharest: Hamangiu, 2017
2. Stefănescu, Ion Traian and Marius, Ezer and Monica, Gheorghe and Sorica, Irina and Brândușa, Teleoacă–Vartolomei and Gabriel, Uluitu and Veronica, Aurelian Voinescu. *Codul muncii comentat.* Bucharest: Universul Juridic, 2017
3. Ticlea, Alexandru and Georgescu, Laura. *Codul muncii comentat și adnotat cu legislație conexă și jurisprudență relevantă*. Bucharest: Universul Juridic, 2017

**Articles in a print journal**

1. Beligrădeanu, Șerban. „Principalele aspecte teoretice și practice rezultate din cuprinsul Legii nr. 40/2011, pentru modificarea și completarea Legii nr. 53/2011, Codul muncii (II)". *Revista Română de Dreptul Muncii,* no. 3 (2011)
2. Ștefănescu, Ion Traian. „Repere concrete rezultate din recenta modificare și completare a Codului Muncii", *Revista Română de Jurisprudență*, no. 2 (2011)
3. Ștefănescu, Ion Traian. „Răspunsuri la provocări ale practicii". *Revista Română de dreptul Muncii*, no. 8 (2011)
4. Țiclea, Alexandru. „Stabilirea obiectivelor de performanţă individuală - prerogativă a angajatorului". *Revista Română de Dreptul Muncii*, no. 7 (2011)

**Legislation**

1. Council Directive 98/58 / EC on the approximation of the laws of the Member States relating to collective redundancies

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# REPARATION MEASURES BY EQUIVALENT FOR THE IMMOVABLE PROPERTY TAKEN OVER ABUSIVELY BY THE STATE

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***Abstract:***

*All former Communist states where democratic regimes were established had to resolve the issue of reparations to be granted to the persons whose immovable property had been taken over abusively by the authorities of the former regime. In this regard as well, Romania has chosen a path that was different from the one followed by other states, proclaiming the principle of restitution in kind of land and constructions, applicable with very few exceptions. Moreover, for the immovable property that, for various reasons, could not be restituted in kind, a system of financial compensation was designed, the amount of which was determined by valuation of the immovable property in question according to international valuation standards.*

*The magnitude of this process, combined with the fragmented and often contradictory legislation, as well as the establishment of new competent authorities to deal with requests, but with unspecialized and insufficient human resources, eventually led to the blocking of the granting of reparation actions.*

*In this situation, the European Court of Human Rights, suffocated by complaints coming from Romania, found that there was a systemic problem and adopted a pilot decision. Law no 165/2013 is the legislative act that seeks to bring things on a normal path.*

***Key words:*** *private ownership right; constructions; valuation; compensation; pilot decision.*

## 1. PRELIMINARY REMARKS

The collapse of the Communist regime in Romania, produced with amazing rapidity and under controversial circumstances, marked the beginning of a period of deep transformations within society. In a very short period of time, there appeared the issue of the attitude the new political leadership had to adopt against the many abusive take-overs of

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private property immovables by the Communist state. Unfortunately, there was no unitary vision of the new leaders about the scale of the reparation measures and the ways to follow.

Two opposing conceptions were shaped: a generalized restitution in kind, which would represent a genuine *restitutio in integrum*, and a partial reparation of the injustices suffered by former owners.

The principle that can be identified in all legislative acts regulating the matter was that of the restitution in kind. But it soon became obvious that throughout the over 40 years of Communist regime the legal and factual situation of a large part of the immovable property taken over abusively had changed to such an extent that its restitution in kind would no longer have been possible, therefore reparation measures had to be designed by means of the equivalent. In this respect as well, the legislative solutions have evolved from capping the amount to granting monetary compensations equal to the value of the immovable property that could not be returned in kind, in order to finally reach a cap of the respective compensations.

In order to support the maximalist variant, in the public space there was conveyed the idea that the granting of full reparation is one of the requirements imposed by our membership in the Council of Europe and accession to the European Union. In fact, there are several principles that can be drawn from the jurisprudence of the European Court of Human Rights which do not converge in this direction, and the absence of specific legislation of general scope did not prevent the first-wave states from joining the European Union, the case of Poland being illustrative in this sense.

It was thus decided that Article 1 of Protocol no (1) of the European Convention on Human Rights (devoted to the right to assets – our note E.C.) does not guarantee a right to acquire goods and does not impose on the contracting states any restriction on their freedom to determine what are the situations and assets for which reparation measures are granted, to choose these measures and to determine the conditions under which they agree to restitute the rights of ownership to the dispossessed persons.[1]

[1] ECHR, Judgment Van der Mussele v Belgium, November 23, 1983, § 48, Series A no 70; Slivenko v. Latvia (dec.) [MC], no 48.321 / 99, § 121, ECHR 2002-II.

The legislation devoted to this area must contain sufficiently accessible, precise and foreseeable rules of national law in their application, which constitutes an aspect of the principle of legality.[1]

The purpose of the Convention is to protect "concrete and effective" rights so that, once they have adopted legislation containing a set of measures to repair the damage caused by the taking over of goods, the states must also ensure the conditions of its application in a timely and useful manner and with the highest consistency. Uncertainty - be it legislative, administrative or related to the practices applied by the authorities - is a factor to be taken into account in assessing the conduct of the state.[2]

Both the interference with respect for the goods and the refrain from action must strike a fair balance between the requirements of the general interest of the community and the imperatives of defending the fundamental rights of the individual, being necessary to respect a reasonable proportionality between the means used and the aim pursued by the state-applied measures, including those that deprive a person of his/her property.[3]

That is why we consider that a brief presentation of the evolution of the main regulations adopted in the field and an assessment of the current state of the relevant legislation are of interest.

## 2. LAW NO 18/1991

The first legislative act that contained reparation measures for privately-owned immovable property was Law no 18/1991 on Land Resources. This provided a partial solution to the problem by allowing the restitution in kind of an area of agricultural land with a surface of maximum 10 ha in arable equivalent per family and of an area of land for forest purposes with a surface of maximum 1 ha per family. According to Art. 41 paragraph (2) of Law no. 18/1991, as drafted when it entered into force, the area of land for forest purposes that could be restituted,

[1] ECHR, Judgment Beyeler v. Italy [MC], no 33.202 / 96, §§ 109-110, ECHR 2000-I.
[2] ECHR, Judgment Vasilescu v. Romania, May 22, 1998, § 51, Reports of Judgments and Decisions 1998-III).
[3] ECHR, Judgment Sporrong and Lönnroth v. Sweden, September 23, 1982, § 73, Series A no 52.

cumulated with the area of agricultural land, could not exceed the total amount of 1 ha per family.
No reparation by equivalent was provided.

### 3. LAW NO 112/1995

Law no. 112/1995 for the regulation of the legal situation of some of the immovable property intended for housing purposes, passed into the state property, is the first legislative act that also provided for the possibility of granting compensatory measures by equivalent. Its object was immovable property intended for housing purposes, passed as such into the state property or into the property of other legal persons, after March 6, 1945, with a title, and in the possession of the State or of other legal persons on December 22, 1989. Based on it, the immovable property intended for housing purposes was restituted to the former owners or to their heirs, upon request. However, the beneficiaries ought to have actually been living in the immovable property, as tenants, on December 22, 1989, or the immovable property itself ought to have been free, on the same date. "Free immovable property" means property not occupied by other persons on the basis of a valid rental agreement.

If the former owner received a compensation for the apartment taken over by the state, the retrocession was conditional upon the restitution of that amount, updated according to certain coefficients, which could not be lower than the growth rate of the average wage income in the economy.

Former owners who could not benefit from the restitution in kind were granted monetary compensation for the constructions and the related land. These were not, however, determined by the market value, but rather by a lower value, resulting from the application of criteria contained in special legislative acts.[1] Thus, the discount coefficients were

[1] In the case of apartments, the evaluation was made by applying the criteria set out in Decree no 93/1977 and Law no 85/1992, republished, legislative acts that regulated the sale of state-owned apartments, and in the case of lands by applying the Criteria for the establishment and evaluation of land belonging to the patrimony of commercial companies with state capital no 2.665 of February 28, 1992, developed by the Ministry of Finance and the Ministry of Public Works and Territorial Planning for the evaluation of the land belonging to the state-owned commercial companies established under the Law no 15/1991 as a result of the reorganization of the former state-owned enterprises, in order to obtain the licence certificate of the right of ownership over the land.

applied to the values thus calculated, the coefficient not being lower than the average growth rate of the average wage income in the economy.

The amount of damages that could be received by a single dispossessed owner (or his/her heirs) was capped. Therefore, it was decided that the total value of the apartment restituted in kind and the compensations due for the apartments not restituted in kind and for the adjoining land must not exceed the sum of the average wage income of a person for a 20-year period calculated on the date when the compensation was determined.

However, if an apartment was restituted in kind to the former owner, to his/her heirs or to the living former owner's relatives up to the second degree, in cases when the value of the respective apartment, calculated according to the legislative acts mentioned above, exceeded the maximum limit of the compensations provided by law, the people in question could not be forced to pay the difference.

The amount representing the eventual increase in value of the apartment after its being taken over by the state, as a result of some additions, super-posing, fittings, utilities and any other constructions, was compensated by right, without fulfilling the conditions provided by the Civil Code, with the imputable losses incurred by it during the entire period of time between the date of the takeover and the date of the final decision of the county commission established for the application of the provisions of the law in question.

However, no compensation was paid for the lack of use of the immovable property.

Payment of the compensation was made by the units subordinated to the Ministry of Finance. Their value was updated on the date of payment, using as a basis the average wage in the economy in the last month of the expired quarter.

## 4. LAW NO 1/2000

Law no 1 for the reestablishment of the right of ownership over agricultural and forest lands, requested according to the provisions of Law no 18/1991 on Land Resources and to the provisions of Law no

For further developments on this topic, see E. Chelaru, *Legal Circulation of Land* (Bucharest:All Beck, 1999), 292-298.

169/1997[1], was adopted in 2000. This increased to a significant extent the areas of land that could be restituted in kind, and up to 50 ha of agricultural land by dispossessed owner [Article 3 paragraph (2)] and not by family, as regulated by Law no. 18/1991. For the land of the dispossessed landowners, natural persons, on which there are pastures and meadows, the reestablishment is made for the difference between the area of 50 ha per family and the one brought in the agricultural production cooperative or taken over by special legislative acts or by any other means from cooperative members or any other dispossessed natural person, but no more than 100 ha per dispossessed owner. Also, the area of land with forest vegetation that was susceptible of being restituted to a dispossessed owner was also increased. "Dispossessed owner" means the person who owns the right of ownership property at the time of dispossession.

Law no 1/2000 also contains provisions devoted to the restoration of the right of ownership over forest land. As an absolute novelty, it also regulates the reconstitution of the right of ownership over lands that were exploited in *associative forms*, with or without legal personality (communes of freeholders and yeomen, compossesorates, guards' communities of wealth, etc.).[2]

Unlike Law no 18/1991, which applied only to land, Law no 1/2000 also provides for the granting of reparation measures for the constructions located on agricultural or forest land which were part of

[1] Law no 1/2000 was amended and supplemented by Government Emergency Ordinance no 102/2001, itself amended and supplemented by Law no 400/2002, which approved it. Law no 1/2000 was also amended by Law no 247/2005, Government Emergency Ordinance no 127/2005, Government Emergency Ordinance no 139/2005, Law no 342/2006, Law no 193/2007, Law no 212/2008, Law no 261/2008, Law no 160/2010 and Law no 267/2011.

[2] For a presentation of these associative forms, please see S. Văcăruş, "Communes of freeholders, communes of yeomen, guards' communities of wealth and compossesorates as subjects of law, in the context of the land fund law", *Dreptul*, no 10. For the view that, in all cases, the beneficiaries of the restoration of the ownership right are members of the respective associative form, the latter being only a manager of the respective land, please see E. Chelaru, *Civil Law. Main Real Rights*, ed. 4 (Bucharest: C.H. Beck, 2013), 171; M. Nicolae, "Amendments to Law no 1/2000 for the reconstruction of the right of ownership over agricultural and forest land through G.E.O. no 102/2001", *Law*, no. 11 (2001): 17; S. Văcăruş, "Holders of the right of ownership over forestry land belonging to the communes of freeholders and yeomen, compossesorates and guards' communities of wealth", *Dreptul*, no 6 (2002): 38.

agricultural or forestry holdings and which were taken over from their owners with the respective land. Thus, Article 31 of Law no 1/2000, in its original wording, provided for the restitution in kind of constructions of any kind belonging to agricultural holdings and which were transferred to state ownership by the effect of Decree no 83/1949, in order to complete some provisions of Law no 187/1945, as well as of the constructions on forest lands, which were part of the forestry holding at the time of state ownership.

After the adoption of Law no 10/2001 it was found that there is an overlap between some of the provisions of the two legislative acts, for the elimination of which a sinuous legislative route was undertaken, which only affected the situation of the constructions taken over with the agricultural land.[1]

At the same time, Law no. 1/2000 also regulated the granting of compensation for land and some constructions, which, for various reasons, could not be restituted in kind.

Unlike Law no 112/1995, Law no 1/2000 did not contain any regulations regarding the way of settling and paying the compensations, referring to a legislative act that was to be adopted at a later date.

## 5. LAW NO 10/2001

Law no 10/14 February 2001 on the legal status of immovable property taken over abusively between March 6, 1945 and December 22, 1989 had as its subject-matter the reparations for the immovable property taken over abusively by the State, by cooperative organizations or by any other legal persons between March 6, 1945 and December 22, 1989, as well as for those taken over by the state on the basis of Law no 139/1940 on requisitions and unrestituted (Art. 1 paragraph (1)][2]. The reason for

[1] For further details on this topic, please see E. Chelaru, *Civil Law. Main Real Rights*,178-179

[2] For further details, please see E. Chelaru, *Reparation Measures Provided by Law no 10/2001*, 33-38.

It was decided that, if the takeover of the building by the State for public utility purposes was not performed by the expropriation procedure, but by means of the conclusion of purchase contracts freely agreed upon by the former owners, the route of the restitution is not open, not even on the basis of Law no 10/2001, nor under Art. 35 of Law no 33/1994, for partial or total reinstatement in the pre-sale situation, the former

granting reparation measures for requisitioned buildings as well starting with 1940 is that the Communist regime, established shortly after the end of the Second World War, did not return them, although, according to the legal provisions in force at that time, the immovable property could solely be requisitioned in use, and the requisition involved only a temporary takeover. [1]

Reparation measures may be claimed only for the immovable property that was and is located on the current territory of Romania.

Having established the principle of restitution in kind, the law provides that, in cases where restitution in kind is not possible, reparation measures by equivalent will be established, which will consist of compensation with other goods or services offered in equivalent by the entity assigned to the settlement of the notification, with the consent of the entitled person or with indemnities granted under the special provisions regarding the regime for the establishment and payment of damages related to the immovable property taken over abusively.

The law regulated several cases where restitution in kind is not possible, an example of which is the situation of the expropriated land, if the works carried out occupy it entirely from a functional point of view. In applying this last legal provision, it was decided to also exempt from the restitution in kind those parts of the expropriated land which, not having constructions built over them, are necessary for their proper use, taking into account the mandatory or, at least, customary standard for the destination of the constructions,[2] but also the land areas on which the sidewalks and the roads are located, "these being intended for access to the houses, for their normal use ..." [3]

Compensations granted under Law no 112/1995 for immovable property which could not be returned in kind were not equal to the value of the immovable property, calculated according to the criteria provided by that law. Article 20 paragraph (2) of Law no 10/2001 provided that the persons were entitled to receive the difference between the value

owners or their heirs having at their disposal the contract-based actions of any seller. S.C.J., Civil Section, Decision no 1461/2002, *Dreptul* no 6 (2003): 244

[1] High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no 1371 of February 7, 2006, *Dreptul* no 1 (2007): 258-259.

[2] High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no 12 of January 5, 2006, *Dreptul*, no 1 (2007): 251-252.

[3] High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no 3417 of March 19, 2009, *Dreptul*, no 1 (2010): p. 211.

received as compensation, updated with the inflation index, and the corresponding value of the property.[1]

## 6. LAW NO 247/2005

Title VII of Law no 247/2005 on the reform of property and justice, as well as some adjacent measures, regulated the regime of settling and payment of damages related to the immovable property that was taken over abusively. Its object was to determine the sources of financing, the amount and the procedure for granting compensation for the immovable property that could not be restituted in kind.

For the purpose of applying the provisions of the new law, two administrative entities were established, namely the Central Compensation Commission, which was empowered to analyse how the claims of the former owners or their heirs were resolved by the entities assigned and to determine the final amount of the indemnities and the National Authority for Restitution of Property, which provided the secretariat of this commission.

The law provided that decisions on compensation for immovable property not returned in kind shall be centralized and verified by the Central Commission. If the Central Commission determined that they were issued in compliance with the provisions of the law, then it had to send the file to an accredited evaluator.[2] The evaluation was to be performed by applying the "International Valuation Standards", respectively, of the standards edited by the International Valuation Standards Committee (IVSC).

[1] The High Court of Cassation and Justice, the Civil and Intellectual Property Section, also ruled in this sense by Decision no 6411 of June 30, 2006.

[2] The decisions that were in the courts at the date of the entry into force of the new law, as a result of their being attacked with an appeal, as well as those that were later attacked in this way within the term prescribed by the law, are exempted." The High Court of Cassation and Justice, Sections united, Decision no LII (52) of June 4, 2007, published in the Official Journal no 140 / 22.02.2008.
On the contrary, in the case of applications submitted to the Central Commission under Law no 247/2005 and which were not the subject of a court decision, it was decided that the courts could not substitute the Central Commission for the settlement of compensation. High Court of Cassation and Justice, Civil Section, Decisions no 4.894 of April 27, 2009 and no 5.392 of May 11, 2009.

Based on the assessment report, the Central Commission issued a decision on the title of compensation. The principles to be respected in the issuance of titles of compensation set out in Article 4 were to grant fair and equitable compensation in relation to domestic and international jurisdictional practice having as its object causes of the settlement of damages for immovable property taken over abusively by the Romanian State, as well as the non-capping of the compensations granted.

Compensation titles could not be sold or purchased and could be capitalized by their conversion into shares issued by the "Proprietatea" Fund, which was a collective investment undertaking of securities, set up as a financial investment company. Most of its capital consisted of shares held by the State in various trading companies. The shares issued by the "Proprietatea" Fund were tradable on the capital market. In order to achieve this desideratum, the law provided that the "Proprietatea" Fund should take the necessary measures to publicly trade its shares.

Law no 247/2005 did not establish the term nor the order in which the Central Commission was to examine the files, which allowed the Central Commission to decide on February 28, 2006 that the order for the analysis of the files would be arbitrary. This judgment was amended on September 16, 2008, when it was established that the files would be examined in the order in which they were registered. In the absence of any legal time-limits, it was decided that the Central Commission be required to rule on claims for repayment or compensation within a "reasonable time", as interpreted in the case law of the European Court of Human Rights.[1]

The compensation granting mechanism did not function properly, mainly because of the delay with which the Proprietatea Fund was established, which is why Law no 247/2005 underwent several amendments. The most important ones were comprised in Government Emergency Ordinance no 81/2007 for accelerating the procedure for granting damages related to the immovable property taken over abusively. The beneficiaries of the "Proprietatea" Fund were granted the possibility to collect a part of the amount in cash, by Government Decision no 128/2008 it was stipulated that after the issuance of the "title of compensation" by the Central Commission, the party interested had the possibility to choose between receiving part of the amount in cash,

[1] High Court of Cassation and Justice, Section of Administrative and Fiscal Litigation, Decisions no 3.857 and 3.870 of November 4, 2008.

within the limit of 500,000 lei, and the remainder in shares and receiving the entire amount in shares. The right of option had to be exercised within 3 years from the date of issue by the Central Commission of the "title of compensation" and the respective applications were analysed in chronological order. However, no time-limit was set for settling these claims.

Payment in cash of the amounts lower than or equal to RON 250,000 had to be made within one year from the date of issue of the payment title and within 2 years for amounts between 250,000 and 500,000 RON.

These legal provisions were adopted in the absence of an impact study, so it was very soon found that the state budget could not pay the damages in the amount determined according to its provisions. In order to maintain the budgetary balance, by Government Emergency Ordinance no. 62/2010, payment in cash of the amounts was suspended for a period of 2 years. During this period, "compensation titles" could only be converted into shares in the "Proprietatea" Fund.

## 7. FINDINGS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The continuous change in the relevant legislation, the attempt to grant more and more generous compensation, the diversity of administrative mechanisms designed to implement the numerous laws containing reparations and the poor functioning of the administrative authorities empowered to apply them led to great delays in solving the claims made by the entitled persons (not even is the process of granting these measures finalized) and to frequent cases of incorrect application of the legal provisions. In turn, this incorrect application, as well as the contradictory nature of some of the rules contained in the various laws, generated a large number of disputes, as well as non-unitary jurisprudence.

Under these circumstances, many people chose to file complaints with the European Court of Human Rights, which found that many of these deficiencies materialized in violation of the provisions of Article 1 of the First Additional Protocol to the Convention, which guarantees the right to property and of Article 6 paragraph (1) of the Convention,

devoted to the right to a fair trial, and obliged Romania to pay considerable damages.

By way of example, we can cite the Cases Vasilescu v. Romania, May 22, 1998, § 51,[1]
by which the Court held that any measure, whether legislative, administrative or linked to the practices applied by the authorities, must be taken into account in order to assess the conduct of the State in the case of deprivation of property. "Indeed, when a matter of general interest is at stake, public authorities are obliged to react in a timely, correct and highly consistent manner."

Similar considerations are comprised in the Decisions Brumărescu v. Romania, October 28, 1999, §§ 34 - 35,[2] Străin et alii v. Romania, July 21, 2006, § 9,[3]; Păduraru v. Romania, December 1, 2005, §§ 23 - 53[4] and Faimblat v. Romania, 13.01.2009, §§ 16 – 17.[5] In the latter decision it was stated that Law no 10/2001 provided illusory protection to persons whose immovable property could not be returned in kind because no reasonable time-limit was set for the payment of compensations.

Even after the entry into force of Law no 247/2005 the situation did not change for the better because the authority set up for the implementation of the respective provisions was not staffed with specialized officials who could verify the accuracy of the assessments made by the approved experts, the press indicating numerous cases in which the goods were overestimated.

No settlement order was established for the claims and, as a rule, it started with those that had as object immovable property of very high value, which soon consumed the funds allocated. Attempts to reschedule payments did not lead to the desired result.

On the other hand, the law also did not contain measures to avoid speculative operations, allowing for the transfer of disputed rights under the conditions of common law. The consequence was that a large number of beneficiaries, exasperated by the slowness with which their claims were solved, assigned their rights in exchange for modest amounts, so

[1] Published in the Official Journal of Romania, no 637/1999.
[2] Published in the Official Journal of Romania, no 414/2000.
[3] Published in the Official Journal of Romania, no 99/2006.
[4] Published in the Official Journal of Romania, no 514/2006.
[5] Published in the Official Journal of Romania, no 141/2009.

that the transferees could obtain compensation in a disproportionately high amount.

Finally, the Proprietatea Fund did not work as expected.

All of this generated a large number of disputes, which, in court cases, received different resolutions, even in identical cases, the number of complaints addressed to the European Court of Human Rights, with a large number of requests, increasing exponentially as well.

Finally, ascertaining the repeatability of claims arising from the malfunctioning of the system of reparation measures conceived by the Romanian State, the European Court of Human Rights ruled a pilot decision[1] in Atanasiu et al. v. Romania, on October 12, 2010, giving Romania a period of 18 months for taking measures to guarantee the effective protection of the rights listed in Art. 6 § 1 of the Convention and in Art. 1 of Protocol no 1, in the context of all the causes similar to the one it settled, in accordance with the principles enshrined in the Convention.

The analysis of the cases pending led the Court to find that the ineffectiveness of the compensation or restitution mechanism continues to be a recurrent and widespread problem in Romania.

Among the causes that led to a steady increase in violations of the rights conferred by the Convention's cited provisions, the Court placed on the first place the gradual extension of the application of repair laws to almost all nationalized immovable property, along with a lack of compensation capping.

The Court also found that "the complexity of the legislative provisions and the changes brought to them were translated into a non-constant judicial practice and generated a general legal uncertainty as to the interpretation of the essential notions concerning the rights of former owners, of the state and of the third-party acquirers of the nationalized immovable property" and the Central Commission set up under the provisions of Law no 247/2005 failed to reach its goal.

The adoption of a new legislative act, corresponding to the provisions contained in the pilot decision, became mandatory.

**8. LAW NO 165/2013.** Law no 165/2013 on measures to complete the restitution in kind or by equivalent of immovable property

[1] Decision no 12 of October 12, 2010, published in the Official Journal of Romania, no 778/2010.

taken over abusively during the Communist regime in Romania[1] fundamentally aims at accelerating the process of settling the unresolved requests formulated by the entitled persons. In order to achieve this goal, the law provided for measures to ensure the application of the principle of restitution in kind, but also the equivalent remedies that could be granted in cases where this principle could not be complied with, unified the procedures for awarding reparation measures by equivalent, setting the terms in which the claims had to be settled, as well as the order of their settlement and capped the amount of compensation.

The provisions of the law apply to applications filed and submitted, legally, to the legal entities, unresolved before the date of its entry into force, to the cases concerning the restitution of immovable property taken over abusively, pending before the courts, as well as to the cases pending before the European Court of Justice Human Rights, suspended pursuant to the pilot judgment of October 12, 2010 in the case of Maria Atanasiu et al. v. Romania, at the date of the entry into force of the law (Article 4).[2]

The reparation measures by equivalent provided by law are compensation with other goods and compensation by value points. If the holder alienates the rights (s)he is entitled to under the property restitution laws, the only remedy to be granted is the compensation by points.

In order to complete the restitution in kind or, as the case may be, the restitution by equivalent of the immovable property taken over abusively during the Communist regime, a special administrative body was set up, namely the National Commission for Compensation of Immovable Property, which functions under the authority of the Prime Minister's Chancellery.

In order to comply with the principle of restitution in kind, the law regulated a procedure for verifying the legality of the decisions issued by the entities assigned to the settlement of the claims and identification of new land that could serve this purpose. In each

[1] Published in the Official Journal of Romania, no 278/2013.

[2] By Decision no 88/2014, published in the Official Journal of Romania no 281 of April 16, 2014, the Constitutional Court rules that the provisions of Article 4, second sentence are constitutional to the extent that the time-limits provided for in Article 33 do not apply to the cases concerning the restitution of immovable property taken over abusively pending before the courts on May 20, 2013.

administrative-territorial unit a commission for land inventory was set up, which inventoried the situation of agricultural land, with or without investments, and of forest lands, in the public or private domain of the state or, as the case may be, of the administrative-territorial unit, which may be subject to the reconstitution of the right of ownership. The lands belonging to the public domain were transferred to the private domain.

If no immovable property to be provided in kind to the eligible persons was identified, the entities invested by the law transmitted to the Secretariat of the National Commission the decisions containing the proposal for compensatory measures, the entire documentation on which they were issued and the documents proving the legal status of the property subject of the restitution at the time of the decision, including any documents relating to demolished constructions. After examining these documents as regards the applicant's entitlement to reparation measures [Article 21 paragraph (5)],[1] and the impossibility of awarding an item of immovable property in kind, the Secretariat of the National Commission proceeds to the valuation of the immovable property that was the subject of the decision, by applying the notarial grid valid on the entry into force of the law and determined the number of points that could be granted. These grids set a minimum value threshold that could be declared by the parties to a legal act transferring the right of ownership over the immovable property, which formed the basis of calculation of the tax due for the respective operation. One point was worth one leu.

The number of points is determined after the deduction of the actual value of the compensation received for the immovable property evaluated.

After verification and evaluation, the National Commission validates or invalidates the decision of the entity invested by the law and approves the score, as the case may be (Article 21 paragraph (8)),[2] and in

[1] By Decision no 686/2014, published in Official Journal of Romania no 68 of January 27, 2015, the Constitutional Court decided that the provisions of Article 21 paragraph (5) are constitutional insofar as they do not apply to the decisions of the entities assigned to the settlement of the notifications issued in the execution of judgments which courts have irrevocably or definitively pronounced, as the case may be, on the status of entitled persons and the scope of the right of ownership.

[2] The provisions of Article 21 paragraph (8) are constitutional insofar as they do not apply to the decisions/provisions of the entities assigned to the settlement of the notifications issued in the execution of judgments which courts have irrevocably or

the event of its validation, issues the decision to compensate the immovable property taken over abusively. The points established by the compensation decision issued on behalf of the owner of the right of ownership, the former owner or his legal or testamentary heirs, cannot be affected by capping measures.

If compensatory measures are granted to persons other than the owner of the right of ownership, the former owner or the legal or testamentary heirs, the beneficiaries will receive a number of points equal to the sum between the price paid to the former owner or his/her legal or testamentary heirs for the transaction of the right of ownership and 15% of the difference up to the value of the immovable asset determined by the assessment according to the notarial scale, without exceeding the value of the immovable asset so established.

The decisions issued by the National Commission shall be communicated within 45 days to the rightful persons, who may appeal within 30 days of receiving them before the Bucharest Tribunal.

The points thus obtained can be capitalized by obtaining cash payment titles. The law also provides for the periods of time in which the payments titles must be issued and for those in which the Ministry of Finance will pay.

Payment titles are issued in the chronological order of issuance of compensation decisions.

## CONCLUSIONS

Application of the principle of restitution in kind and the granting of uncapped financial compensation, especially in the extended form conceived by Law no 247/2005, have produced and continue to produce particularly negative effects on the Romanian economy.

On the one hand, the restitution in kind of agricultural lands has disorganized the agriculture of Romania, a country which, from a net exporter of agri-food products, has become a net importer and the restitution of forest lands has created the premises of unreasonable wood exploitation, with incalculable harmful effects on the environment. Similarly, the restitution in kind of immovable property that had received

definitively pronounced on the status of entitled persons and the scope of the right of ownership. Constitutional Court, Decision no 686/2014, published in the Official Journal of Romania no 68 of January 27, 2015

a public utility purpose, such as educational establishments or hospitals, led to their being evacuated.

On the other hand, even in the absence of an impact assessment, it was obvious to any person in good faith that the granting of monetary compensations equal to the value of the immovable property that cannot be returned in kind, determined through the application of the evaluation standards, is an economically unsustainable measure.

The changes in the political configuration, made after the electoral processes, have also put their imprint on the measures designed by the authorities. These have materialized through the adoption of a fragmented and contradictory legislation that has gradually expanded the scale of reparations to be granted and whose application has generated a lot of conflict between the potential beneficiaries of these measures and authorities on the one hand and between the beneficiaries themselves, on the other hand, a conflict whose resolution was sought before the judiciary. The legislation that regulated the granting of reparation measures for the private immovable property taken over by the state or other legal entities during the communist regime has a clear non-unitary and unrealistic character. If the adoption of the measure of partial restitution of land contained in the land resources law can be explained by the need to restore social order in the rural world, where the inhabitants had started a process of re-entry in possession by way of deed, the subsequent legislative acts devoted to this matter pursued either the satisfaction of the initiators' personal interests (Law No 1/2000 is even called the "Lupu Law", according to its initiator's name), or political goals.

The assessment of this legislation, made in the considerations of the pilot judgment in Atansiu v. Romania, relieves us of further comments.

Of course, the provisions of Law no 165/2013, a legislative act aimed at rationalizing and finalizing the granting of reparation measures, are not absolved of criticism themselves and have already generated a large degree of dissatisfaction as well. The adoption of measures for the harmonization of a legislation that is so diverse, based on which some requests have already been resolved, was, however, impossible.

The main merit of this legislative act is that it gave up granting compensation equal to the market value of immovable property that cannot be returned in kind and resorted to a realistic manner of setting its

amount. Of course, the measure can be considered discriminatory if we take into account the fact that quite a lot of people have already received compensatory damages due to the valuation of buildings according to the international valuation standards, but it is precisely this latter fact that decisively contributed to the blocking of the mechanism under Law no 247/2005.

The law unified the procedures for granting compensation, set time-limits for the application of its provisions and established the principle of solving the claims in the order of their registration, thus removing arbitrariness.

It was also discouraged to speculate on the rights of persons entitled to reparation measures by capping the amount of damages that can be granted to transferees.

Finally, even if it is disadvantageous for persons residing in other regions of the country, the conferral of exclusive jurisdiction to hear appeals to the Bucharest Tribunal has the merit of ensuring a unitary judicial practice.

## BIBLIOGRAPHY

**Books**

1. Chelaru, E.. *Civil Law. Main Real Rights*. ed. 4 Bucharest: C.H. Beck, 2013

**Articles in a print journal**

1. Nicolae, M.. "Amendments to Law no 1/2000 for the reconstruction of the right of ownership over agricultural and forest land through G.E.O. no 102/2001". *Dreptul*, no. 11 (2001): 17;
2. Văcăruş, S. "Communes of freeholders, communes of yeomen, guards' communities of wealth and compossesorates as subjects of law, in the context of the land fund law". *Dreptul*, no 10: 171;
3. Văcăruş, S. "Holders of the right of ownership over forestry land belonging to the communes of freeholders and yeomen, compossesorates and guards' communities of wealth". *Dreptul*, no 6 (2002): 38.

**Case Law**

1. ECHR, Judgment Van der Mussele v Belgium, November 23, 1983, § 48, Series A no 70; Slivenko v. Latvia (dec.) [MC], no 48.321 / 99, § 121, ECHR 2002-II.
2. ECHR, Judgment Beyeler v. Italy [MC], no 33.202 / 96, §§ 109-110, ECHR 2000-I.
3. ECHR, Judgment Vasilescu v. Romania, May 22, 1998, § 51, Reports of Judgments and Decisions 1998-III).
4. ECHR, Judgment Sporrong and Lönnroth v. Sweden, September 23, 1982, § 73, Series A no 52.
5. High Court of Cassation and Justice, Section of Administrative and Fiscal Litigation, Decisions no 3.857 and 3.870 of November 4, 2008.

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# LEGAL RESTRICTIONS ON WORK ON SUNDAYS AND FESTIVE DAYS IN POLAND

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***Abstract:***

*The article discusses legal regulations of Polish labor law regarding work on Sundays and public holidays. These issues relate to the employees' right to weekly rest. General rules concerning work on Sundays and public holidays are regulated in the Labor Code. However, on March 1, 2018, a new law regulating the employment in sales outlets entered into force. It is planned to introduce, within two years, a total ban on working on Sundays and holidays in such facilities. Work will be exceptionally allowed only in selected places of a special nature.*

***Key words:*** *labor law; Poland; work on Sunadys; work on public holidays.*

## INTRODUCTION

In the countries of the Judaeo-Christian civilisation the rule of a six-day working week, besides obvious praxiological reasons (the need to provide necessary rest to those working)[2], has very strong axiological foundations, as it stems from religious imperatives (the duty to refrain from performing work on the seventh day of the week). The rule was, for the first time, enshrined in law by emperor Constantine the Great in 321 AD. Sunday (the Day of Sun – *dies Solis*) was established by him the day of rest, on which day performance of any commercial transactions and handling matters at public offices was forbidden[3]. Over a span of the following seventeen centuries successive generations of the Europeans celebrated Sunday as a festive day, set aside also for a rest needed after

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[2] T. Kotarbiński, *Traktat o dobrej robocie* [A Treatise on Good Work] (Ossolineum, 1982), 383 and 466.

[3] W. H. Carroll, *Historia Chrześcijaństwa*, t. 1 *Narodziny Chrześcijaństwa* [*History of Christianity, Vol. 1: The Birth of Christianity*] (Wrocław, 2009), 554. The principle was further consolidated by emperor Theodosius, and then included in *Codex Iustinianius* (Book 3 –„Concerning Festivals").

the hardships of the weekly work. What is more - a close link existing between the rhythm of daily life and the laws of religion resulted in many religious holidays or public festivals (such as coronation anniversaries or other lay events) celebrated during the year. According to conservative estimates, in late Middle Ages the number of working days in a year was, on the average, 265-270, or 5 days per week. It can be thus assumed that, statistically, every week an additional feast day (besides Sunday) was enjoyed by the population[1]. While the days in question were made holy, they undoubtedly provided a most important role as periods of rest. The right to a free Sunday was not challenged in the times of social changes initiated by the industrial resolution and labour transformations related thereto (shifting the focus from agricultural and artisan work to contract work).It is therefore not surprising that the rule of a weekly uninterrupted rest period was relatively early reckoned by the International Labour Organisation as one of the most fundamental employment-related standards. As early as in 1921, in Convention No.14 concerning the application of the weekly rest in industrial undertakings it was stated that the staff employed in any industrial undertaking, public or private, should enjoy, in every period of seven days, a period of rest comprising at least twenty-four consecutive hours. It also should, wherever possible, be fixed so as to coincide with the days already established by the traditions or customs of the country or district. A similar rule was established by Convention No. 106 of 1957 concerning weekly rest in commerce and offices and in the European Social Charter of 1963.[2]As follows from the presented regulations, not only should the principle of a six-day working week be observed, but the day of rest should be, wherever possible, the same for all and fall on the day of the week approved by the tradition or customs of the country.

Presently, the rule of six-day working week is usually not contested. In addition, from the 4th until the latter half of the 20th century Sunday was widely accepted in Europe as the seventh day of the week, intended for rest in accordance with the tradition and customs.

[1] I. Skierska, *Sabbatha sanctifices. Dzień święty w średniowiecznej Polsce* [*Sabbatha Sanctifices. The Holy Day in Mediaeval Poland*] (Warszawa, 2008), 188.

[2] As Art. 2 para. 5 of the ESC provides: „With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: (...) 5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest."

The privileged nature of Sunday as the seventh day of rest in the week was originally emphasised also in the EU law. As Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (no longer valid now) provided[1]: "Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3. (...) The minimum rest period referred to in the first subparagraph shall in principle include Sunday".Directive 93/104/ECwas challenged by the United Kingdom on the grounds of amisuse of Community powers, as grantedby the EC Treaty. In the view of the UK government, the then Art. 118a of the EC Treaty was the appropriate legal basis for the adoption by the Community only of measures whose principal aim was the protection of the health and safety of workers. As the Court of Justice ruled that no connection had been shown between Sunday rest and labour safety and health (as if such a connection existed in case of any other day of the week), the provision in question was amended by a removal of the sentence concerning inclusion of Sunday into the weekly period of rest; the respective judgment of the CoJ of 12 November, 1996 (C-84/94) thus disregarded the above mentioned, centuries-old tradition. The following Directive (2003/88/ECof 4 November, 2003) concerning certain aspects of the organisation of working time[2], which repealed Directive 93/0104/EC, contains a provision where no reference to Sunday can be found[3]. Certainly enough, Sunday does fall, as a rule, within the uninterrupted period of weekly rest, although the grounds for such a qualification of the day have been officially removed from the EU law.

[1] OJ L.1993.307.18 of 1993.12.13.
[2] OJ L.2003.299.9 of 2003.11.18.
[3]For a broader discussion of the subject see P. Grzebyk, „Ochrona odpoczynku niedzielnego", *Czas pracy, praca zbiorowa pod red* L. Florka [*Protection of Sunday Rest Time in Working Time*, ed. L. Florek], (Warszawa, 2011).

## 1. GENERAL REGULATIONS CONCERNING WORK DONE ON SUNDAYS AND HOLIDAYS

In Poland Sunday has been recognised by law as a non-working day since 1919 r.[1] (currently under the Act of 18 January, 1951, on Non-Working Days)[2]. In addition, under statutes providing for relations of the State with churches and religious denominations, employees being members of minority churches and faith-based associations are entitled to days off from work on the days which are festive for the persons (the employer being entitled to make the leave conditional upon the employee making up for the day off at some other time)[3].

The recognition of Sundays and other (public and religious) festive days mentioned in the Act of 1951 as days off work means a general prohibition on making employees work on the days. Doing work then should therefore be considered an exclusion from the general rule[4]. Detailed regulations concerning the ban are contained in the Labour Code, enacted as long ago as in 1974.The prohibition of work on Sundays and other days off has, of course, never been an absolute one[5].The law provides for many exclusions from the ban. The work on Sundays and other days recognised by law as non-working ones is

[1] Act of 18 December, 1919 on Working Time in Industry and Commerce (Journal of Laws No. 27, item 227).

[2] Unified text: Journal of Laws of 2015, item 90. In addition, non-working days are public holidays (4 days) and 9 days of religious festivals (in practical terms 7 days, as two of the church festivals always fall on Sunday).

[3] Z. Hajn: *Prawo pracowników należących do mniejszości wyznaniowych do zwolnienia od pracy w celu uprawiania kultu religijnego*, (w:) *Człowiek, obywatel, pracownik. Studia z zakresu prawa. Księga Jubileuszowa poświęcona Profesor Urszuli Jackowiak* ["The Right of Employees Belonging to Religious Minorities to Have a Day Off for Worship Purposes" in *Man, Citizen, Employee. Studies in Jurisprudence. A Jubilee Book in Honour of Professor Urszula Jackowiak*, *Gdańskie Studia Prawnicze*, vol. XVII, (Gdańsk, 2007) 123.

[4] A. Sobczyk in *Kodeks pracy. Komentarz* [Labour Code. A Commentary], ed. A. Sobczyk, 3rd edition (Warszawa, 2017), 666.

[5] Even in prohibitions resulting from religious rules most often a ban on „non-necessary" work done on Sundays and holidays is mentioned. A comprehensive doctrine on the subject can be, by the way, found in the writings of mediaeval Christian scholars and papal decrees. For example, in the opinion of Thomas Aquinas the ban put on work on holidays is not broken by work of service aimed at worshipping the God, and the „Decretals" of Pope Gregory IX allow one to do the necessary work (for a broader discussion see Skierska, *Sabbatha sactifices…*,418 *et seq.*).

allowed in cases where such work is necessary due to its specificity or nature, instances being enumerated in law. These include: a need to carry out rescue operations and overhauls, doing shift or continuous work, work done at healthcare facilities, in transport and communication, work aimed at protecting persons and property and work in agriculture, and other work needed considering its social utility and satisfaction of daily needs of the public (e.g. in catering, at hotels, cultural facilities). Under special legal arrangements (to be explained further on) counted among the allowed work on Sundays and holidays is, to a certain degree, work at commercial establishments.

The work allowed on Sundays and festive days is subject to a specific legal regime. Firstly, the law provides that if no other regulations have been established at the employer's, deemed to be work done on Sundays and festive days shall be the work between $6^{00}$on such a day and $6^{00}$on the day that follows (another time frame having been fixed as regards the work at commercial establishments). For the work done on Sundays the employer shall provide the employee with another day off within 6 days preceding or following the Sunday, and for the work done on holidays – within the accounting period of one to four months, as a rule. Where it is not possible to provide a day off within the above mentioned period, the employee is entitled to remuneration for working overtime. In addition to the above said, an employee working on Sundays should be given a free Sunday at least once every four weeks.

## 2. PROHIBITION OF WORK ON SUNDAYS AND HOLIDAYS AT COMMERCIAL ESTABLISHMENTS

On 1 March, 2018 essential amendments made to legal regulations concerning the work done on Sundays and festive days at commercial establishments came into force. Earlier, before October 2007, the list of exclusions from the prohibition of work on Sundays and holidays had mentioned also sales outlets. The said means that in practical terms there had been no limitations regarding work in commerce and, consequently, a majority of shops (big shopping malls being no exclusion) stayed open 7 days a week. In October, 2007, a provision was added to the Labour Code banning work at commercial establishments on holidays only, work at the sales outlets remaining allowed on Sundays, albeit only as regards the work needed for its social

utility and satisfying the daily needs of the society. The limitation was, however, interpreted so widely that all shops were, as a rule, open on all Sundays (save for the Sundays which were, at the same time, days of public - lay or religious - festivals).

The freedom to make employees work on Sundays, with almost no constraints, was long contested by part of the public opinion. The voices of protest came, first of all, from representatives of Christian churches, but also from big trade unions. They were, however, neglected by many and blamed as allegedly conflicting with the principle of economic freedom. It was argued that Poland's economy could not afford a ban on commercial activities on Sundays and holidays as it would affect the economic growth, resulting in a rise of unemployment and a drop in the salaries of the staff employed in commerce. It was also being predicted that the ban would bring the country back to the times of "real socialism" and would hit the very foundations of market economy. But pressure on the government was mounting. Poland's largest trade union, "Solidarity", even drew on the heritage of the August agreements, signed in Gdańsk on 31 August, 1980, which gave rise to the independent trade union movement in the country, and contributed to later socio-economic changes in countries of the so-called Soviet bloc. One of the August demands was the introduction of free Saturdays, hence – according to the trade unionist – securing Sundays as days off to as wide circles of the working people as possible was justified even more. Restoration of free Sundays to nearly a million people employed in commerce would thus mean executing the will of the "first Solidarity" (existing and operating legally in the years 1980-1981). Eventually, making amendments to the law became possible after the parliamentary elections of October, 2015. The incoming government, formed by political forces which, before the elections, had signed a programme agreement with "Solidarity" trade union, satisfied part of the social demands of trade unionists, including limitations on trading on Sundays[1]. On 10 January, 2018 the Act on Limitation of Commerce on Sundays and Holidays as well as Certain Other Days was passed[2] and came into force on 1 March, 2018. Under the Actfull limitation of work at commercial establishments will take place as of 1 January, 2020, transitional solutions being applied until that

[1] Other demands included, *inter alia*, lowering of the retirement age to 65 years for men and 60 for women, raised by the previous government to 67 years.

[2] Journal of Laws of 2018, item 305, hereinafter referred to as the "Act".

time. The latter will consist in work being allowed in shops on the first and last Sunday of each month until the end of 2018 and only on the last Sunday in 2019.

The Act generally forbids doing work in commerce or performing gratuitous services, related to trading, in commercial establishments on Sundays and holidays, as well as on 24 December and on the Saturday immediately preceding the first day of Easter. The ban concerns both employees within the meaning of labour law, persons performing work or providing services under civil law contracts, and persons directed to work by temporary work agencies (intermediating between employees and employers). Time frame of Sunday and other days to which the Act pertains has been determined in a way different than that applied in the Labour Code. The Act provides that deemed to be work in commerce and performance of commerce-related services on Sundays and holidays at commercial establishments shall be the work done within the 24 consecutive hours falling between $24^{00}$on Saturday and $24^{00}$on Sunday and between $24^{00}$on the day immediately preceding a holiday and $24^{00}$on the festive day, respectively. The Act concerns various types of commercial establishments, i.e. all facilities where commerce takes place and commerce-related activities are carried out (*inter alia* shops, department stores, stalls etc.). The Act categorically rules out the running of commerce on Sundays and holidays (with the exclusions discussed below), but what the legislator is actually aiming at is prohibiting assignment of work to employees and other persons hired under civil law contracts. This means that commercial establishments may be open on Sundays and holidays if the commerce is run personally by the entrepreneur being a natural person, in his/her own aim and on his/her own account, i.e. where it is the owner[1] (or a person having other rights to the establishment) that services the customer himself/herself without hiring others to assist him/her.

The ban on commerce is not absolute, of course. The Act enumerates types of outlets and activities not covered by the prohibition. Examples include: petrol stations; florists; drugstores; the establishments selling, for the most part, souvenirs, religious articles, press, public transportation tickets, tobacco articles; gambling and betting outlets; post offices; festivals and fairs; outlets in sea- , river- and airports and

[1] It seems that members of the entrepreneur's family are also taken into account in that respect.

(railway and bus) stations; bakeries, confectioneries and ice-cream makers; restaurants and bars etc.

As seen above, the list of exclusions from the prohibition to do work on Sundays and holidays is rather extensive. It can be thus stated that even after 1 January, 2020 and the lapse of the transitional period of gradual implementation of the statutory constraints, the ban on commerce will not pertain to quite many commercial outlets providing selected services satisfying essential consumer needs. The Act additionally allows commercial outlets to be open, without any limitations, on two consecutive Sundays preceding the first day of Christmas, the Sunday immediately preceding the first day of Easter and the last Sundays falling in January, April, June and August.

Certain limitations have also been imposed on commercial activities on 24 December, i.e. the Christmas Eve and the Saturday immediately preceding the first Day of Easter. On those days it is forbidden to employ staff at commercial establishments after $14^{00}$, the employees' right to remuneration for the time not worked owing to a reduction of the working day being retained.

To enforce the general ban on making employees and other persons work at commercial establishments on Sundays and holidays, the legislator has provided for liability of entrepreneurs under criminal and administrative criminal law. And thus assignment of work in spite of the prohibition is a petty offence penalised with a fine of PLN 1,000 up to 100,000.The role of public prosecutors in cases of that kind is played by labour inspectors who have been authorised to inspect adherence to law by entrepreneurs involved in commercial activities without warning and round the clock.

In addition, persistent or malicious breaking of the prohibition to employ staff on Sundays, festivals and other days covered by the ban is qualified as a criminal offence prosecuted under the mode prescribed by provisions of the criminal law.

## CONCLUSIONS

The limitations on employment on Sundays and festivals make up an essential part of the protective measures established by labour law provisions. They combine the function of securing rest to employees with their role of a measure allowing the society to celebrate certain days due

to lay or religious reasons. Although labour law sets up limitations to work done on days being days off by law, it nevertheless provides for exclusions from the rule. As far as the work allowed on Sundays and holidays is concerned, additional limitations have been set up: a duty to provide a day off to those employed, and where the latter is not possible – an additional remuneration.

Work at commercial establishments is treated by the legislator in a special way. Since 2018 the establishments have been exempted from general provisions of the Labour Code. They have been removed from the list of cases in which work on Sundays and festive days had been allowed and have been made subject to a special legal regime. The relatively short time that has passed since the moment of introduction of the limitations placed on Sunday and holiday work in commerce does not allow for a comprehensive assessment of the established legal solutions. In particular, macroeconomic effects of the Act of 2018 are not known yet. Nevertheless, it seems that the apocalyptic visions of the condition of Poland's economy, free of commerce made on Sundays (such as a dramatic drop in GDP or a rapid growth of unemployment) are rather far from reality. In general, the new regulations are not violated, either, although attempts to circumvent them have been noted (e.g. opening shopping malls situated near railway stations under the excuse of the malls allegedly performing the role of the stations).

The public has taken quite a favourable attitude towards the imposed limitations. By initial surveys, more than half of the population find the new law to be good (33% stating that it is „very good", 19% - „rather good", 20% - „definitely wrong", 21% - „rather wrong", and 7% not having any opinion)[1]. Reflected in the results are opinions formed almost immediately, after just a few Sundays on which commercial activities were stopped. Time will show if the social opinions are likely to change (whether in favour of the new solutions or not). Only with time may it be also decided whether the limitations in question should be corrected, and in what way.

[1] https://wpolityce.pl/polityka/386762-a-miala-byc-katastrofa-sonda.

## BIBLIOGRAPHY

### Books

1. Carroll, W. H. *Historia Chrześcijaństwa*, t. 1 *Narodziny Chrześcijaństwa* [*History of Christianity, Vol. 1: The Birth of Christianity*]. Wrocław, 2009.
2. Grzebyk, P. „Ochrona odpoczynku niedzielnego", *Czas pracy, praca zbiorowa pod red* L. Florka [*Protection of Sunday Rest Time in Working Time*, ed. L. Florek]. Warszawa, 2011.
3. Hajn Z. *Prawo pracowników należących do mniejszości wyznaniowych do zwolnienia od pracy w celu uprawiania kultu religijnego*, (w:) *Człowiek, obywatel, pracownik. Studia z zakresu prawa. Księga Jubileuszowa poświęcona Profesor Urszuli Jackowiak* ["The Right of Employees Belonging to Religious Minorities to Have a Day Off for Worship Purposes" in *Man, Citizen, Employee. Studies in Jurisprudence. A Jubilee Book in Honour of Professor Urszula Jackowiak*, *Gdańskie Studia Prawnicze*, vol. XVII. Gdańsk, 2007.
4. Kotarbiński, T. *Traktat o dobrej robocie* [A Treatise on Good Work]. Ossolineum, 1982.
5. Sobczyk A. in *Kodeks pracy. Komentarz* [Labour Code. A Commentary], ed. A. Sobczyk, 3rd edition. Warszawa, 2017.
6. Skierska, I. *Sabbatha sanctifices. Dzień święty w średniowiecznej Polsce* [*Sabbatha Sanctifices. The Holy Day in Mediaeval Poland*]. Warszawa, 2008.

### Websites

1. https://wpolityce.pl/polityka/386762-a-miala-byc-katastrofa-sonda.

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# SOME REMARKS ON THE AMENDMENT TO THE ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY IN POLAND

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***Abstract:***

*In 2017, two amendments to the Law on the National Council of the Judiciary were adopted. The first one was vetoed by the president. However, the next amendment was not much different when it comes to important matters from the first one. Both amendments were questioned as to their compliance with the Constitution, especially in regard to the method of appointing judges for the members of this body and because of the interruption of the constitutionally determined term of office of judges currently sitting in the Council. The amendments were also critically assessed by the Venice Commission.*

***Key words:*** *Poland; National Council of the Judiciary; amendments; judge; veto.*

## INTRODUCTION

The Constitution of the Republic of Poland of 1997[2] fully meets the standards of modern European constitutionalism. In particular, it guarantees the principle of a democratic state ruled by law (art. 2), the principle of the division of powers (art. 10), the principle of the independence of courts (art. 173) and the principle of the independence of judges (art. 178).

Art. 10 of the Constitution clearly states that "the system of government of the Republic of Poland shall be based on the division and balance between the legislative, executive and judicial powers", the latter being vested in "courts and tribunals". The Constitution regulates them in chapter VIII, emphasizing that"the courts and tribunals shall constitute a separate power and shall be independent of other branches of power" (art. 173)". Nevertheless, "the administration of justice" is reserved only for certain types of courts expressly mentioned in art. 175 p. 1 of the

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[2]Official Journal of Laws "Dziennik Ustaw", no 78, item 483, with later amendments.

Constitution. In accordance with art. 45 p. 1 (under the title "Personal freedoms and rights" in Chapter II of the Constitution) – "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". The presumption of justice in all matters speaks in favor of the "common courts".

According to the Constitution, judges are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary, for an indefinite period of time. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. They cannot belong to political parties, trade unions or perform public activities incompatible with the principles of independence of courts and judges. Judges shall not be removable. The recall of a judge from office, suspension from office, transfer to another bench or position against his will, may occur only by virtue of a court judgement and only in the instances prescribed in a statute. A judge may be retired as a result of illness or infirmity which prevents him from discharging the duties of his office according to the procedure determined by a statute (art. 178-180). According to art. 182 of the Constitution, the scope of citizens' participation in the administration of justice shall be specified by a statute.

In regard to the Supreme Court, the Constitution, among others, specifies that the First President of the Supreme Court shall be appointed by the President of the Republic of Poland for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court (art. 183 p.3).

A significant constitutional position has been assigned to the Constitutional Tribunal regulated in art. 188 - art. 197 of the Constitution. It not only decides about the hierarchical conformity of normative acts, but also about the conformity to the Constitution of the purposes or activities of political parties, constitutional complaints, competence disputes between central constitutional organs of the State and the President's temporal inability to hold office. Its judgements are universally binding and final (art. 190 p.1), and they are subject to immediate publication in the official journal of laws in which the original normative act was promulgated (art. 190 p. 2). The Constitutional Tribunal consists of 15 judges elected individually by the Sejm for nine years from amongst persons with significant legal knowledge. The

President and Vice President of the Tribunal are appointed by the President of the Republic from amongst candidates presented to him by the General Assembly of Judges of the Constitutional Tribunal. The judges of the Constitutional Tribunal are also independent in the exercise of their office and are subject only to the Constitution. The organization of the Tribunal and proceedings before the Tribunal are determined by a statue. The basic constitutional solutions in regard to the judiciary clearly indicate that "they fit into the canon of solutions functioning in democratic countries"[1].

In regard to the National Council of the Judiciary, the Constitution provides that this body "shall safeguard the independence of courts and judges" (ar. 186 p. 1). In order to perform that task the Council may make applications to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges. Importantly, the Constitution itself defines the composition of the National Council of the Judiciary (art. 187) which consists of: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic, 2) fifteen judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts, 3) four members chosen by the Sejm from amongst its deputies and two members chosen by the Senate from amongst its senators. The term of office of those chosen as members of the National Council of the Judiciary is four years. The organizational structure, the scope of activity and procedure for work of the National Council of the Judiciary, as well as the manner of choosing its members shall be specified by a statute[2].

[1]See more: K. Grajewski, „Podstawowe założenia ustrojowe władzy sądowniczej w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997" r. /in:/ J. Boszycki and others (eds.), *Aktualni problemisuczasnegokonstitucionalizmu (na prikładiUkraini ta Respubliki Polsza*), (Kijiv, 2017); see also – W. Skrzydło (ed.), *Sądy i trybunały w Konstytucji i w praktyce* (Warszawa, 2005) and A. Szmyt (ed.), *Trzecia władza. Sądyitrybunały w Polsce*, (Gdańsk, 2008).

[2]See: A. Rytel – Warzocha, P. Uziębło, "National Council of the Judiciary as the Guardian of the Independence of Judges and Courts in Poland in the Light of Recent Legislative Amendments", in *The International Conference „European Union's History, Culture and Citizenship" 10th edition* (Bucharest: C.H. Beck Publishing House, 2017).

It should be also mentioned that the doctrine and the jurisprudence emphasize the broad meaning of constitutional provisions concerning the division of power and the judiciary which shall not be limited to the organizational structure of state organs, but is particularly important for the protection of civil rights. This is about avoiding the possibility of abuse of power by any of its segments[1], but in particular about the citizens' right to court (art. 45 p. 1). The meaning of the assumptions of the tri-division of power - in the area of our interest – is that without assuring the specific position of the "third power" (independence of courts and judges) by the legislator, it would be difficult to talk about the reality of citizens' right to due processsatisfyingconstitutional standards.

The second important aspect is the issue of the "separateness" of the third power[2]. This separateness is also of a guarantee nature for the principle of court independence and the citizen's right to due process satisfying constitutional standards.

The aforementioned constitutional frameworks of the "third power" have been important from the point of view of constitutional disputes since the end of 2015. In the autumn 2015 right-wing parties won parliamentary elections and also - a few months earlier – the presidential election. They won the absolute majority of seats in both chambers of the parliament but they did not obtain the majority of seats needed to amend the Constitution. However, they were given the opportunity to create the government and freely pass laws. By way of legislation and constitutional practice, in cooperation with the President, they began the process of the destruction of the Polish constitutional system. Its essence is thetakeoverof the "third power" in order to eliminate control over the parliament and government. The paralysisof the Constitutional Tribunal in 2016 became a symbol. It was also connected with subordinating the Prosecutor's Office to the executive and ensuring that the Minister of Justice has a significant influence on the judiciary. In 2017, the anti-constitutional political and legal campaign

[1]See: P. Sarencki, "Wstęp do art. 1-29", in L. Garlicki, M. Zubik (ed.), *Konstytucja Rzeczy pospolitej Polskiej*. *Komentarz, v. 1* (Warszawa, 2016) 331-332.
[2]Seemore: R. Hauser, „Odrębność władzy sądowniczej w doktrynie i orzecznictwie Trybunału Konstytucyjnego – zagadnienia wybrane", *Krajowa Rada Sądownictwa* No. 1 (2015).

covered the area of common courts and the Supreme Court. The culmination was the "takeover" of the National Council of the Judiciary[1].

## STATUS OF THE NATIONAL COUNCIL OF THE JUDICIARY

In the light of the abovementioned provisions of the Constitution, there is no doubt that the National Council of the Judiciary is fundamental forthe functioning of the judiciary. The Constitution of 1997 defines the function of this body, its essential competences and composition, referring more detailed matters to statutory regulation. In the Polish constitutional tradition, the National Council of the Judiciary is a relatively new body as it was introduced to the Constitution then in force at the beginning of the constitutional transformation by the constitutional amendment of April 1989[2], following the results of the "Round Table" negotiations. The narrow regulation defined that the President shall appoint judges at the request of the National Council of the Judiciary. However, it was a milestone, because it created a special type of a state body representing the judiciary, recognized in modern democracies as an important guarantee of the judiciary independence[3]. The Council is functionally associated with the judiciary. The currently binding Act on the National Council of the Judiciary was adopted on May 12, 2011[4].

An organ of this type is traditionally perceived as a *sui generis* "representative" of the judiciary - essential for guaranteeingits independence – in relations with other constitutional bodies[5]. For the genesis of this organ in Poland, the strive of social forces- during the Round Table negotiations - to change the manner of appointing judges in

[1]Some parts of the contribution presented at the Conference *Bratislava Legal Forum 2018* (22-23.02.2018) – A. Rytel-Warzocha, A. Szmyt, "Dispute over the reform of the "third power" in Poland" - have been used in the article

[2]Official Journal of Laws „DziennikUstaw" No 19, item 101.

[3]Seemore: K. Grajewski, „Zmiany status prawnego Krajowej Rady Sądownictwa", in Z. Witkowski and others (ed.), *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej* (Toruń, 2017), 91 and next.

[4]Official Journal of Laws „DziennikUstaw" No 126, item 714; unified text: Official Journal of Laws „DziennikUstaw" 2016, item 976 with later amendments.

[5]Seemore: L. Garlicki, „Uwaga 2 do art. 186", in L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz, v. IV* (Warszawa, 2005).

order to provide institutional guarantees and eliminate the lack of independence of courts was important[1].

These forces considered the postulate of establishing such a body an indispensable condition for a new constitutional structure of the state. What is important - at the basis of the implementation of the idea there was a clear assumption that the Council should be composed of judges. It is worth recalling that Poland was the first country transforming the constitutional system in which the postulate of establishing an independent judicial council was implemented[2]. Following the aforementioned amendment of 1989 to the Constitution of the Polish People's Republic, a corresponding provision of art. 42 was introduced to the so-called Small Constitution of 1992[3]. However, it only continued the previous narrow scope of regulation[4].

The Constitution of the Republic of Poland of 1997 also clearly indicates (art. 179 in conjunction with art. 144 p. 3 p. 17) that, in the context of cooperation between the National Council of the Judiciary and the President of the Republic of Poland in regard to appointing judges, "it is not the task of the President, but the National Council of the Judiciary to uphold the independence of courts and the independence of judges"[5].

On March 14, 2017, the government submitted a draft bill[6] to amend the existing law of 2011. It focused on changing the way of electing judges to the National Council of the Judiciary. The judges were to be elected by the Sejm from among candidates indicated by the Marshal of the Sejm. The associations of judges had - according to the

[1]Seemore: Grajewski, „Zmiany status prawnego..", 91-95.

[2]P. Tuleja, „Konstytucyjny status Krajowej Rady Sądownictwa", in P. Tuleja (ed.), *Krajowa Rada Sądownictwa. XX-lecie działalności* (Warszawa, 2010), 61.

[3]Ustawa konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym (OfficialJournal of Laws „Dziennik Ustaw" No 48, item 426 with lateramendments).

[4]More detailed issues were still regulated by the Law on the National Council of the Judiciary of 20 December 1989 r. (Official Journal of Laws „DziennikUstaw" No 19, item 101). The second Law on the National Council of the Judiciary was adopted on 27 July 2001 (Official Journal of Laws „DziennikUstaw" No 100, item 1082, unified text: Official Journal of Laws „DziennikUstaw" No 11, item 67 with later amendments ).

[5]J. Ciapała, „Charakter kompetencji Prezydenta RP. Uwagi w kontekście powoływania sędziów", in *Przegląd Sejmowy* No 4(2008): 41.

[6]The Sejm document No 1423/VIII term of office. In the voting on 7 April 2017 r. the Sejm did not accept the request to reject the draft in the first reading.

draft - only the right to submit recommendations to the Marshal of the Sejm. This did not mean that the candidate was legally registered. The essence of the problem was not changed by "cosmetic" adjustments made during the parliamentary work on the draft. The prescribed procedure could not prevent the politicization of the elections of judges to the Council or prevent the ruling majority from pushing through their own candidates. The draft clearly violated art. 187 p. 1 of the Constitution, which does not definethe Sejm as the entity responsible for electing judges to the National Council of the Judiciary.

Although the provisions of the Constitution do not explicitly state that the election of fifteen judges to the National Council of the Judiciary shall be made by judges, art. 187 p. 1 p. 3 expressly states that the Sejm elects four deputies to the National Council of the Judiciary. So, as the Constitution clearly indicates in art. 187 p. 1 p. 3 that the deputies – the Council members are elected by the Sejm (senators by the Senate of the Republic of Poland), the legislator clearly did not want to entrust the parliamentary body with the election of fifteen judges. The Constitution clearly points that the parliament is to have "its" influence on the National Council of the Judiciary through deputies and senators, and not through other categories of Council members. If it was to be different, the Constitution would shape the Sejm's competence differently and clearly. The amendment proposed in the draft would lead to the situation that as many as 21 members out of all 25 members of the Council are elected by the parliament. Such solution would eliminate the constitutional assumption about the "mixed" character of the Council as a specific organ of the self-government of judges. Therefore, the draft violated art. 187 p. 1 of the Constitution, but also the principle of the division of power and balance between state authorities (art. 10) and the principle of the independence and separateness of the judiciary (art. 173 and art. 186 p. 1)[1]. This met with strong criticism from the legal and constitutional point of view, among others expressed in the opinion submitted by the National Council of the Judiciary[2]. Many years before,

[1]Grajewski, „Zmiany statusu prawnego…", 104-105, also: R. Piotrowski, „Konstytucyjne granice reformowania sądownictwa", *Krajowa Rada Sądownictwa*, No 2 (2017): 14-15.

[2]"Opinia Krajowej Rady Sądownictwa z 30.01.2017 r. w przedmiocie rządowego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw", in *Krajowa Rada Sądownictwa* No 1 (2017).

the Constitutional Tribunal also stated that art. 187 p. 1 p. 2 of the Constitution expresses the "principle of electing judges by judges"[1]. These are also international standards, shaped by the Committee of Ministers of the Council of Europe, the Venice Commission and the Consultative Council of European Judges[2]. It should be also added that a different view should be assessed as a surprising novelty in the science of constitutional law. It would not take into account the far-reaching effects of such reasoning, completely abstracting from the constitutional position of the Council.

The draft of the amendment also provided for the expiry of the mandates - during the term of office - of judges who were members of the National Council of the Judiciary, despite the fact that the Council is a body provided for in the Constitution and its art. 187 par. 3 determines the 4-year term of office of elected Council members. The explanatory note to the draft did not indicate any extraordinary reasons that would be constitutionally justified. Recalling the judgment of the Constitutional Tribunal in this respect (case no. K 25/07) was clearly manipulative. In this judgment, the Constitutional Tribunal indicated that "limitations may be introduced during the term of office of constitutional and statutory organs, if it is justified by an important public interest". The statutory proposal was clearly contrary to the constitutional principle of the rule of law (art. 2). This contradiction was indicated in many professional legal opinions.

An important element of the justification for the expiry of the mandates of judges sitting currently in the Council was to establish a "common" term of office of all judges elected to the Council - instead of the "individual" term of office ofparticular judges. The applicant who

[1]The judgement of 18 July 2007 (case number K 25/07) – see: OTK-A 2008, No 3, Item 44. This opinion is obvious in the doctrine of constitutional law–see: M. Masternak – Kubiak, M. Haczkowska, *Komentarz. Konstytucja Rzeczypospolitej Polskiej* (Warszawa, 2014) 475-476; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warszawa, 2009), 820.

[2]Grajewski, "Zmiany status prawnego…", 108. The standards recalled to by the author as examples provides that "no less than the half of the members of judiciary councils shall be judged elected by their representatives from among judges of all levels of judiciary" and that „councils of judiciary serve to protect judges against political influences, therefore it is difficult to accept the entirely new composition of the council being the result of parliamentary elections", as well as "in order to avoid manipulations and illegal pressure, judges elected by judges shall be the majority of council members".

introduced the draft recognized the expiry of current mandates as the only possible solution in such a situation. The Constitutional Tribunal's judgment of 20 June 2017 in case K 5/17 turned out to be "helpful" after the submission of the draft amendment. The Tribunal ruled that art. 13 p. 3 of the binding Act on the National Council of the Judiciary "understood in such a way that the term of office of members (...) elected from among the judges of ordinary courts is individual, is inconsistent with art. 187 p. 3 of the Constitution"[1]. In the justification to the judgment, the Constitutional Tribunal did not indicate any argument in this regard. It only concluded that "the construction of the constitutional provision" indicated that it was "one common term of office". It is worth noting that the Tribunal referred in its judgement to all "elected" members of the National Council of the Judiciary. Therefore, it directly pointed out that it should concern all 15 judges of individual courts as well as 4 deputies and 2 senators. In the draft amendment to the act, the argument concerning the expiration of the term of office, however, was referred only to judges, omitting the deputies and senators currently sitting in the Council.

The draft amendment also divided the National Council of the Judiciary - constitutionally uniform - into two separate "assemblies". In practice, one assembly was supposed to have - through its composition - a political character. The decisions of the Council were to be made separately by both assemblies, which in fact strengthened the "political" part of the Council and its status. The above mentioned proposals were contrary to the Constitution, and were in conflict with the assumption of the uniform character of the Council, provided for in art. 187 of the Constitution. Even earlier in the doctrine it was emphasized that the mixed nature of the Council did not mean its internal division into curia (teams), because the Council shall be a unified constitutional collegial body[2].

The analysis of the above draft amendment to the Act on the National Council of the Judiciary leads to the conclusion that its main goal was to gain "a strong, even decisive influence on the activities of this body by the currently governing political forces"[3]. The Sejm adopted

[1] OTK – A 2017, item 48.
[2] Gralicki, „Uwaga 3 do art. 187", in L. Garlicki (ed.), *Konstytucja* …
[3] Grajewski, "Zmiany status prawnego…", 118. The author rightly concluded that „governmental proposals not only in certain parts but in general aim to prevent or at

the amendment on 12 July 2017 without significant changes[1]. As the Senate did not introduce any amendments, the act was handed over to the President of the Republic on 17 July 2017 for signature. On 31 July 2017 - pursuant to art. 122 p. 5 of the Constitution - the President refused to sign the bill and forwarded it to the Sejm for reconsideration[2]. The Chancellery of the President published information in which it was pointed out that "the main issue submittedto the Sejm for review concerns the change of rules for the election of judges to the National Council of the Judiciary. The new procedure for electing judges to the National Council of the Judiciary by the Sejm requires the introduction of a requirement that this election should be made by a qualified majority of 3/5 votes"[3]. It was indicated that such choice would guarantee the appointment of Council members not only by the parliamentary majority, but by consensus of various parliamentary groups. At the same time, the beginning of work on the presidential draft amendment to the Act on the National Council of the Judiciary was announced.

On 26 September 2017, the presidential draft amendment of the Act on the National Council of the Judiciary was submitted to the Sejm[4]. The Act was adopted by the Sejm on 8 December 2017. The Senate did not introduce any amendments. The President signed the adopted amendment on 20 December 2017[5].

The assessment of this phase of "reforming" the National Council of the Judiciary makes it possible to conclude that it was still focused on issues concerning the procedure of electing judges to this body. In his proposal, the President did not question - as was already evident at the stage of the veto to the amendment previously adopted by the Sejm - the very idea of delegation the competence of electing judges to this body to the Sejm. Only the formula has changed, as the election was to be made by a 3/5 majority with a quorum of ½ of the statutory number of deputies. It is worth noting that this did not change the political essence

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least impend the effective performance by the National Council of the Judiciary of its primary function expressed in art. 186 p. 1 of the Constitution".

[1]All expert opinions regarding the draft are available at www.sejm.gov.pl under the Sejm document No 1423/VIII term of office (9 opinions of the Sejm Analysis Office and opinions of the Supreme Bar Council and the General Prosecutor's Office).

[2]The Sejm document No 1792.

[3]See: www.prezydent.gov.pl – legislacja /ustawy/ zawetowane (on a monthly basis).

[4]The Sejm document No 2002.

[5]The Official Journal of Laws „DziennikUstaw" 2018, item 3.

of the procedure, and even opened the way to political fairs[1]. Proposing candidates for members of the Council by groups of at least 2 thousand citizens or by groups of 25 judges can easily become "political doors". Therefore, omitting the MPs as entitled to propose candidates is of relatively minor importance. In case of failure to elect the determined number of members of the Council in the "basic" procedure (by a 3/5 majority), a reserve procedure for roll-call voting is provided, according to a special formula of one vote per one candidate.

Unfortunately - contrary to the Constitution - the presidential proposal also assumed, as before, the expiry of the mandate of the previous judges sitting in the National Council of the Judiciary. This solution has remained - in essence - in the amendment adopted by the Sejm, although it means that the constitutionally defined term of office is to be interrupted and there is no protection of rights acquired on the basis of art. 2 of the Constitution.

In the course of legislative work, the technical rules for submitting candidates for members of the National Council of the Judiciary were reformulated, but the importance of the role of political clubs in this proceeding has become even stronger. Also the requirement of the absolute majority of votes - in the course of the next procedural "step" - *de facto*makes the barrier of deciding by the majority of 3/5 votes needed at an earlier stagemeaningless. The final shape of this procedure - more than the original proposal - emphasizes the importance of procedural aspects of political nature. It allows the governing majority to choose up to 60% of the Council's members. Just as in the vetoed act, the obvious contradiction between the adopted solutions and art. 187 and art. 10 of the Constitution remained unchanged.

In its opinion of 11 December 2017, the Venice Commission referred to the "reformation" of the National Council of the Judiciary and stated that the election of 15 members of the Council from among judges by the Sejm would lead to an increase in the degree of politicization of the Council. The same effect would result from the interruption of the term of office of current judges in the Council. The Venice Commission recommended a return to the solution which involves the election of

[1]See: A. Sulikowski K. Otręba, „Kilka uwag o przeszłości i perspektywach Krajowej Rady Sądownictwa", in *Krajowa Rada Sądownictwa* No 3(2017): 38.

candidates to the National Council of the Judiciary from among judges by judges themselves (through general assemblies of judges)[1].

Attention should be also paid to the wider "European" context of reforming justice in Poland, including the National Council of the Judiciary. In addition to the opinion of the Venice Commission, it is worth taking into account the recommendations of the European Commission of 20 December 2017 on the rule of law in Poland supplementing Commission recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520[2]. The European Commission referred to its recommendation of 26 July 2017, when it stressed that the entry into force of the law on the National Council of the Judiciary would lead to a "structural weakening of the independence of the judiciary in Poland" and would have "an immediate and concrete impact on the independent functioning of the entire judiciary". The Commission even then recommended to the Polish authorities that the law should not come into force. It recommended reforms that would respect the rule of law, Europeanlaw and European standards. It also recommended the preparation of regulations in close cooperation with representatives of the judiciary. The Commission also noted that in autumn 2017 the National Council of the Judiciary and common courts published a number of statements rejecting allegations directed - in the government campaign - against courts, judges and the National Council of the Judiciary.

In the above recommendation, the European Commission also referred to the opinion of the European Networks of Councils for the Judiciary (ENCJ) of 13 October 2017 on the presidential draft of the Act on the National Council of the Judiciary, in which it highlighted the inconsistency of this law with the European standards in the area of Judicial Councils. Italso noted the remarks of the Special UN Rapporteur on the Independence of Judges and Lawyers, in which it criticized the draft law on the National Council for the Judiciary of 27 October 2017 in terms of the independence of the body.

[1]See: www.rpo.gov.pl – "Opinia Komisji Weneckiej na temat zmian w ustawie o Krajowej Radzie Sądownictwa, ustawie o Sądzie Najwyższym i na temat Prawa o ustroju sądów powszechnych" (2017-12-12).
[2]Brussels, 20 December .2017, C (2017) 9050 final (see: www.konstytucyjny.pl – kronikakonstytucyjna – 28 February 2018).

In the domestic arena, the National Council of the Judiciary on 31 October 2017adopted an opinion on the presidential bill, stating that it was "essentially" inconsistent with the Constitution, because it provided the Sejm with the competence to appoint judges - members of the Council and prematurely interrupted the constitutionally determinedterm of office of current judges - members of the Council. On 11 November 2017, the Commissioner for Citizens' Rights sent a letter to the President of the Republic of Poland in which he recommended not to adopt the Act. Both these positions did not escape the attention of the European Commission in the said recommendation. The Commission did not ignore the critical remarks of the Council of Bars and Law Societies of Europe (CCBE) of 24 November 2017, as well as the Association of Polish Courts "Iustitia" of 29 November 2017, the Helsinki Foundation for Human Rights and Amnesty International.

The adoption of the amendment to the Act on the National Council of the Judiciary on 8 December 2017 has been assessed by the European Commission as "new concerns about the rule of law in Poland", giving "a further significant increase in the constitutional threat" in this respect. In regard to the National Council of the Judiciary, the threats were indicated and the recommended actions were formulated.

## CONCLUSIONS

The destructive amendment of the Act on the National Council of the Judiciary and the political and media campaign against this body form a part of a broader action against the "third power" taken by the legislative and executive authorities in Poland in 2017. This met ineffective criticism at the national level, but also on the European level, from the Venice Commission and the European Commission in particular. Moving away from European standards is perceived as a systemic threat to the rule of law. The amendment of the Act - in experts' opinions - is contrary to the Constitution of the Republic of Poland. In particular, entrusting the Sejm with the competence to elect judges - members of the National Council of Judiciaryand shortening the constitutionally guaranteed term of office of judges currently sitting in the Council violate the Constitution. The concept of a common term of office for all judges in the Council, adopted in the Act, hadan instrumental dimension and was to serve mainly as an argument for

shortening the term of office of current judges in the Council[1]. It is justifiable to asses that the National Council of the Judiciary has become the "political prey" of the current ruling majority. This is an element of significant subordination of the judiciary to the legislative and executive authorities[2].

## BIBLIOGRAPHY

### Books

1. Garlicki L. „Uwaga 2 do art. 186", in Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz, v. IV*. Warszawa, 2005.
2. Garlicki L. „Uwaga 3 do art. 186" in Garlicki L. (ed.). *Konstytucja Rzeczypospolitej Polskiej. Komentarz, v. IV*. Warszawa, 2005.
3. Grajewski K. „Podstawowe założenia ustrojowe władzy sądowniczej w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997", in Boszycki J. and others (ed.). Aktualni problemi suczasnego konstitucionalizmu (na prikładi Ukraini ta Respubliki Polsza). Kijiv, 2017.
4. Grajewski K. „Zmiany statusu prawnego Krajowej Rady Sądownictwa", in Witkowski Z. and others (ed.). *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej*. Toruń, 2017.
5. Masternak – Kubiak M, Haczkowska M. *Komentarz. Konstytucja Rzeczypospolitej Polskiej*. Warszawa, 2014.
6. Sarnecki P. „Wstęp do art. 1-29" in Garlicki L., Zubik M. (ed.). *Konstytucja Rzeczypospolitej Polskiej. Komentarz, v. 1*. Warszawa, 2016.
7. Skrzydło W. (ed.). *Sądy i trybunały w Konstytucji i w praktyce*. Warszawa, 2005.
8. Szmyt A. (ed.). *Trzecia władza. Sądy i trybunały w Polsce*. Gdańsk, 2008.

[1]See: A. Rakowska – Trela, Ocena zgodności z Konstytucją RP rządowego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (druk nr 1423), 17, www.sejm.gov.pl.
[2]See: Grajewski, „Zmiany statusu prawnego…", 118.

9. Tuleja P. „Konstytucyjny status Krajowej Rady Sądownictwa" in Tuleja P. (ed.). *Krajowa Rada Sądownictwa. XX-lecie działalności*. Warszawa, 2010.

**Article in a print journal:**

1. Ciapała J. „Charakter kompetencji Prezydenta RP. Uwagi w kontekście powoływania sędziów", *Przegląd Sejmowy,* No 4(2008).
2. Hauser R. „Odrębność władzy sądowniczej w doktrynie i orzecznictwie Trybunału Konstytucyjnego – zagadnienia wybrane". *Krajowa Rada Sądownictwa* No 1(2015).
3. Opinia Krajowej Rady Sądownictwa z 30.01.2017 r. w przedmiocie rządowego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw, in „Krajowa Rada Sądownictwa" No 2(2017).
4. Piotrowski R. „Konstytucyjne granice reformowania sądownictwa", *Krajowa Rada Sądownictwa* No 2(2017).
5. Rytel-Warzocha A., Uziębło P. "National Council of the Judiciary as the Guardian of the Independence of Judges and Courts in Poland in the Light of Recent Legislative Amendments" in *The International Conference „European Union's History, Culture and Citizenship", 10th edition*. Bucharest: C.H.Beck Publishing House, 2017.
6. Rytel-Warzocha A., Szmyt A. Dispute over the reform of the „third power" in Poland; a paper presented at the „Bratislava Legal Forum 2018" (22-23.02.2018).
7. Sulikowski A., Otręba K.. „Kilka uwag o przeszłości i perspektywach Krajowej Rady Sądownictwa", *Krajowa Rada Sądownictwa* No.3( 2017).

**Case Law**

1. The judgement of the Constitutional Tribunal of 18 July 2007 (case number K 25/07) – OTK-A 2008, No 7, item 80.
2. The judgement of the constitutional Tribunal of 16 April 2008 (case number K 40/07) – OTK-A-2008, No 3, item 44.
3. The judgement of the constitutional Tribunal of 20 June 2017 (case number K5/17) – OTK-A 2017, item 48.

**Legislation**

1. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (The OfficialJournal of Laws „Dziennik Ustaw" No 78, item 483 with lateramendments).
2. Ustawa Konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym (The Official Journal of Laws „Dziennik Ustaw" No 48, item 426 with lateramendments).
3. Ustawa z dnia 20.12.1989 r. o Krajowej Radzie Sądownictwa (The Official Journal of Laws „Dziennik Ustaw" No 73, item 435 with lateramendments).
4. Ustawa z dnia 27.07.2001 r. o Krajowej Radzie Sądownictwa (unified text – The Official Journal of Laws „Dziennik Ustaw" 2010, No 11, item 67).
5. Ustawa z dnia 12.05.2011 r. o Krajowej Radzie Sądownictwa (The Official Journal of Laws „Dziennik Ustaw" No 126, item 714 with lateramendments).
6. Ustawa z dnia 8.12.2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (The OfficialJournal of Laws „Dziennik Ustaw" 2018, item 2).

**Websites**

1. www.konstytucyjny.pl – kronika konstytucyjna (28.02.2018) – Zalecenie Komisji Europejskiej z dnia 20.12.2017 r. w sprawie praworządności w Polsce – Bruksela, C (2017) 9050 final.
2. www.prezydent.pl – legislacja /ustawy/ zawetowane (on a monthlybasis).
3. www.rpo.gov.pl (2017.12.12) – Opinia Komisji Weneckiej na temat zmian w ustawie o Krajowej Radzie Sądownictwa, ustawie o Sądzie Najwyższym i na temat Prawa o ustroju sądów powszechnych.
4. www.sejm.gov.pl.
5. www.sejm.gov.pl. - Rakowska - Trela A. Ocena zgodności z Konstytucją rządowego projektu ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (druk nr 1423)".

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# DOCUMENTATION OF SUCCESSION RIGHTS IN THE EU

**Mariusz ZAŁUCKI**[1]

***Abstract:***

*In many legal systems, documents confirming the rights of the heirs and other people benefiting from the inheritance are issued in order to confirm the rights to the inheritance acquired. The purpose of such documents is to present the rights under mortis causa legal succession to a third party, and legitimisation of the right currently vested in the entitled person, or solving of the possible doubts. Since the respective instruments documenting the rights to inheritance are only of territorial nature, with the entrance into force of the EU Succession Regulation, the European heirs were offered a new instrument of trans-border consequences – the European Certificate of Succession. The author presents the problems of this area, with particular emphasis on collision of various ways of documenting the rights to inheritance*

***Key words****: succession law; inheritance law; EU Regulation on Succession; succession rights*

## INTRODUCTION

The subject of succession law has been reviving for some time, particularly in the post-communist countries[2]. The standards considered stable so far do not stand the test of the time. Therefore, the legislators consider whether and how to change the succession law[3]. The succession law issues have been significantly changing. Nowadays, the citizens of the particular EU countries are owners of assets not only in the territory

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[2] Michelle Cottier, "Adapting Inheritance Law to Changing Social Realities : Questions of Methodology from a Comparative Perspective," *Oñati Socio-Legal Series* 4, no. 2 (2014): 196–221.

[3] Barbara E. Reinhartz, "Recent Changes in the Law of Succession in the Netherlands: On the Road Towards a European Law of Succession?," *Electronic Journal of Comparative Law* 11, no. 1 (2007): 1–18.

of the country of their citizenship[1]. More and more often, they become owners of assets located in the other EU countries. In the context of a death of the owner of such assets, slightly different succession law problems originate than before[2]. Firstly, the succession case becomes one of international nature, where it is necessary to determine the law subject to which the case will be resolved[3]. Secondly, it is important to determine which country authorities will be competent to handle the case[4]. Thirdly, it is important in what way the successor is to prove their status before other people in other countries[5].

All of these issues are subject to various legal regulations in the EU member states, and the laws in that regard vary significantly in many cases. In the international context, it must be mentioned that for some time the EU Succession Regulation No. 650/2012[6] has been binding, which is a revolutionary change in that law domain. The intent of the European legislator was to abandon the principle of indicating the governing law from the perspective of the citizenship of the given person[7]. The European Regulation has introduced a new link in a succession case with a specific legal system, namely the habitual place of residence of the testator at the moment of their death[8] – for the purpose

[1] Isidoro Antonio Calvo Vidal, "El Reenvío En El Reglamento (UE) 650/2012, Sobre Sucesiones," *Millennium DIPr: Derecho Internacional Privado*, no. 1 (2015): 17–25.

[2] Felix M. Wilke, "Das Internationale Erbrecht Nach Der Neuen EU-Erbrechtsverordnung," *Recht Der Internationalen Wirtschaft*, no. 9 (2012): 601–9.

[3] Tomasz Kot, "Wejście w życie Rozporządzenia spadkowego - Wybrane zmiany w prawie polskim," *Krakowski Przegląd Notarialny*, no. 1 (2016): 55–68.

[4] Anna Wysocka-Bar, "Jurysdykcja Krajowa Sądów Polskich a Kolizyjna Jednolitość Spadku," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. 14 (2016): 90–109.

[5] Richard Crône, "Le Certificat Successoral Européen," in *Droit Européen Des Successions Internationales. Le Règlement Du 4 Juillet 2012*, ed. Georges Khairallah and Mariel Revillard (Paris, 2013), 169–86.

[6] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Official Journal of 27.07.2012, No. L 201/107.

[7] Paul Lagarde, "Les Principes de Base Du Nouveau Du Règlement Européen Sur Les Successions," *Revue Critique de Droit International Privé*, no. 11–12 (2012): 691–732.

[8] Max Atallah, "The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012)," *Baltic Journal of European Studies* 5, no. 2 (2015): 130–46.

of indicating the governing law and, as to the principle, the jurisdiction in that case. At the same time, the citizenship is no longer the basic element connecting the succession case with the specific domestic legal regulations, at least basically. The EU Succession Regulation introduced new standards in that regard[1].

Extremely interesting on that background is the area of documenting the acquisition of the rights to inheritance. After conclusion of a succession case and determination of who and on what principles acquires the rights to inheritance, the successor stepping into the rights and duties of the deceased must be capable of proving to the other persons that he or she has acquired the respective rights from the deceased[2]. In the particular European legal systems, the tradition in that regard differs. The legislators avail of various instruments of only territorial nature[3]. Since the moment of the EU succession law coming into force, a new instrument of above-national scope has appeared for these purposes. Despite the fact that from the moment of commencement of using the new legal act as much as three years have lapsed[4], the legal nature of some institutions introduced by it raises certain doubts. This refers mainly to the new method of documenting the acquisition of the rights to inheritance – the European Certificate of Succession[5].

Against this background, the aim of my comments is to present a new instrument for documenting the rights to the succession, as well as the first imperfections which can be seen in its functioning and which need to be corrected.

[1] Richard Frimston, "Legislative Comment Brussels IV : The Draft Succession (and Revocation of Wills) Regulation," *Private Client Business*, no. 2 (2010): 105–12.
[2] Jan Gwiazdomorski, "Stwierdzenie praw do spadku," *Przegląd Notarialny*, no. 7–8 (1950).
[3] Mariusz Załucki, "Dillemas of Documenting Succession Rights in the EU," *European Studies. The Review of European Law, Economics and Politics* 4, no. 1 (2017).
[4] The provisions of the Regulation apply to the succession cases in which the testator died after 17 August 2015.
[5]Jerzy Pisuluński, "Europejskie Poświadczenie Spadkowe," in *Rozprawy Cywilistyczne : Księga Pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi*, ed. Marlena Pecyna, Malgorzata Podrecka, and Jerzy Pisuliński, 2013, 619–43.

## IDEA OF THE EUROPEAN CERTIFICATE OF SUCCESSION

Accordingly to the assumptions of the EU legislator, the European Certificate of Succession is a document of uniform nature basically throughout the EU[1]. It is supposed to facilitate the documentation of the rights to inheritance to the successors and other persons identified in that act in all of the European Union countries[2], except the UK, Ireland and Denmark, which – as it has to be reminded – have not participated in passing the Regulation No. 650/2012[3], which means that they are not bound with the Regulation and do not apply the same (see Recitals 82 and 83 of the Regulation). In practice this means that in these European countries the Certificate of Succession will not be issued and will both result in the legal consequences determined in the Regulation[4]. In other EU countries, apart from the previously applied instruments, the European Certificate of Succession may be used.

The *ratio legis* of the new solution seems to be obvious, although the solution does not refer to the whole European Union. More and more succession cases in the EU comprise a foreign element. One of the main problems that appear on the background of resolving the cases in practice has always been the matter of documenting the rights to inheritance in a foreign country by a person having a legal interest (e.g. legal successor[5]). The legal status before the Regulation No. 650/2012 has been introduced required the heir of dissipated inheritance, i.e. one that was located in the territory of more than one country, to instigate several cases of inheritance before the authorities of various countries in order to prove

[1] Angelika Fuchs, "The New EU Succession Regulation in a Nutshell," *ERA Forum*, no. 16 (2015): 119–24.

[2]Martin Schauer, "Europäisches Nachlasszeugnis," in *Europäische Erbrechtsverordnung*, ed. Martin Schauer and Elisabeth Scheuba (Wien, 2012), https://doi.org/10.1007/s13398-014-0173-7.2.

[3] Mireia Artigot i Golobardes, "The Intended and Unintended Effects Ot the UK's Not Opt-in to Regulation 650/2012 on Cross-Border Succession," *SSRN Electronic Journal*, 2016, 1–35.

[4] Fabrizio Marongiu Buonaiuti, "The EU Succession Regulation and Third Country Courts," *Journal of Private International Law* 12, no. 3 (2016): 545–65.

[5] Andrea Bonomi and Patrick Wautelet, *Le Droit Européen Des Successions. Commentaire Du Règlement n°650/2012 Du 4 Juillet 2012*, 2nd ed. (Bruxelles: Bruylant, 2016).

their entitlement[1]. As it may be imagined, which was also proven in practice, this was not satisfactory. Therefore, the task of the European Certificate of Succession is to enable faster adjudication in trans-border inheritance cases[2]. Fast, simple and efficient closure of a succession case which has trans-border implications in the European Union requires that the heirs, legatees, executors of the will or administrators of the estate are able to demonstrate easily their status or the rights and powers in another Member State, for instance in a Member State in which the succession property is located (see Recital 67 of the Regulation). Therefore, the European Certificate of Succession is an attempt to facilitate the achievement of that objective. The document is used based on the principle that the authority to which the document is presented cannot require from the holder another document confirming their right to inheritance, i.e. a domestic document[3].

Enabling the competent authorities to avail of such instrument as the European Certificate of Succession is, thus, an important achievement of the EU legislator. It may be considered one of the milestones of the European succession law. Identification of the heirs and other competent authorities on above-national level with the use of one document (which is the result of the Regulation coming into force) has changed the previous state of affairs.

Nevertheless, the idea has its drawbacks. The European Certificate of Succession, which was supposed to solve the problems in documenting succession rights, raises new doubts, which have not been present before[4]. This refers to at least the following areas:

1. lack of a comprehensive regulation regarding the procedure of issuing the ECS;
2. relationship between the ECS and other documents used in the EU countries to document the succession rights;

[1] Załucki, "Dillemas of Documenting Succession Rights in the EU"

[2] Christian Hertel, "European Certificate of Succession—content, Issue and Effects," *ERA Forum* 15, no. 3 (September 12, 2014): 393–407.

[3] As for example the German *Erbschein* or the Austrian *Einantwortungsurkunde.* Cf. Lutz, Michalski, *Erbrecht* (Heidelberg: C.F. Müller, 2010); Stephan Verweijen, *Verlassenschaftsverfahren: Handbuch* (Wien: Linde Verlag, 2014).

[4] This is characteristic of the new Regulation. See: Mariusz Załucki, "Disinheritance Against The EU Regulation on Succession (No. 650/2012). Polish Law Perspective", *European Journal of Economics, Law and Politics* 4, no. 2 (2017): 16–33.

3. the catalogue of persons which may avail of the ECS.

The matters require a closer look.

## 3. SOME NEW DOUBTS

### a) LACK OF A COMPREHENSIVE REGULATION REGARDING THE PROCEDURE OF ISSUING THE ECS

When analysing the scope of the doubts, we should start by saying that the legal regulations regarding the European Certificate of Succession are not complete. In relation to creating such an instrument there was a necessity to introduce provisions in the domestic law regulating the organisation and course of proceedings regarding the ECS, in the scope in which this has not been specified in Regulation No. 650/2012[1]. Different countries could pass different laws in that regard. As an example, in Poland the draft act related to Regulation No. 650/2012 coming into force was passed as the Act of 24 July 2015 on Amending the Act – the Code of Civil Procedure, the Act – the Notarial Law and Some Other Acts. The new act has introduced, among others, changes regarding the legal regulation of the notarial activities, comprising provisions on the notarial activities related to the European Certificate of Succession (Articles 79.1b and 95q–95x of the Notarial Law, among others)[2]. Notaries Public have become, next to the courts, the authorities competent to issue the European Certificates of Succession, providing that the domestic legislator has so decided. In Poland the legislator has made such a decision[3]. The new Act provides, among other things, that in the scope which has not been comprised in the Regulation the provisions on preparing the inheritance certification deed, i.e. another instrument serving the documentation of the succession rights but of domestic nature[4], apply accordingly to the European Certificate of Succession (Article 95q of the Notarial Law). This very

[1] Mariusz Załucki, "Adaptacja prawa polskiego do wymogów Unijnego Rozporządzenia spadkowego (Nr 650/2012)", *Studia Prawnicze. Rozprawy I Materiały* 11, no. 2 (2015): 5–18.

[2] Tomasz Kot, "Wejście w życie Rozporządzenia spadkowego - Wybrane zmiany w prawie polskim"

[3] Mirosława Pytlewska-Smółka, "Europejskie Poświadczenie Spadkowe," *Nowy Przegląd Notarialny*, no. 1 (2016): 21–37.

[4] Cf. Piotr Borkowski, *Notarialne poświadczenie dziedziczenia* (Warszawa: Wolters Kluwer Polska, 2011).

thing may raise serious doubts, particularly because the nature of the two certificates differs greatly[1].

Yet, altogether, the very procedure imposed by the Polish law seems to be correct. When presenting the solutions, it must be first of all indicated that the notary confirms in a deed the issue, correction, change or cancellation of a European Certificate of Succession or suspension of its consequences, as well as a refusal to carry out such activities (Article 95t of the Notarial Law). The activities of a notary public with regard to the issue, correction, change or cancellation of an European Certificate of Succession or suspension of its consequences may be appealed against (Article 95x of the Notarial Law). The very fact of drawing up the European Certificate of Succession is recorded in the Succession Register (Article 95i of the Notarial Law)[2]. Poland is one of the countries which decided to introduce such succession cases register in its legal system. In that scope the register may be important in future, as it will be discussed further herein. The register contains, inter alia, the following information: (1) the date and place of issue of the document attesting to the rights in the succession, its rectification, modification, erasure or suspension of its effects; (2) the authority issuing the document; (3) the identity of the deceased, including the date and place of death or the discovery of the deceased's corpse and his habitual residence at the time of death; (4) the identity of the heir. These are essential data for the settlement of the succession case.

On the background of such statutory solutions, other issues are, however, more interesting, namely the one regarding refusal to carry out the activities and the appeal measures related thereto. A problem applying to the competencies of a notary public to refuse the issue of an ECS and the reasons for such refusal appears. In the light of absence of a uniform European principle in that regard it may be expected that the practice of the Member States will differ. Each discrepancy in the area seems to be rather unwanted[3]. The European Certificate of Succession is an instrument which should be applied uniformly throughout the EU.

[1] Załucki, "Dillemas of Documenting Succession Rights in the EU"
[2]Justyna Maliszewska-Nienartowicz, "Postępowanie o wydanie Europejskiego Poświadczenia Spadkowego – Nowe obowiązki sądów państw członkowskich Unii Europejskiej," *Europejski Przegląd Sadowy*, no. 5 (2016): 24–30.
[3] Dennis Solomon, "The Boundaries of the Law Applicable to Succession," *Anali Pravnog Fakulteta Universiteta U Zenici*, no. 18 (2016): 193–220.

Otherwise, documentation of the rights of the successor may have no sense. Therefore, changes in the legal acts to make the matter more precise will be needed in future, which refers particularly to the provisions of the Regulation.

### b) RELATIONSHIP BETWEEN THE ECS AND OTHER DOCUMENTS USED IN THE EU COUNTRIES TO DOCUMENT THE SUCCESSION RIGHTS

Other problems, in turn, concern the question of the coexistence of national means of documenting the rights to the succession. As is already well known, the ECS is only a supplementation of the existing methods of documenting the acquisition of inheritance, and is not of obligatory but of optional nature. One of the major problems related to that, is the previous or subsequent issue by the competent authority of a member state of a document confirming the acquisition of succession rights in the previous (national) form[1]. This issue has not been in any way solved by the Regulation, which means that the Certificate does not replace the internal documents used by the member states for similar purposes (Article 62.3 of the Regulation). Meanwhile, there may occur collisions of the particular documents, at least in the situation when the ECS has already been issued and only then the domestic document, or when there already exists a domestic document at the moment the ECS is issued. As regards the estate of the deceased located in several countries, it is possible that several domestic documents are issued as well as the ECS, or even several independent ECS. Such situations cannot be avoided in the current state of affairs, similarly as the discrepancies between the contents of the respective documents cannot be avoided.

This issue is the object of one of the first concerns of the preliminary ruling procedures (in the light of the provisions of the Regulation), filed by the domestic courts to the European Court of Justice. In the case C-20/17 (*Vincent Pierre Oberle*), the German Kammergericht Berlin asked on 18 January 2017 whether Article 4 of the Regulation is to be interpreted such that it also applies the sole domestic jurisdiction to the issue of the domestic succession certificates by the member states, which are not replaced by the European Certificate of

[1] Załucki, "Dillemas of Documenting Succession Rights in the EU"

Succession (see Article 62.3 of the Regulation No. 650/2012), with the result that divergent provisions adopted by national legislatures, are ineffective on the ground that they infringe higher-ranking European law[1]. In effect the matter referred to a situation when an authority of one of the member states was competent with regard to a respective succession case of an EU citizen, and whether an authority of another country could document the rights to inheritance as regards the property located in the territory of that country.

The resolution of the Court of Justice is awaited. In that context, it seems that for the purpose of uniform practices in the EU countries, it would have to be assumed that the provisions of Article 4 of the Succession Regulation applies the exclusive jurisdiction to the member state of the latest place of habitual residence of the testator to the whole succession case and, therefore, to the issue of a document confirming the right to the inheritance, preventing the documentation of succession in another member state.

This position seems to confirm the Advocate General's view of the Court of Justice. In his opinion of 22 February 2018, the Advocate General confirms that Article 4 of the Regulation must be interpreted as meaning that it also determines jurisdiction in proceedings before the judicial authorities of a Member State for the issue of national certificates of succession[2]. The Advocate general also stressed that the interpretation of the provisions of the Regulation, which prescribes that jurisdiction should be determined on the basis of the rules of that Regulation also with regard to proceedings for the issue of a national documents confirming the rights to succession, limits the possibility to issue conflicting national certificates and other instruments, including European Certificate of Succession, decisions and authentic instruments in different Member States. This view seems acceptable and desirable. In the light of this view, a document confirming the succession right issued in a member state in breach of Article 4 of the Succession Regulation, should then be treated as invalidly issued, which would enable a refusal to accept the consequences thereof[3]. This is, however, so complicated

[1] Official Journal of 10.04.2017, No. C 112/19.
[2] ECLI:EU:C:2018:89.
[3] This shall not, however, apply to the European Certificate, as the Regulation does not provide for the possibility of refusing the acceptance of the consequences of the European Certificate of Succession in the other member states. As it may be expected,

that also other stands are possible. That is why we have to wait for the final verdict of the ECJ in this case. But undoubtedly the relationship between the domestic documents and the ECS is unsure and perhaps there will be another intervention of the ECJ needed.

### c) THE CATALOGUE OF PERSONS WHICH MAY AVAIL OF THE ECS

In addition to the above, some other doubts arise in connection with the catalogue of persons eligible to apply for the ECS. It is because the European legislator has decided that not every person having a legal interest therein may use the instrument, but only such person whose legal status towards the inheritance was clearly indicated in the EU Succession Regulation[1]. The catalogue has been determined in Article 63.1 of the Regulation. The provision limits the circle of people who may avail of the ECS. The limitation has a broader sense, because only the person indicated in the contents of Article 63.1 of the Regulation may apply for the issue of a ECS.

Among the entitled persons are heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate. The European legislator has listed four categories of persons who may use the European Certificate of Succession.

The categories are not defined in the Regulation. Whereas, as to the principle, there are no serious doubts in determining the meaning of the terms and the domestic laws often treat them in a uniform manner, this does not mean that only interpretation characteristic to the domestic regulations must be applied to the terms. These are autonomous terms of the Regulation No. 650/2012 (an act of international private law), and in that context they must be interpreted[2].

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possibly the withdrawal procedure referred to in Article 71.2 of the Regulation will apply.

[1] M. Załucki, *Unijne rozporządzenie Spadkowe Nr 650/2012. Komentarz*, ed. Mariusz Załucki (Warszawa: C.H. Beck, 2018).

[2] Laura-Dumitrana Rath-Boşca, Loredana Mirela Barmoş, and Ioana Andreea Stănescu, "The Need to Harmonize the Laws of the European Union Regarding the Succesion Law," *Agora International Journal of Economical Sciences*, no. 10 (2016): 35–40.

In the light of the laws commented upon, the greatest doubts refer to whether every of the legatees may avail of the ECS. As it is known, various types of provisions function within the systems of the particular European countries[1]. The most popular are *legatum per damnationem* and *legatum per vindicationem*[2]. The former has only obligation consequences whereas the latter has consequences *in res*. For the solution of that problem, important is the clarification of the term "legatee" with direct right to inheritance.

It seems indisputable that the legatee *per damnationem* has no such rights to inheritance, although this depends on the specific statutory solution of the Member States[3]. Basically, the consequence of such legacy is that at the moment of opening the inheritance, there is created only an obligatory relationship, in which the legatee *per damnationem* is a creditor. Such legatee may not, therefore, be considered to have direct right to inheritance. The case is different as regards the legatee *per vindicationem*. In this case, at the moment of the death of the testator, the legatee directly acquires the object of the succession. As it may be considered, this should contribute to interpreting the provisions of the Regulations such that the legatee *per vindicationem* has direct right to inheritance. Unfortunately, further doubts may be indicated in such case. In such understanding the object of the legacy is not part of the inheritance but is directly transferred to the legatee *per vindicationem*. The fact may raise some reservations. This refers rather to the language, or editorial aspect of the provision than to accepting that the legatee *per vindicationem* will be a person to use the ECS pursuant to Article 63.1. The existence of such a possibility is additionally supported by the fact that the material qualification of the legacy *per vindicationem* in some legal systems makes the institution close to that of appointing a heir. Thus, it must be considered that a legatee *per vindicationem* will be the very person to have a direct right to the inheritance in the light of the Regulation commented upon.

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[1] Jacek Górecki, "Zapis testamentowy w prawie kolizyjnym," *Problemy Prawa Prywatnego Międzynarodowego*, no. 5 (2009): 131–46.

[2] Maksymilian Pazdan, "Aspekty kolizyjnoprawne zapisu windykacyjnego," *Problemy Prawa Prywatnego Międzynarodowego*, no. 16 (2015).

[3] The law of Member States differs significantly. Cf. Mariusz Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future* (Kraków: AFM, 2015).

There is also one more problem in that regard, namely that the Regulation does not entitle the creditors of the inheritance to apply for the issue of the ECS or use the same[1]. As it has been explained in the literature, this results mainly from the opinion that the benefits of the possible availing of such instruments are doubtful for creditors. In a controversial situation they will have to prove their claims in litigation. Moreover, the ECS is to prove the rights of the heir instead of the rights of the creditors of the testator, which has also been raised as an argument against obtaining such possibility by the creditors. Despite that fact, such solution may raise doubts, as it forces the creditors to instigate specific domestic litigation for proving their status. In order to accelerate trans-border succession cases, other solution would rather be expected, namely one which enables the creditor to avail of the ECS as well.

## CONCLUSIONS

The new European instrument certifying the succession rights is a revolutionary step in the succession law, which contributes to shortening of the procedures of the inheritance acquisition and reducing of the risk of acquiring the inheritance by unauthorised persons. Still, the instrument has some faults and imperfections. The main imperfection is the continuous co-existence of the domestic instrument intended basically for the same purpose. There are also some other doubts which will create difficulties in applying the new solution. This has to be changed in the future. The direction which may be followed in the future is complete resignation from the domestic instruments of documenting succession rights and leaving only the ECS. For that purpose one European register of the Certificates of Succession would have to be created, which would enable elimination of the co-existence of several certificates issued by the authorities dealing with succession in the particular countries. The Polish Succession Register could serve as an example.

[1] Elena Anatolyevna Kirillova et al., "Transboundary Succession of Business : Problems Related to Practice," *International Journal of Economics and Financial Issues* 5 (2015): 125–30.

## BIBLIOGRAPHY

**Books**

1. Borkowski, Piotr. *Notarialne poświadczenie dziedziczenia.* Warszawa: Wolters Kluwer Polska, 2011.
2. Lutz, Michalski. *Erbrecht.* Heidelberg: C.F. Müller, 2010.
3. Verweijen, Stephan. *Verlassenschaftsverfahren: Handbuch.* Wien: Linde Verlag, 2014.
4. Załucki, M.. *Unijne rozporządzenie Spadkowe Nr 650/2012. Komentarz*, ed. Mariusz Załucki. Warszawa: C.H. Beck, 2018.

**E-Books**

1. *Uniform European Inheritance Law. Myth, Dream or Reality of the Future*. Kraków: AFM, 2015. https://doi.org/10.1017/CBO9781107415324.004.

**Articles in a print journal**

1. Artigot i Golobardes, Mireia. "The Intended and Unintended Effects Ot the UK's Not Opt-in to Regulation 650/2012 on Cross-Border Succession." *SSRN Electronic Journal*, 2016, 1–35.
2. Atallah, Max. "The Last Habitual Residence of the Deceased as the Principal Connecting Factor in the Context of the Succession Regulation (650/2012)." *Baltic Journal of European Studies* 5, no. 2 (2015): 130–46.
3. Bonomi, Andrea, and Patrick Wautelet. *Le Droit Européen Des Successions. Commentaire Du Règlement n°650/2012 Du 4 Juillet 2012*. 2nd ed. Bruxelles: Bruylant, 2016.
4. Calvo Vidal, Isidoro Antonio. "El Reenvío En El Reglamento (UE) 650/2012, Sobre Sucesiones." *Millennium DIPr: Derecho Internacional Privado*, no. 1 (2015): 17–25.
5. Cottier, Michelle. "Adapting Inheritance Law to Changing Social Realities : Questions of Methodology from a Comparative Perspective." *Oñati Socio-Legal Series* 4, no. 2 (2014): 196–221.
6. Crône, Richard. "Le Certificat Successoral Européen." In *Droit Européen Des Successions Internationales. Le Règlement Du 4 Juillet 2012*, edited by Georges Khairallah and Mariel Revillard, 169–86. Paris, 2013.
7. Frimston, Richard. "Legislative Comment Brussels IV : The Draft

Succession (and Revocation of Wills) Regulation." *Private Client Business*, no. 2 (2010): 105–12.
8. Fuchs, Angelika. "The New EU Succession Regulation in a Nutshell." *ERA Forum*, no. 16 (2015): 119–24.
9. Górecki, Jacek. "Zapis Testamentowy W Prawie Kolizyjnym." *Problemy Prawa Prywatnego Międzynarodowego*, no. 5 (2009): 131–46.
10. Gwiazdomorski, Jan. "Stwierdzenie Praw Do Spadku." *Przegląd Notarialny*, no. 7–8 (1950).
11. Hertel, Christian. "European Certificate of Succession—content, Issue and Effects." *ERA Forum* 15, no. 3 (September 12, 2014): 393–407. https://doi.org/10.1007/s12027-014-0355-y.
12. Kirillova, Elena Anatolyevna, Elena Vladimirovna Pozdnyakova, Evgeniy Dmitrievich Gorevoy, Inna Vladimirovna Ershova, and Nikolay Nikolaevich Nadezhin. "Transboundary Succession of Business : Problems Related to Practice." *International Journal of Economics and Financial Issues* 5 (2015): 125–30.
13. Kot, Tomasz. "Wejście W Życie Rozporządzenia Spadkowego - Wybrane Zmiany W Prawie Polskim." *Krakowski Przegląd Notarialny*, no. 1 (2016): 55–68.
14. Lagarde, Paul. "Les Principes de Base Du Nouveau Du Règlement Européen Sur Les Successions." *Revue Critique de Droit International Privé*, no. 11–12 (2012): 691–732.
15. Maliszewska-Nienartowicz, Justyna. "Postępowanie O Wydanie Europejskiego Poświadczenia Spadkowego – Nowe Obowiązki Sądów Państw Członkowskich Unii Europejskiej." *Europejski Przegląd Sadowy*, no. 5 (2016): 24–30.
16. Marongiu Buonaiuti, Fabrizio. "The EU Succession Regulation and Third Country Courts." *Journal of Private International Law* 12, no. 3 (2016): 545–65. https://doi.org/10.1080/17441048.2016.1246285.
17. Pazdan, Maksymilian. "Aspekty Kolizyjnoprawne Zapisu Windykacyjnego." *Problemy Prawa Prywatnego Międzynarodowego*, no. 16 (2015).
18. Pisuluński, Jerzy. "Europejskie Poświadczenie Spadkowe." In *Rozprawy Cywilistyczne : Księga Pamiątkowa Dedykowana Profesorowi Edwardowi Drozdowi*, edited by Marlena Pecyna, Malgorzata Podrecka, and Jerzy Pisuliński, 619–43, 2013.

19. Pytlewska-Smółka, Mirosława. "Europejskie Poświadczenie Spadkowe." *Nowy Przegląd Notarialny*, no. 1 (2016): 21–37.
20. Rath-Boşca, Laura-Dumitrana, Loredana Mirela Barmoş, and Ioana Andreea Stănescu. "The Need to Harmonize the Laws of the European Union Regarding the Succesion Law." *Agora International Journal of Economical Sciences*, no. 10 (2016): 35–40.
21. Reinhartz, Barbara E. "Recent Changes in the Law of Succession in the Netherlands: On the Road Towards a European Law of Succession?" *Electronic Journal of Comparative Law* 11, no. 1 (2007): 1–18.
22. Schauer, Martin. "Europäisches Nachlasszeugnis." In *Europäische Erbrechtsverordnung*, edited by Martin Schauer and Elisabeth Scheuba. Wien, 2012. https://doi.org/10.1007/s13398-014-0173-7.2.
23. Solomon, Dennis. "The Boundaries of the Law Applicable to Succession." *Anali Pravnog Fakulteta Universiteta U Zenici*, no. 18 (2016): 193–220.
24. Wilke, Felix M. "Das Internationale Erbrecht Nach Der Neuen EU-Erbrechtsverordnung." *Recht Der Internationalen Wirtschaft*, no. 9 (2012): 601–9.
25. Wysocka-Bar, Anna. "Jurysdykcja Krajowa Sądów Polskich a Kolizyjna Jednolitość Spadku." *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego I Porównawczego*, no. 14 (2016): 90–109.
26. Załucki, Mariusz. "Adaptacja Prawa Polskiego Do Wymogów Unijnego Rozporządzenia Spadkowego (Nr 650/2012)." *Studia Prawnicze. Rozprawy I Materiały* 11, no. 2 (2015): 5–18.
27. "Disinheritance Against The EU Regulation on Succession (No. 650/2012). Polish Law Perspective." *European Journal of Economics, Law and Politics* 4, no. 2 (2017): 16–33.

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# THE CONTRIBUTION PERIOD - ESSENTIAL CONDITION OF ACCESSING SOCIAL INSURANCE BENEFITS IN THE PUBLIC PENSION SCHEME

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***Abstract:***

*The pension, the most important social insurance benefit provided under the public pension system, is conditioned by the completion of a certain contribution period. Two main requirements are necessary to ensure the social protection of the different categories of insured individuals within the unitary pension system. The first requirement is the correct interpretation and application of the rules of substantive law governing the legal institution of the contribution period. The second one is represented by the understanding of the purpose for which special conditions for the calculation of the contribution period have been established, The analysis of legal provisions in the field, in the context of important legislative social security changes, aims at identifying the existing vulnerabilities and formulating the proposals for their remediation, in order to respect the principle of equal treatment of public pension beneficiaries.*

***Key words:*** *contribution period; pension; insurance benefits; principle of equal treatment of public pension beneficiaries*

## INTRODUCTION

As from 1 April 2001, following the entry into force of Law 19/2000 on the public pension system and other social security rights[2], a new legal institution, namely that of the contribution period, was regulated. This institution replaced the one of the seniority of work that constituted the benchmark for granting pensions until 1 April 2001. The

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[2] Published in the Official Gazette of Romania Part I, no. 140 of 1 April 2000, subsequently amended and supplemented, abrogated on 01.01.2011, with the entry into force of Law 263/2010 on the unitary pension system

contribution period is a new concept, which includes the length of service, but extends to other periods as well, the central element of the notion being that of being contributive. Thus, the contribution period refers to periods of time for which social security contributions were paid or were due. The establishment of the contribution period, as a prerequisite for the provision of social security benefits in the form of pensions, is the materialization of the contributory principle. This principle has two important components, namely the contribution period and the level of income that forms the basis for the contribution due by the public pension policyholders. The subject of analysis in this study is only contribution periods.

For the correct understanding of the notion of contribution period, with all regulated alternatives, it is important to specify who has the quality of insured in the public pension system. According to article 3 letter. a) of Law 263/2010 on the unitary system of public pensions[1] the insured are the natural persons for whom the employer / entity assimilated to the employer is obliged to withhold and pay the social security contribution, the natural persons who earn income from independent activities or intellectual property rights and who, on the basis of the individual insurance statement, owe the social security contribution, according to the provisions of the Fiscal Code, as well as the natural persons who pay the social insurance contribution on the basis of the social insurance contract. The legislator defines the contribution period and the forms in which it is regulated by law in letters p), r), t) and u) and j) of the same art. 3 of Law 263/2010, as follows:

- *contribution period* - the length of time for which social security contributions to the public pension system were due, as well as for which social security policyholders owed and paid social security contributions to the public pension system;

- *full contribution period* - the length of time provided by the present law in which insured persons have completed the contribution period in order to qualify for old-age pension, early retirement pension or partial early retirement pension;

- *minimum contribution period* - the minimum period of time prescribed by the present law in which insured persons have completed

[1] Published in the Official Gazette of Romania, Part I, no. 852 of 20.12.2010, subsequently modified and completed

the contribution period in order to qualify for a pension at the age of standard retirement age;

- *potential contribution period* - the period of time provided by the present law, considered a contribution period and granted for the calculation of the invalidity pension, as a credit for the unpaid contribution due to the disabling condition;

- *assimilated periods* - periods for which social security contributions were not due or paid and which are assimilated to the contribution period in the public pension system.

## THE REGULATION OF THE CONTRIBUTION PERIOD IN THE UNITARY PENSION SYSTEM

According to art. 45 of par. (1) of Law 263/2010, the contribution period within the public pension system consists of the sum of the periods for which the contribution to the state social insurance budget was due by the insured and then by the employer[1].

According to par. (1) ^ 1 of the same article, in the case of insured persons, natural persons who earn income from independent activities and / or intellectual property rights, for which social security contributions are due according to the Tax Code and who filed the individual insurance declaration, the contribution period is calculated in proportion to the paid contribution if the annual insured income is lower than the average of 12 minimum gross wage.

In the case of optionally insured persons, based on the social insurance contract, the contribution period consists of the sum of the periods for which the social security contribution was due and paid, as established by the insurance contract concluded with the pension fund.

Therefore, under current national legislation, there are three situations taken into account in determining the contribution period in the public pension system, namely:

-*the cumulative periods* for which the social security contribution was due, even if it was not actually paid, a situation applicable to those categories of insured persons referred to in Art. 6 pars. (1) (I), (II) and

[1] See A. Tabacu, *Drept procesual civil* (Bucharest: Universul Juridic, 2015), 149-151, for detailes about substantive competence of courts in resolving cases having as their object the recognition of contributions

(III), who have the status of employees, including persons assimilated to them;
- *the cumulative periods* for which the social security contribution was actually due and paid, in proportion to the level of the insured income, a minimum limit being set for it, in order to calculate a complete traineeship. This limit is 12 minimum wages per economy for a calendar year. If the income on which the contribution was calculated and paid is less than 12 gross minimum wages, then the contribution period is calculated in proportion to the contribution paid. In particular, for the establishment of a 12-month contribution period, a social insurance contribution for an income of 12 minimum wages should be paid. If the income was of only 10 minimum wages, the insured will have only 10 months instead of 12 months.
- *the cumulative periods* for which the social security contribution, including interest and related penalty payments, was due and paid, according to the law, by insured persons under the social insurance contracts concluded with the county pension institutions. The social insurance contract is a contract concluded voluntarily between natural persons and territorial pension houses for the purpose of being insured in the public pension system in order to obtain the old-age pension or to supplement the insured income used in the calculation of this pension category.

In the case of persons insured on the basis of an individual statement of insurance or a social insurance contract, if they have not paid the social security contribution due for a certain period, that period shall not be taken into account when the right to retirement is exercised until payment of that contribution, together with interest and penalties for late payment.

The contribution period corresponding to the social security contribution due by persons receiving compensatory payments and paid from the unemployment insurance budget at the level of the individual social security contribution is determined by applying to the period of contribution the ratio between the individual contribution to social benefits and the social security contribution quota approved for workplaces under normal conditions.

Thus, the contribution period in the public system of insured persons providing a *dependent activity*, is the sum of the periods for which the contribution to the state social insurance budget was due by

the employer and the insured.[1] The situation of self-employed policyholders is different. For them the law specifies that the contribution period is the period during which the social security contribution was paid. The solution adopted by the legislator corresponds to the specificity of the legal employment relationship. Thus, no damage can be caused to the employee because, although he carried out his activity and the individual social insurance contribution was retained monthly, the employer did not fulfill his contractual obligation to pay the contributions to the state social insurance budget. The public institution managing the state social security budget has the possibility in this situation to recover from the employee the amounts due as a contribution.

A different solution adopted by legislation for self-employed policyholders is not discriminatory, because the two categories of policyholders do not operate under the same conditions. Thus, self-employed policyholders manage their own financial resources, being the ones who pay their contributions directly, as opposed to those employees who depend financially on their employers.

Due to the fact that the vast majority of insured persons in the public pension system are the employees, social insurance being a compulsory component of the individual labor contract, Law no. 263/2010 also contains provisions regarding the length of service that is useful for establishing the pension right prior to the current reform in the system. Thus, according to Law no. 3/1977 on state social security and social assistance pensions[2], the length of service that was taken into account when determining the pensions for the work done was the period when a person was employed on the basis of an employment contract and for which the unit contributed to the social insurance fund. Proof of seniority in work, for retirement, was made through the workbook, drafted according to the law[3].

Currently, the Labor Code defines seniority in work in art. 16 paragraph (4), stating that it is granted to an employee by the provision

[1] See M. Tudor, D. Iancu, A. Pirvu, *Drept financiar si fiscal. Drept bugetar. Control financiar* (Pitesti: Universitatii din Pitesti, 2016), 66, for detailes about obligation to pay contribution to the state social insurance budget.

[2] Published in the Official Bulletin no. 82 of 6 August 1977, subsequently amended and supplemented, now repealed

[3] See in this respect Decree of the Council of State no. 92 on the work card, dated April 16, 1976, and published in the Official Bulletin no. 37 of 26 April.

of labor on the basis of an individual employment contract[1], without referring to the payment of the contribution to the state social insurance budget. The solution is correct as long as the two legal institutions, namely the seniority and the length of contribution are different, being regulated by distinct normative acts. However, it should be noted that the period recognized as seniority in work for an employee is automatically a contribution period in the public pension system, regardless of whether the employer has paid or not the social security contribution.

A particularly interesting issue is the part-time contribution of part-time employees, which the Labor Code defines as employees whose normal working hours, calculated weekly or as a monthly average, are lower than the number of normal working hours of a full-time employee. Under the legal provision, a part-time employee can work, for example, 20 hours a week, spread over three working days. In this situation, according to the program provided by the National House of Public Pensions, the part-time employee will benefit from 3 days of contribution period, according to the actual days worked. If the 20 hours were spread over 5 working days of the week, the employee would benefit from 5 days of contribution. The solution is discriminatory, with social security legislation not fitting perfectly with the changes in the part-time employee concept.

The contribution period is certified to policyholders once every two years, ex officio, by the NCPP and the territorial pension houses. The contribution period is also certified at the insured's request, for a fee, at any time during the year. The service tariff is set annually by the NPMC and the territorial pension houses.

As mentioned above, policyholders who meet the conditions of the contribution period benefit from insurance benefits in the event of the insured social risk. Thus, when old age occurs and the physical and mental capacity to work and earn income from the professional activity diminish the insured employees who have contributed a minimum period to the state social insurance budget benefit from a pension. The survivors of the insured also benefit from the pension in case of his death. The public system *assimilates the contribution period* and the non-contributory periods, hereinafter referred to as assimilated periods, in which the insured person:

[1] C. Nenu, *Contractul indivudal de muncă* (Bucharest: C.H. Beck, 2014), 68

a) received a disability pension[1];

b) attended the day courses of university education, organized according to the law, during the normal period of the respective studies, provided they graduated with a diploma;

c) performed the military service as a military or short-term military service, during the legally established period, was concentrated, mobilized or in prison;

d) received from 1 April 2001 to January 1, 2006 social security indemnities granted according to the law;

(e) benefited, from 1 January 2005, from leave for temporary incapacity for work caused by an accident at work and occupational diseases;

f) benefited from parental leave up to 2 years from 1 January 2006 or, in the case of a disabled child, up to 3 years old.

Policyholders, who completed several higher education institutions following their full-time courses during the normal period of their studies, provided they graduated with a diploma, benefit from the assimilation, as an internship, of a single study period of their choice. The legislator does not make any distinction in the sense that it is necessary to distinguish between public and private education, taking into account both the master's and the doctoral studies, regardless of whether they are subsidized places from the state budget or in a 'tax' scheme[2].

[1] The current regulation brought by Law 263/2010 is restrictive in terms of periods assimilated to the contribution period in the sense that the legislator excludes periods in which policyholders have received social security benefits such as maternity leave and leave for temporary incapacity for work , leave and indemnity for the raising and care of the sick child, these periods being considered as assimilated only when they are expressly assimilated to the contribution period.

[2] By the provisions of art. 49 of Law 293/2010, the legislator assimilated the contribution period to non-contributory periods through which the policyholders were objectively unable to obtain income. It is the reason for which the legislator considered, as a period assimilated to the contribution period, the period of the day courses of university education, since those who have completed other forms of higher education have had the opportunity to work and earn income. On these grounds, we find ourselves in different objective situations, not being a disguised provision, as the constitutional principle of equal rights of citizens has not been violated. In this regard, see A.C. Moarcăș-Costea, *Drepturile sociale ale lucrătorilor migranți*, Bucharest: C.H.Beck, 2011, 45.

All categories of persons listed above benefit from assimilated periods if during these periods they have not completed their contribution periods, either by paying them or only by owing them. These periods are used to obtain statutory social security benefits, less for early retirement and partial early retirement, for which the periods of university education, organized according to the law, during the normal period, on the condition that they were graduated, the periods in which a military service as a military or short-term military performed, during the statutory period, when the policyholder was concentrated, mobilized or taken into custody and the periods during which an invalidity pension was received.

## THE FULL STAGE AND THE MINIMUM CONTRIBUTION PERIOD IN THE PUBLIC PENSION SYSTEM

The Romanian legislator distinguishes between the situation in which the insured person has completed a minimum traineeship or a full contribution period in terms of the valorization of the right to retirement.[1]

The minimum contribution rate for both women and men is 15 years. An exceptional situation is represented by the military, volunteers and soldiers, police officers and civil servants with special status in the penitentiary administration, in the field of national defense, public order and national security, for which the minimum contribution is of 20 years for women and men[2]. To qualify for a retirement pension, the legislator requires two cumulative conditions to be met: the standard retirement age and the minimum contribution period.

The full contribution period is 35 years for both women and men. It is constituted differently according to the required social security benefit. In the case of old-age pension, the contribution period also includes all non-contributory periods. In the case of early retirement or partial anticipated retirement pension, the contribution period does not include the assimilated periods in which the insured person was in one of the following situations:

- received a invalidity pension;

[1] C. Nenu, C. Popescu, *Dreptul asigurărilor sociale* (Craiova : Sitech, 2014), 92
[2] Art. 54 para. 2 of the Law no. 263/2010.

- attended the day courses of university education, organized according to the law, during the normal period of the respective studies, provided they graduated with a diploma;

-performed the military service as a military or short-term military, during the legally established period, was concentrated, mobilized or in prison.

In the case of early or partial anticipated pensions, the law governs the insured person's right to obtain such benefits only if he exceeded the full contribution period with at least 8 years, that is, completed such a period or exceeded it with maximum 8 years.

## SPECIAL REGULATIONS FOR THE FULL CONTRIBUTION PERIOD

In view of the different situations in which insured persons performed their activity, the legislation established differentiated periods for full contributions as well as reductions in the standard retirement age.

The full contribution period is 20 years for people who have been mining for at least 20 years, or 30 years for people who have completed at least 20 years in artistic activities in certain professions.

The full contribution period is 15 years for individuals who have worked in Zone I of exposure to radiation or at least 17 years in radiation exposure Zone II. These people benefit from an old-age pension regardless of their age.

According to art. 58 of Law 263/2010, persons who have completed a pre-existing disability insurance period benefit from the reduction of the standard retirement ages, depending on the degree of disability, as follows:

a) 15 years, in the situation of the profoundly disabled insured persons, if they have achieved at least one third of the full contribution period in the conditions of the pre-existing handicap for the insured person;

b) 10 years, in the case of severely disabled persons, if at least two-thirds of the full contribution period has been achieved in the conditions of the pre-existing handicap of the insured person;

c) 10 years, in the case of the moderately disabled if they have completed, under the conditions of the pre-existing handicap, the complete contribution period.

Between the public system and other systems not integrated to it, social security contribution periods are mutually recognized, that is, seniority or length of service, with the aim of obtaining rights to old age, invalidity and survivor pension[1]. Consequently, such recognition is made only with regard to the acknowledgement of pension rights, not the obtaining of benefits provided by the law, such as, for example, taking into account working conditions that have been used in order to reduce the retirement age. In other words, work performed in a particular system under certain special conditions cannot be assimilated into another system under the same conditions.

## CONCLUSIONS

The contribution period is a legal institution with important meanings and implications in the social security system, the main component of which is social protection in the event of social risk of old age. That is why the legislation has to consider the social and normative reality of the past 35 years, provided that the complete contribution period for men and women has been established as such. Equalizing the contribution period for women and men, establishing special circumstances, in which the complete length of service is decreased due to the working conditions the activity was performed, imposing limitations on optional and compulsory insurance for those receiving income from independent activities, are measures designed to meet the needs of our society at this stage of development. It is imperative, however, for the Romanian legislator to have the objective of respecting the principles laid down in the European Pillar of Social Rights, so that the differences between the national pension system and other European systems are eliminated in a reasonable period.

## BIBLIOGRAPHY

### Books

1. Moarcăş-Costea, A.C. *Drepturile sociale ale lucrătorilor migranți*. Bucharest: C.H.Beck, 2011.
2. Nenu, C. and C. Popescu, *Dreptul Asigurarilor Sociale*. Craiova: Sitech, 2014.

[1] Art. 192 para. 1 of the Law no. 263/2010

3. Nenu, C. *Contractul individual de muncă*. Bucharest: C.H. Beck, 2014
4. Tabacu, A. *Drept procesual civil. Legislație internă și internațională. Doctrină și jurisprudență*. Bucharest: Universul Juridic, 2015.
5. Tudor, M. and D. Iancu and A. Pirvu. *Drept financiar si fiscal. Drept bugetar. Control financiar*. Pitesti: Universitatii din Pitesti, 2016.

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# ROLE OF LEGAL CERTANITY IN A DEMOCRATIC STATE OF LAW ON THE EXAMPLE OF POLAND

**Beata STĘPIEŃ-ZAŁUCKA** [1]

***Abstract:***

[...] *It is a breach of the Constitution to establish vague, ambiguous regulations, which do not allow the citizens to foresee the legal consequences of their conduct (judgement of the Constitutional Tribunal of 7 January 2004, K 14/03).*

*The concept of the rule of law has been formulated by our civilisation a few thousand years ago. Throughout the ages it has become a foundation for the construction and development of a concept of the state of law comprising the elements of the state and the law. In the Constitution of the Republic of Poland of 2 April 1997, the idea was directly expressed in Article 2 reading: "the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice", and at the same time – apart from other rules – it has become one of the principal rules binding in Poland. What is more, it has also become basis for deriving further rules of law out of it, and first of all the rule of legal certainty. In a democratic state of law legal certainty is particularly important as it enables the individuals to prudently arrange their affairs such that the respective adjudications do not come as a surprise to them and that they are able to foresee the adjudication in the given circumstances. Therefore, if the rule is only a postulate in a certain state the individuals have no trust in law and have no feeling of security as regards the law, and without that we cannot talk about the trust in the state, or consequently, about a democratic state of law in general.*

***Key words:*** *Polish law; constitutional law; constitution; legal certainty; rule of law*

## INTRODUCTION

The idea of the rule of law has been formulated within our civilisation a few thousand years ago. Throughout the ages, it has become a foundation for the construction and development of a concept of the state of law comprising the elements of the state and the law. The

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concept dates back to the 19th century Germany, as the term *"Rechtsstaat"*, generally translated as the 'state of law' or law-abiding state', appeared in the German culture and legal order. Most of the representatives of the doctrine indicate that the pioneer in formulating the concept was R. von Mohl, who in his work published in 1832 presented a characteristics of an absolutist state. He discussed the material aspects of the state of law, in which a decisive basis for considering the state to be a state of law is whether in that state the superior principle is the freedom of citizens. The doctrine of R. von Mohl was continued by F.J. Stahl. However, he based his theory on the assumption of the activity of the state. In his opinion, the element characterising the state of law is the method of achieving specific objectives, instead of the very objectives themselves (formal approach)[1].

For the Polish creators of the constitutional system of key importance was the definition of the state of law proposed by *K. Stern*, who referring to the above theories founded its concept on the assumption that the state of law as such, in which state authority is exercised solely on the basis of the constitution and laws aimed at protecting the dignity of a man, freedom, justice and legal certainty. He also indicated that achievement of the identified objectives requires assumption by the creators of the system of specific constitutional principles, such as separation and balance of powers, basic rights defined in the constitution and based on the idea of inalienable and indefeasible human dignity, the principle of liberty of the individual, however, subject to some limitations (set out mainly by the ban on infringing the essence of rights or by the principle of proportionality), the principle of equality, or the principle of human rights protection by courts[2] – namely principles which are related not only to a state of law but also to a democratic state. It is not possible to implement the principles in a state, where democratic principles are not complied with, particularly as regards political democracy such as freedom of assembly, association, operation of political parties, if there are no free elections to the representative bodies or there is no personal freedom such as freedom of speech. Therefore, as

[1] Przemysław Czarnek et al., "Prawo konstytucyjne", in *Leksykon obywatela*, ed. Sławomir Serefin and Bogumił Szmulik (Warsaw: C.H. Beck, 2008), 6.
[2] Piotr Tuleja, "Comment to the art. 2," *Konstytucja RP. Tom I. Komentarz. Art.1-86*, edited by Marek Safjan and Leszek Bosek (Warsaw: C.H.Beck, 2016): 219-220.

stated by P. Winczorek, the relationship between the idea of a state of law and a democratic state is obvious[1].

The concept of the state of law stands in opposition to the systems based on absolute, unspecified and uncontrolled power. The basic negative stipulation differing the state of law from other legal forms is the exclusion of freedom and arbitrariness of action by the authorities, while the positive stipulation is the binding power of law[2]. The latter stipulation has two aspects – material and formal one. The formal aspect focuses on the thesis that law is a value in itself and must be complied with. The material aspect refers to the thesis that law should accomplish the idea of justice. In that scope the rule of law has an instrumental nature, as it serves the accomplishment of a specific objective.

In the Constitution of the Republic of Poland of 2 April 1997, the concept of the state of law was directly expressed in Article 2 reading that "*the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*", and at the same time – apart from other rules – it has become one of the principal rules binding in Poland[3]. What is more, it has also become basis for deriving further rules of law, and first of all the rule of legal certainty[4].

It must be mentioned right at the beginning that such origin of legal certainty, deriving from the principle of a democratic state of law – as a stipulation directed to the legislator – is identified with a narrower aspect of the concept (in the European literature the aspect is also called a formal aspect[5]). A broader aspect comprises the practice, which includes the certainty of judicial decisions and, thus, certain repeatability and predictability of court adjudications. The essence of the concept is that court decisions must comply with the binding system of law, but must

[1] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* (Warsaw: Liber, 2008), 19.

[2] Przemysław Czarnek et. al, "Prawo konstytucyjne", 66.

[3] Wider Anna Młynarska –Sobaczewska, *Autorytet państwa* (Toruń: Dom Organizatora, 2010), 224 and next.

[4] Wojciech Sokolewicz, "Comment to the art. 2*," Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V,, edited by Leszek Garlicki (Warsaw: Wydawnictwo Sejmowe, 2007), 33; decision of the Constitutional Tribunal of 27 June 2006, K 16/05, OTK ZU 2006/6A, No. 69.

[5] Bronislav Totskyi „Legal certainty as a basic principle of the land law of Ukraine," *Jurisprudence* 21(1) (2014): 209, https://www.mruni.eu/upload/iblock/850/JUR-14-21-1-10.pdf.

also be cohesive with the previous adjudications. Of course, this does not mean that departure from the previous line of adjudication is not possible in a given case. Owing to the independence of the judiciary, the judge has such a possibility at any time. However, in such case the judge must thoroughly justify the abandonment of the generally accepted line of adjudication and introduction of a precedence[1].

The object of this paper shall be legal certainty in the narrower meaning.

## 2. THE ESSENCE OF LEGAL CERTAINTY

In the Polish legal system the creators of the constitutional system imposed on the legislator the duty to establish laws, which means not "any" law but one of adequate quality[2]. Therefore, striving for the legal certainty has become one of the basic goals[3]. The goal, as mentioned by John A. Lovett[4], is an eminent one and, therefore, extremely hard to achieve. This does not refer solely to the Polish legislation but also of other countries in Europe and around the world. In my opinion, it is high time to draw attention of the legislator and the doctrine to the essential importance of legal certainty, as it seems underestimated nowadays.

What is the legal certainty? As regards certainty, we usually mean something we are one hundred percent sure, something absolutely reliable[5]. Whereas, legal certainty, as suggests Ł. Dubiński, is "*a stipulation directed to the legislator to establish laws which do not become a kind of a trap for the citizen, and that the citizens may run their affairs believing that they are not exposed to legal consequences which could not have been foreseen at the moment of making the respective*

[1] Beata Stepien- Zalucka,"Stabilność Prawa. Zadanie na dziś czy na wczoraj," *Przegląd Prawa Publicznego* 12, (2017): 9-22. See also: Elina Paunio, "Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order" in *German Law Journal* 11 (2011): 1469 and next.

[2] Decision of the Constitutional Tribunal of 5 January 1999, K. 27/98.

[3] Paul Heinrich Neuhaus, "Legal certainty versus equity in the conflict of laws," *Law and Contemporary Problems* 4 (1963): 797, 802, http://scholarship.law.duke.edu/lcp/vol28/iss4/7/.

[4] John A. Lovett, "On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond,", *Louisiana Law Review* 4 (2003): 1399, http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6017&context=lalrev.

[5] Słownik języka polskiego,https://sjp.pwn.pl/slowniki/pewno%C5%9B%C4%87.html.

*decision*"[1]. Therefore, the principle is often called – particularly in the decisions of the Constitutional Tribunal – the principle of state loyalty to the addressee of the legal standards, as the essence of the principle is that the legislator guarantees to the addressees of the legal standards the maximum foreseeability and predictability of the court decisions made[2]. Thus, when establishing laws the legislator must draw up the acts of law such that the legal standards included therein do not become a trap for the citizen[3], and that the citizen may handle their affairs in confidence that he or she is not exposed to the legal consequences which cannot be foreseen at the moment of making the decision, and that the actions undertaken in accordance with the binding laws will also be accepted by the legal order in future. New laws established by the legislator cannot come as a surprise to the addressee, who should have time to adjust to the changing regulations and calmly make decisions as to the further conduct[4]. From the perspective of the subject of rights, it is a feature of law which consists in that the addressee of the standard – the citizen, taxpayer, person endowed with a right – is capable of foreseeing the consequences of facts (state of affairs) determined by law, which includes the consequences of actions or omissions of themselves and other people[5]. In other words, legal certainty means the possibility of acting within the determined limits without a fear of arbitrary or unpredictable intervention of the state[6]. As stated by the European Court of Human Rights in Strasbourg, it is required that the domestic law "*complies with the*

[1] Łukasz Dubiński, "Uwagi na tle pewności i bezpieczeństwa polskiego i unijnego prawa podatkowego," *Finanse, Rynki Finansowe, Ubezpieczenia* 5 (2016): 1, http://www.wneiz.pl/nauka_wneiz/frfu/83-2016/FRFU-83-cz1-21.pdf.

[2] Decision of the Constitutional Tribunal of 20 January 2009, P 40/07.

[3] Przemysław Mikłaszewicz, "Zaufanie do prawa współcześnie" in *Konstytucja. Rząd. Parlament, Księga jubileuszowa profesora Jerzego Ciemniewskiego*, edited by Piotr Radziewicz and Jan Wawrzyniak (Warsa: Wydawnictwo Sejmowe, 2014), 189.

[4] Decisions of the Constitutional Tribunal of 3 December 1996, K 25/95, 25 November 1997, K 26/97, 10 April 2001 r., U 7/00, 5 November 2002 r., P 7/01, 7 June 2004 r., P 4/03, 15 February 2005 r., K 48/04 i 29 November 2006 r., SK 51/06.

[5] Hanna Filipczyk, *Postulat pewności prawa w wykładni operatywnej prawa podatkowego* (Warsaw: Proinfo, 2013), 21.

[6] Jim Murdoch and Ralph Roche, *Europejska Konwencja Praw Człowieka a działania policji. Podręcznik dla funkcjonariuszy policji i innych organów ścigania*, (Strasburg: Wydawnictwo Rady Europy 2013), 16, https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_POL.pdf.

*principle of the rule of law – which means a concept intrinsically related to all of the articles of the Convention*"[1]. Similar opinion is expressed by T. Spyra, who claims that the understanding of legal certainty should not be limited solely to the possibility of foreseeing the legal consequences of conduct by a citizen but also the reaction of the state to such conduct[2].

A conclusion may be drawn that the central category of legal certainty is its predictability[3], achieved specifically by transparency, clarity, defined nature and stability, or rather permanence, of the acts of law[4]. It has to be mentioned here that the stability of law, which is often associated with legal certainty in colloquial meaning, is a separate category. It is only one of the elements of legal certainty, so the terms may not be deemed interchangeable, notwithstanding the importance of the stability of law for legal certainty. However, in case of collision of the two principles, more important is the certainty understood as the necessity of creating conditions for the possibility of foreseeing the actions of state authorities and the related behaviour of the citizens[5]. Such understanding of legal certainty – as the predictability of the actions of the state – guarantees the confidence in the legislator and the established law, thus, building the legal security of the subjects. Therefore, in a democratic state ruled by law, it should be considered unacceptable for a legal system to comprise an act giving the state authorities too much freedom and resulting in complete unpredictability of adjudication[6].

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[1] Decision of the European Court of Human Rights in Strasbourg 25 June 1996, in case Amuur vs. France, pkt 50.

[2] T. Spyra, *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni* (Crakow: Kantor Wydawniczy: Zakamycze, 2006), 192.

[3] Leszek Bosek, "Comment no. 8 for art. 2," *Konstytucja RP. Tom I. Komentarz. Art.1-86*, edited by Marek Safjan and Leszek Bosek (Warsaw: C.H.Beck, 2016).

[4] Marzena Kordela, "Pewność prawa jako wartość konstytucyjna," in *Wykładnia konstytucji. Aktualne problemy i tendencje*, edited by Marek Smolak (Warsaw: Wolters Kluwer, 2016), 155; Ion Predescu, Marieta Safta, The principle of legal certainty, Basis for the rule of law, Landmark case-law, 9, https://www.ccr.ro/ccrold/publications/buletin/8/predescuen.pdf

[5] Biuro Trybunału Konstytucyjnego, *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym* (Warsaw: Wydawnictwa Trybunał Konstytucyjny, 2015), 32.

[6] Decision of the Constitutional Tribunal of 17 May 2006, K 33/05.

Summing up this part of the deliberations it must be stated that legal certainty is one of the most expected characteristic features of the quality of law. Law is good when it represents legal certainty. In short words, legal certainty is a specific value of the law, treated as something essential. And it is a positive one. In the objective aspect, the value may be compared to a certain construct – a perfectly rational "abstract subject" – whereas in the subjective aspect it may be compared to an empiric subject or category of such subjects[1].

## 3. INFLUENCE OF LEGAL CERTAINTY ON THE LEGAL SYSTEM

Legal certainty, as a constitutional sub-principle of the principle of democratic state of law, appeared in Poland in 1989 together with the Act of 29 December 1989 on Amendment of the Constitution of the People's Republic of Poland, which came into force on 31 December 1989[2]. Further it was included in the Concise Constitution of 1992[3] and in the currently binding Constitution of 1997. Since the very beginning of its existence, it was related to certain duties of the legislators with regard to the establishment of law. However, the duties have been changing with time – following the development of the Constitutional Tribunal judicature and the doctrine – and taking new, broader dimensions.

One of the basic duties derived from the principle of legal certainty became the obligation to publish normative acts. The obligation results from the fact that for the law to have specific legal consequences, it must be known to the recipients, which means that the society must be capable of reading its contents. The publication duty is connected to still another obligation – applying an adequate *vacatio legis* in the process of establishing law. As considered by the Constitutional Tribunal, *vacatio legis* is a duty to abide by the 'resting' time of law, which separates the time of publishing a legal act from the time of the act coming into force,

[1] Hanna Filipczyk, *Postulat pewności*, 21-23.
[2] Act: Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej, Dz.U. 1989 nr 75 poz. 444.
[3] Act: Ustawa Konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym, Dz.U. 1992 nr 84 poz. 426.

for the purpose of giving the law addressees the time to adjust to the changed regulations and taking adequate decisions with regard to the further conduct[1]. Therefore, the "adequacy" of *vacationis legis* must be considered in the context of the possibility of getting to know the contents of the new regulations by the addressees and directing their affairs in consideration of such regulations (decision of the Constitutional Tribunal of 11 September 1995, P 1/95, OTK 1995, No. 1, item 3).

Another duty which is related to legal certainty is the principle of sufficiently defined nature of law, which means the requirement to establish standards which are clear and understandable to the addresses and enable unequivocal determination of the contents thereof, which raise no interpretation doubts and do not result, in consequence, in discrepancies in the process of providing interpretations. "[...] *lack of clarity of a regulation may justify determination of its non-compliance with the Constitution, providing that the lack of clarity is so extensive that the discrepancies resulting therefrom cannot be removed by virtue of regular measures applicable to the elimination of the lack of homogeneity in the application of the respective law;* [...] *if other methods of removing the consequences of the lack of clarity of a regulation, specifically by interpretation of the regulation in court adjudications, prove to be insufficient*" (judgement of the Constitutional Tribunal of 3 December 2002, P 13/02, OTK-A 2002, No. 7, item 90)[2].

Another duty may be the acceptance of the non-retroactivity principle. The principle is defined by the Constitutional Tribunal in the following manner: "*in order not to establish legal standards which would require to apply the newly established legal standard to events (sensu largo) which occurred before the entrance into force of the newly established legal standards, and to which the law has not applied the*

[1] Decisions of the Constitutional Tribunal of : 15 December 1997 r., K 13/97, OTK-A 1997, No. 5–6, and 4 January 2000 r., K 18/99, OTK 2000, No. 1.

[2] Moreover, it is worth noting that such requirements as to the content of the law are also visible in case law European Court of Human Rights, where we can read that "a norm cannot be regarded as a «law» unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able to foresee the consequences which a given action may entail"; "a rule is foreseeable if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct"; "especially, a rule is foreseeable when it affords adequate protection against arbitrary interference by public ri ies". Ion Predescu, Marieta Safta, *The principle*, 8-9. https://www.ccr.ro/ccrold/publications/buletin/8/predescuen.pdf.

*legal consequences set out by the new standards* [...]" (decision of the Constitutional Tribunal of 22 August 1990, K 7/90, OTK 1990, No. 1, item 5, p. 51). However, the Tribunal has finally confirmed the non-absolute nature of the principle, considering that in a situation of collision with another constitutional principle, e.g. the principle of social justice, the principle may be departed from, which also applies to the cases, when the new regulation, which is to be retroactive, is more favourable to the addressee (see for example the decision of the Constitutional Tribunal of 25 June 1995, K 15/95, OTK 1996, No. 3, item 22; or judgement of the Constitutional Tribunal of 31 March 1998, K 24/97, OTK 1998, No. 2, item 13). It must be added, however, that allowing the direct applicability of the new legal regulations to the circumstances pending is possible solely if the standards "*do not apply to the events that occurred before their coming into force but only – in a prospective manner – modify the situation of the subjects whose legal situation was different in the light of the previous regulations. The new regulation does not change anything retro-actively [...] but only introduces a change for the future*" (judgement of the Constitutional Tribunal of 13 April 1999, K 36/98, OTK 1999, No. 3, item 40)[1].

Another duty resulting from the principle of legal certainty is the duty to protect the acquired rights. The duty boils down to consideration when creating an act of law of the rights which have been separately acquired by the subjects. Therefore, the legislator may not arbitrarily omit the rights or deprive the entitled subjects of the rights. This does not mean that the legislator cannot amend the law to the disadvantage of the citizens. The legislator may do so, but only if the law complies with the Constitution[2]. "*This means that the changes of the legal situation of the citizens in such cases must be backed by principles, values or constitutional standards which are clear to understand »prima facie«*". A limitation of the rights acquired requires determination whether: "***1)*** *the limitations introduced are based on other standards, principles, or constitutional values;* ***2)*** *there is a possibility of implementation of the respective standard, principle or constitutional value without infringing*

[1] Boguslav Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warsaw: C. H. Beck, 2012).
[2] Beata Stepien- Zalucka , "Utrata stypendiów sportowych wskutek nowelizacji ustawy o sporcie a ochrona praw nabytych", *Przegląd Prawa Konstytucyjnego* (2016): 150-153.

*the rights acquired; **3)** the constitutional values – for the implementation of which the legislator limits the rights acquired – may be given priority in this specific situation before the values forming basis for the principle of protection of the rights acquired; **4)** the legislator implemented the necessary actions in order to provide the subjects of law with the conditions to adjust to the new regulation*" (judgement of the Constitutional Tribunal of 17 October 2000, SK 5/99, OTK 2000, No. 7, item 254).

It is worth emphasising that the duties of the Polish legislator stemming out from legal certainty coincide with those that have been formulated throughout the years by the European Court of Justice. Legal certainty, as the principle which must be taken into account when establishing laws, is visible not only in internal regulations of countries such as Poland. It has been visible, and at the same time protected, since the very beginning of the European integration process. Along with the subsequent adjudications, the broad and multidimensional nature of the principle has been emphasised, as derived from the fact that ensuring legal certainty depends on the implementation of the other principles and rules applicable to the establishment of laws.

The first decision applicable to legal certainty was that in the combined cases Nos 42/59 and 49/49 of SNUPAT v High Authority (1961), ECR 109, in which the Court of Justice considered the very term of legal certainty and its importance, claiming that the subjects must know the scope of their rights and duties, as based on such knowledge they may adequately carry out specific actions. Further years have, however, disclosed new dimensions of legal certainty in the context of the Community, which highlighted other rules in establishing laws inseparably connected with legal certainty. And so, deciding in the case of *Tomadini v Administrazione delle Finanze dello Stato* (Case: C-84/78 Tomadini v Administrazione delle Finanze dello Stato (1979), ECR 1801) of 1979, the Court of Justice emphasised not only the importance of legal certainty as such but also indicated that the effects arrived prior to the publication of the act should not be regulated by the later legal acts. (It must be additionally mentioned that the relationship between legal certainty and non-retroactivity has also been developed in the later decisions of the European Court of Human Rights. In the case of R v Kent Kirk, the Court stated: "[...] *it is sufficient to point out that such retroactivity may not, in any event have the effect of validating ex post*

*facto national measures of a penal nature which impose penalties for an act which, in fact, was not punishable at the time at which it was committed. That would be the case where at the time of the act entailing a criminal penalty, the national measure was invalid because it was incompatible with Community law"*[1]. Moreover, the Court also indicated that "*The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice*".[2])

In the cases of Faccini Dori contra Recreb Srl[3]**.** of 1994, and Foto-Frost v Hauptzollant Lübeck Ost of 1987[4], the Court of Justice considered that from the principle of justified expectations it appears that law must be clear, predictable and cohesive, and that the principle boils down to limiting the possibility of changing the legal standards and stability of principles imposed by them[5].

Contributing to the evolution of the essence of the legal certainty and the retroactivity ban, the Court of Justice has, however, allowed in the subsequent years the possibility of applying exceptions from the principle of non-retroactivity. This happened in Case C-331/88, R v MAFF[6], (1990) ECR I- 4023, where the Court decided that "*As regards the retroactive effect of the directive at issue outside the criminal sphere, it should be recalled that* [...] *although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected*"[7]. Another principle with which the Court of Justice connected legal certainty was the protection of the acquired rights, *understood by the Court* to be strongly protected legitimate expectations, granted clearly to the subjects of law

[1] Case: C -63/83 R v Kent Kirk (1984) ECR 2689, paragraph 21.
[2] Case: C -63/83 R v Kent Kirk (1984) ECR 2689, paragraph 22.
[3]Case: C-91/92, *European Court Reports 1994 I-03325*, ECLI identifier: ECLI:EU:C:1994:292.
[4] Case: 314/85, 22 October 1987.
[5] Ion Predescu, Marieta Safta, *The principle*, 8-9.
[6] Case C-331/88 R v MAFF, ex parte Fedesa (1990) ECR I- 4023, paragraph 48.
[7] Case C-331/88 R v MAFF, ex parte Fedesa (1990) ECR I- 4023, paragraph 48.

by administrative acts[1]. The implementation of legitimate expectations was made dependent by the Court on the following three conditions: "*First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules*"[2].

## 4. RELATIONSHIP BETWEEN LEGAL CERTAINTY AND LEGAL SECURITY, CITIZENS CONFIDENCE IN THE STATE AND THE LAWS ESTABLISHED BY THE STATE

In the well known philosophical theory of Radbruch, security is one of the three components of the idea of law, next to justice and purposefulness, as security does not exist for itself but for the societies and is to serve the societies[3]. In the legal doctrine, however, the category of legal security – also called "certainty at law" – means generally all positive results of legal certainty seen from the perspective of the subject of the respective law. In particular, it is the condition of the subject achieved thanks to the fact that law has been assigned the very principle of certainty. However, it must be mentioned that the term 'legal security' is often given a broader meaning, covering with its scope also "*some elements referring to the contents of the law* [...]"[4].

So based on the deliberations presented in the previous sub-chapter, it may be concluded that the principle of citizens confidence in the state and the law established by the state is based on legal certainty, namely – as it has been explained earlier herein – such collection of characteristic features assigned to law which ensure legal security to the subjects[5], and at the same time "*enable the subjects to decide about their conduct based on complete knowledge of the basis of operation of state authorities and the legal consequences which may result from such*

[1] Ion Predescu, Marieta Safta, *The principle*, 8-9.
[2] Case T-347/03 Branco v Commission (2005) ECR II-255, paragraph 102.
[3] Gustav Radbruch, *Filozofia prawa* (Warsaw: Wydawnictwo Naukowe PWN, 2009): 79-83.
[4] Hanna Filipczyk, P*ostulat pewności,* 23.
[5] Marzena Kordela, "Pewność prawa", 154.

*conduct. A subject should be capable to determine both the consequences of the particular behaviours and events on the grounds of the legal status binding at a given moment, and expect that the lawmaker does not change the same in an arbitrary manner. Legal security of a subject related to legal certainty contributes to the predictability of the operation of state authorities, and also to the possibility of forecasting the consequences of own actions*"[1]. The principle requires from the legislator not to establish legal standards which would impose charging of the citizens without simultaneous introduction of specific principles of conduct, adequately clear and enabling the enforcement rights by the citizens[2].

In practice, legal certainty must be considered a precondition for freedom of citizens in a state. It results from the fact that only based on certain knowledge of the binding law, the subjects are capable to foresee the consequences and make choices enabling the organisation of their affairs and assume responsibility for their own decisions[3]. From such perspective, legal security is somehow correlated with human dignity, as it is a manifestation of respecting a subject by the legal order as an autonomous and rational being. Thus, infringement of legal certainty has usually some effect on dignity, which is the source of all rights and freedoms[4]. Correlation with dignity does not mean, nevertheless, that legal security given by the certainty of the established laws is an absolute category, the more so because it may not collide with other values, the implementation of which requires a change in the legal system. The situation is not that simple. Legal security and certainty – representing constitutional values – may come into conflict with other constitutional values (we need to remember that the requirement of balance has been generally introduced in the principles), but what is more, they may lose with the other constitutional values based on the proportionality principle (Article 31.3 of the Constitution). Therefore, a subject must always remember that in some situations introduction of changes to their disadvantage may in some situations be necessary. So the subject must

[1] Decision of the Constitutional Tribunal of 14 June 2000, P. 3/00.
[2] Decision of the Constitutional Tribunal of 8 December 1992, K. 3/92.
[3] Lord Mance, "Should the law be certain?", 3 and next, https://www.supremecourt.uk/docs/speech_111011.pdf.
[4] "Wystąpienie dr Janusza Kochanowskiego, Rzecznika Praw Obywatelskich na konferencji naukowej „Język polskiej legislacji, czyli zrozumiałość przekazu a stosowanie prawa"," https://www.rpo.gov.pl/pliki/1165502902.pdf.

take into account that a change in social or economic conditions may require not only amendment of the binding laws but also immediate implementation of new legal regulations[1].

This means that legal certainty and security do not always take precedence before the other constitutional values. Without prejudice to the above, a subject of law may in practice expect that a given legal regulation is not changed to their disadvantage in an arbitrary manner, or that the legislator will not freely draw up the contents of the binding standards, treating them as an instrument to achieve varying goals that have been arbitrarily set out by the legislator[2].

Summing up the discussion, it must be said that legal certainty should be perceived not as a value in itself but mainly as one of the elements of a certain formula, namely the legal system in which the disturbance of one of its components affects the other components, thus infringing the system as a whole. In other words, legal certainty[3] is inseparably related to legal security[4] as well as the citizens confidence in the state and the laws established by the state[5]. Lack of certainty will sooner or later result in spreading chaos within the legal system, which is an insult to the rules of establishing laws, harming not only the very legal system[6] but also all of the areas of life[7].

## CONCLUSION

In 1939 Radbruch wrote that legal certainty is such a great value that a judge cannot focus on their own feeling of justice but on the legal

[1] Decision of the Constitutional Tribunal of 20 January 2011, Kp 6/09.

[2] "Wystąpienie dr Janusza Kochanowskiego, Rzecznika Praw Obywatelskich na konferencji naukowej „Język polskiej legislacji, czyli zrozumiałość przekazu a stosowanie prawa", https://www.rpo.gov.pl/pliki/1165502902.pdf; Lord Mance, "Should the law", 3.

[3] Decision of the Constitutional Tribunal of 12 January 1995 r.

[4] Wojciech Sokolewicz and Marek Zubik, "*Comment to the art. 2*," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, edited by Leszek Garlicki and Marek Zubik (Warsaw: Wydawnictwo Sejmowe, 2016) 131−132.

[5] Decision of the Constitutional Tribunal of 16 June 2003, K 52/02.

[6] Decision of the Constitutional Tribunal of 20 November 1995.

[7] Stefanie A. Lindquist and Frank C. Cross, "Stability, Predictability And The Rule Of Law: Stare Decisis As Reciprocity Norm", https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf.

standards. As a justification he stated that we would despise a priest preaching against his own beliefs, but respect a judge who in every case followed the road set out by the binding laws[1]. Despite the lapse of over a century from the moment those words were written, they have not lost their importance. In the contemporary democratic state of law one of the basic principles determining the relationship between a subject of law and the state is the principle of protecting the citizens confidence in the state and the laws established by it. A key to building the confidence is legal certainty, which provides the subject with a feeling of legal security in the state. It may surely be stated that legal certainty is a value which must be respected in a democratic legal system and, consequently, in a state[2].

## BIBLIOGRAPHY

### Books

1. Banaszak, Bogusław. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warsaw: C. H. Beck, 2012.
2. Białas – Zielińska, Klaudyna. *Radbrucha Koncepcje pozytywizmu prawniczego i iusnaturalizmu w ujęciu Gustava Radbrucha*, http://www.bibliotekacyfrowa.pl/Content/35304/0007.pdf.
3. Biura, Trybunału Konstytucyjnego. *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym.* Warsaw: Wydawnictwa Trybunał Konstytucyjny, 2015.
4. Bosek, Leszek. "Comment no. 8 for art. 2" in *Konstytucja RP. Tom I. Komentarz. Art.1-86*, edited by Marek Safjan and Leszek Bosek . Warsaw: C.H.Beck, 2016.

[1]Klaudyna Białas – Zielińska, *Radbrucha Koncepcje pozytywizmu prawniczego i iusnaturalizmu w ujęciu Gustava Radbrucha*, 68, http://www.bibliotekacyfrowa.pl/Content/35304/0007.pdf.

[2]Andrzej Bisztyga, „Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – stan kompatybilności czy konkurencyjności?", *Przegląd Prawa Konstytucyjnego* 3 (2011): 186; Bruno Deffains and Catherine Kessedjian, *Index of Legal Certainty. Report for the Civil Law Initiative* (Fondation pour le droit continental, 2015), 5, https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2015/04/ILC-Report-june-2015_EN.pdf.

5. Czarnek, Przemysław and Marek Dobrowolski and others, "Prawo konstytucyjne", in *Leksykon obywatela*, edited by Sławomir Serefin and Bogumił Szmulik. Warsaw: C.H. Beck, 2008.
6. Deffains, Bruno and Catherine Kessedjian. *Index of Legal Certainty. Report for the Civil Law Initiative*. Fondation pour le droit continental, 2015. https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2015/04/ILC-Report-june-2015_EN.pdf.
7. Filipczyk, Hanna. P*ostulat pewności prawa w wykładni operatywnej prawa podatkowego.* Warsaw: Proinfo, 2013.
8. Kordela, Marzena. "Pewność prawa jako wartość konstytucyjna." In *Wykładnia konstytucji Aktualne problemy i tendencje*, edited by Marek Smolak. Warsaw: Wolters Kluwer, 2016.
9. Lindquist, Stefanie A. and Frank C. Cross. *Stability, Predictability And The Rule Of Law: Stare Decisis As Reciprocity Norm*, https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf.
10. Mikłaszewicz, Przemysław. "Zaufanie do prawa współcześnie." In *Konstytucja. Rząd. Parlament, Księga jubileuszowa profesora Jerzego Ciemniewskiego*, edited by Piotr Radziewicz and Jan Wawrzyniak. Warsaw, 2014.
11. Młynarska –Sobaczewska, Anna. *Autorytet państwa*. Toruń: Dom Organizatora, 2010.
12. Murdoch, Jim and Ralph Roche. *Europejska Konwencja Praw Człowieka a działania policji. Podręcznik dla funkcjonariuszy policji i innych organów ścigania*. Strasburg: Wydawnictwo Rady Europy, 2013. https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_POL.pdf.
13. Radbruch, Gustav. *Filozofia prawa*. Warsaw: Wydawnictwo Naukowe PWN, 2009.
14. Sokolewicz, Wojciech. "Comment to the art. 2*." In Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V,, edited by Leszek Garlicki. Warsaw:Wydawnictwo Sejmowe, 2007.
15. Sokolewicz, Wojciech and Marek Zubik. "Comment to the art. 2." In *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed.

Leszek Garlicki and Marek Zubik. Warsaw: Wydawnictwo Sejmowe, 2016.
16. Spyra, Tomasz. *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni.* Cracow: Kantor Wydawniczy Zakamycze, 2006.
17. Tuleja, Piotr. "Comment to the art. 2." In *Konstytucja RP. Tom I. Komentarz. Art.1-86*, edited by Marek Safjan and Leszek Bosek. Warsaw: C.H.Beck, 2016.
18. Winczorek, Piotr. *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r*. Warsaw: Liber, 2008.

**Articles in a print journal**

1. Bisztyga, Andrzej. "Europejska Konwencja Praw Człowieka a Karta Praw Podstawowych Unii Europejskiej – stan kompatybilności czy konkurencyjności?" *Przegląd Prawa Konstytucyjnego* 3 (2011): 186.
2. Paunio, Elina. "Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order." *German Law Journal* 11 (2011): 1469 and next.
3. Stępień-Załucka, Beata. "Stabilność Prawa. Zadanie na dziś czy na wczoraj." *Przegląd Prawa Publicznego* 12 (2017): 9-22.
4. Stępień-Załucka, Beata. "Utrata stypendiów sportowych wskutek nowelizacji ustawy o sporcie a ochrona praw nabytych."*Przegląd Prawa Konstytucyjnego* (2016): 150-153.
5. Totskyi Bronislav „Legal certainty as a basic principle of the land law of Ukraine", *Jurisprudence,* no. 21(1), (2014): 209

**Articles in an online journal**

1. Dubiński, Łukasz. „Uwagi na tle pewności i bezpieczeństwa polskiego i unijnego prawa podatkowego." *Finanse, Rynki Finansowe, Ubezpieczenia* 5 (2016): 1, http://www.wneiz.pl/nauka_wneiz/frfu/83-2016/FRFU-83-cz1-21.pdf.
2. Lovett, John A. "On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyon." *Louisiana Law Review* 4 (2003): 1399,

http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6017&context=lalrev.

3. Mance Lord, "Should the law be certain?", 3 and next, https://www.supremecourt.uk/docs/speech_111011.pdf.
4. Neuhaus, Paul Heinrich. "Legal certainty versus equity in the conflict of laws." *Law and Contemporary Problems* 4 (1963): 797, 802. http://scholarship.law.duke.edu/lcp/vol28/iss4/7/.
5. Predescu, Ion and Marieta Safta. "The principle of legal certainty. Basis for the rule of law, Landmark case-law.": 9. https://www.ccr.ro/ccrold/publications/buletin/8/predescuen.pdf.

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# WHO IS THE CREDITOR OF THE DEBTOR'S DEBTOR?

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***Abstract:***

*The current article subjects to analysis certain aspects of a particular legal situation in which are found persons whose liability has been entailed for insolvency. What happens with them when the insolvency procedure shall be concluded and what is their relation to the creditors? For these questions the practice has constantly responded. Is it the fairest? Does this practice has a correspondent in law?*

***Key words:*** *creditor; debtor; insolvency; claim; fraud; civil law; principle*

The idea of such study emerged after ascertaining in the practice of the courts an unaccountable attitude in the adoption of a solution to the following situation in which are found the persons whose liability has been engaged for insolvency: in a company found in insolvency, has been entailed the liability of the administrator for insolvency. Until the decision ascertaining the liability entered into force, shall take place the conclusion of the procedure for insolvency. In such situation, the courts shall allow the conclusion of the procedure for insolvency. In such case, the court shall allow the enforcement of the administrator whose liability has been entailed, at the request of one of the company's creditors.

Moreover, the same creditor shall submit an action to set a transaction aside against the administrator, whose liability has been entailed, thus aiming the ascertainment of the unenforceability of an immovable patrimonial transfer the latter one had performed.

Our attention has been drawn by the constancy with which the society aims its creditors to initiate the enforcement against the liable administrator, as well as the submission by them of the action to set the transaction aside.

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Are such relations between creditors of the insolvent company (or bankrupt) and the persons whose liability has been entailed for insolvency interesting?

As priority, the following are to be examined: if for the enforcement it is necessary only the condition of the existence of the quality as creditor, owner of clear, liquid and eligible claim, we need to see the exigencies required for the promotion of an action to set a transaction aside.

Art 1562 of the Civil Code states that "if the creditor proves a prejudice, then he is entitled to ask the unenforceability of the legal acts concluded by the debtor with the violation of his rights".

The mentioned text, which is also the headquarters of the action to set the transaction aside, refers to a permitted situation[1]. The situation emphasized by the bold words (creditor, towards him, concluded by the debtor with violation of his rights) is the following: it is necessary the existence of a legal relation of claim between the debtor and the creditor. The debtor, being aware of the situation, tries to ruin the performance of the claim that the creditor has against him and in the fraud of the creditor's rights creates or expands a state of insolvency.

The creditor may very well use the action to set the transaction aside, if his right has been violated by the debtor in the conclusion of the act.

Thus, it is necessary the pre-existence of a legal relation between the creditor who submits the action to set the transaction aside and his debtor.

The doctrine is rich in opinions according to which the action to set the transaction aside is admissible also for the value of a right received subsequently after the allegedly fraudulent act, but this right of claim must come from a pre-existing legal relationship between the creditor and the debtor, a future legal relationship of a debt claim[2].

What legal relation is between the creditor of the insolvent company and the person whose liability has been entailed?

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[1] Fl.Baias, E.Chelaru and coordinators, *Noul Cod Civil. Comentariu pe articole* (Bucharest: C.H. Beck, 2012).

[2] Cărpenaru, Stefan, and Vasile Nemeș and Mihai Hotca. *Legea nr.85/2006 privind procedura insolvenței. Comentarii pe articole*, 2nd Edition (Bucharest: Hamangiu, 2008).

There was and there is no legal relationship between the person to whom the liability was attributed and the claimant in the revocation action.

This is why: the obligation to pay was established by the decision to entail the liability. By this decision, the person whose liability has been activated was compelled to cover, from his own patrimony, and to bring in the patrimony of the debtor company a certain amount of money, related to the offence for which the liability has been entailed.

We draw attention to the following:

- The birth of the obligation for payment may be represented only by Art 169 of the Law No 85/2014[1] (entailing the liability for insolvency) or, for offences committed in the past, for a procedure performed under the auspices of the former regulation, by Art 138 of the Law No 85/2006[2] (the liability of the management);

- The action to set the transaction aside has been submitted by the insolvency administrator of the debtor company as claimant and has as plaintiff the person whose liability has been entailed;

- Art 169 of the Law No 85/2014 states: "(1) *Upon the request of the insolvency administrator or liquidator, the syndic judge may order that a part or the entire passive patrimony of the debtor, legal person in insolvency, without overcoming the prejudice in relation to that offence, be covered by the members of the board management and/or supervision of the company, as well as by any other persons who may have contributed in the state of insolvency of the debtor, by one of the following actions* (…)", while Art 138 of the Law No 85/2006 stated that "(1) *If within the relation concluded in accordance to Art 59 Para 1 are identified persons to whom is imputable the insolvency of the debtor, upon the request of the legal administrator or liquidator, the syndic judge may order that a part or the entire passive patrimony of the debtor,*

[1] Published in Official Monitor, First Part, no. 466/25.06.2014
[2] Present Law was repealed by the new Insolvency Law: Law 85/2014 on Insolvency Prevention and Insolvency Proceedings

*legal person in insolvency, without overcoming the prejudice in relation to that offence, be covered by the members of the board management and/or supervision of the company, as well as by any other persons who may have contributed in the state of insolvency of the debtor, by one of the following actions* (…)".[1]

These texts state that "an integrant part or the entire passive of the patrimony of the debtor, legal person, who is in insolvency, without overcoming the prejudice related to that offence be covered by…" and namely "a part of the passive patrimony of the debtor, legal person, who is in insolvency, be covered by…"

These are the legal relationships in which the debtor, the insolvent company, has a passive patrimony towards its creditors (these relations for claim are between the creditors and the debtor, namely the person found in insolvency).

If there are mentioned the elements of the liability stated by Art 169 or Art 13, "a certain part of the debtor's passive" shall be covered by the members of the board who have caused the insolvency.

The passive belongs to the debtor and shall remain in his possession. The relations of claim between the debtor and creditor shall not be altered. To "cover" a part of the passive refers to paying the debtor to amount of money established for the board for it, after that, to pay the money to the creditors by the judicial liquidator.[2]

Thus, the creditors are the creditors of the debtor company, and the persons whose liability for insolvency has been entailed based on Art 169 or Art 138 become the debtors of the company, with no legal relation to its creditors.

The persons whose liability has been entailed shall pay those amounts of money to the company. The entailment of the liability generates a legal relation between the insolvent debtor-company which becomes the creditor for the persons whose liability has been activated.

The legislator's will in accordance with the previous mentioned is expressed by Art 171 of the Law No 85/2014, namely Art 140 of the Law No 85/2006: "*The amounts of money registered according to Art 169*

[1] I.Turcu, *Legea procedurii insolvenței. Comentariu pe articole*, *3rd Edition* (Bucharest: C.H. Beck, 2009).
[2] R. Bufan, *Tratat practic de insolvență* (Bucharest: Hamangiu, 2014).

*Para 1 shall be integrated within the patrimony of the debtor and shall be destined, in case of reorganization, for the payment of the claims according to the payment program, completing the necessary funds for the continuity of the debtor's activity and, in case of bankruptcy, to cover the passive patrimony*"; while Art 140 states that "*The amounts of money registered according to Art 138 Para 1 shall be part of the debtor's patrimony and shall be destined, in case of reorganization, for the payment of the claims according to the payment program, completing the funds necessary for the debtor's activity and, if bankruptcy, to cover the passive patrimony*".

This is the legal relation emerged from the decision to entail the liability. The person whose liability has been entailed shall become a debtor for the insolvent company (*The amounts of money registered according to Art 169 Para 1 shall be integrated within the patrimony of the debtor*). Subsequently to this legal relation, the debtor company shall pay (distribute) by liquidator these amounts of money to its creditors (this is another legal relation between the creditor and the insolvent debtor company).

From this procedure it results that there is no legal relation established between the creditors of the insolvent company and the persons liable for this.

Why all these considerations?

The plaintiff in the action to set the transaction aside, had, at the date of the contested act, the quality as creditor for the insolvent company, while the person whose liability has been entailed, was a debtor of that company, being issued the decision by which the liability was ascertained based on Art 169 of the Law No 85/2014 or Art 138 of the Law No 85/2006.

These were the legal relations existent in the conclusion of the act appealed by the action to set the transaction aside.

Therefore, the plaintiff and the defendant of the action to set the transaction aside were not parties of the same legal relation at the moment of the conclusion of the appealed act. The plaintiff was not the creditor of the defendant and has never been. The obligation for payment established by the decision to entail the liability had as creditor the insolvent company, according to Art 171 of the Law No 85/2014 or Art 140 of the Law No 85/2006.

Under these conditions, the premise of the submission of the action to set the transaction aside is not fulfilled.

At the conclusion of the act appealed by an action to set the transaction aside, the plaintiff was not the creditor of the defendant and had no legal relation with him, while the defendant was not the debtor of the plaintiff, thus unable to cause him a prejudice. He could have framed a pre-existing own creditor or begging a future creditor whose debt arose from a pre-existing legal relationship.

This is not the case of the current study. The claim of the creditor arose only from legal relations with the debtor company, and the payment obligation of the person liable arose towards the debtor company, from the action to ascertain the liability.

Art 1562 of the Civil Code states that "*If the creditor proves a prejudice, then he is entitled to ask the unenforceability, towards him, of the legal acts concluded by the debtor with the damage of his rights*".

The requirements of the law are not fulfilled, and there is no legal relationship between the person to whom the liability was attributed and the plaintiff's creditor of the company before or at the time when the act challenged by the revocation action was concluded.

Also, under the same legal reasoning applied to the simplified hypothesis of an enforcement request, it cannot be upheld because the creditor of the company in insolvency is not the creditor of the person to whom the liability has been attributed.

We have proven that the entailment of the liability based on Art 169/Art 138 does not turn the persons held liable into debtors for the creditors of the insolvent company.

The liable persons are the debtors of the insolvent/bankrupt company.

What happens if the decision ascertaining the liability is not enforced until the conclusion of the procedure for bankruptcy (namely until the disappearance of the company as legal subject)?

Art 173 Para 2 of the Law No 85/2014 states that "*after the conclusion of the procedure of bankruptcy, the amounts of money resulted from the enforcement shall be distributed by the legal enforcer according to the provisions of the current title, based on the definitive table of claims placed at his disposal by the legal liquidator*"; while Art 142 Para 2 of the Law No 85/2006 states that "*after the conclusion of the procedure of bankruptcy, the amounts of money resulted from the*

*enforcement shall be distributed by the legal enforcer according to this law, based on the definitive table of claims placed at his disposal by the legal liquidator*".

The conclusion of the bankruptcy procedure does not change the owner of the claim against the person whose liability has been entailed (until this moment the person was debtor for the bankrupt company – having the obligation to deliver to the company's patrimony the amounts of money to which was compelled by the liability).

If it is stated that the holder of the claim against this person changes, then it must be shown by what legal means that transfer from the patrimony of the bankrupt company to the patrimony of the creditor of that company would be operated.

By what legal means does the company's creditor has become the creditor for the person whose liability has been entailed?

By none!

What is the legal relation between the obligations to pay the amount of money for which the liability has been activated with the right to claim that the creditor holds upon the debtor company?

None!

Of course, the company's creditor appears in an undesirable and not just fair situation since, although he was recognized as having the right not to be able to claim, but as long as there is no text to regulate the situation in the special legislation and has not been identified no legal mechanism through which the creditor of the company can justify such action, consistent jurisprudence favorable to the creditor in this hypothesis remains tributary in declining his legal support.

## BIBLIOGRAPHY

### Books

1. Baias, Fl. And E.Chelaru and coordinators, *Noul Cod Civil. Comentariu pe articole*. Bucharest: C.H. Beck, 2012.
2. Bufan, Radu, *Tratat practic de insolvență*. Bucharest: Hamangiu, 2014.
3. Cărpenaru, Stefan, and Vasile Nemeș and Mihai Hotca. *Legea nr.85/2006 privind procedura insolvenței. Comentarii pe articole*, 2nd Edition. Bucharest: Hamangiu, 2008.

4. Turcu, Ion, *Legea procedurii insolvenței. Comentariu pe articole*, 3rd Edition. Bucharest: C.H. Beck, 2009.

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# A STATUTORY MODEL OF TRADE UNIONS AT THE EMPLOYER LEVEL IN POLAND

**Maciej ŁAGA** [1]

***Abstract:***

*The paper describes a statutory model of trade unions at the employer level in Poland. Freedom of associacion guaranteed in ILO Convention No. 87 includes freedom to establish union structures. However, the Polish legislator enforces Polish trade unions to establish so-called 'works union organizations' at the employer level. Trade unions which does not establish a 'works union organization', exercise practically no rights of workers' represenation at the employer level. In effect Polish law is a significant obstacle to development of trade unions in contemporary Poland.*

***Key words:*** *trade unions; freedom of association; employer level trade union; works union organization; Polish trade unionism.*

Trade unions in Poland are losing their popularity in recent decades. Large groups of workers do not exercise freedom of association nowadays. The question is whether labour law is an obstacle for trade unions establishment and functioning. The author advances a thesis that labour law is a significant obstacle for development of trade union movement in Poland.

The paper is divided into four sections and a conclusion. In the first section freedom of association is described. Next two sections refer to Polish statutory law on above mentioned freedom and union structures. In the last section the author searches for social implications of statutory law. The main findings are summarized in the conclusion.

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## 1. INTERNATIONAL, EUROPEAN AND CONSTITUTIONAL LAW

International standards for collective representation of workers are regulated in the Polish Constitution[1] (hereinafter referred to as the Constitution) and in a number of acts of international and European law. Referring to art. 12 of the Constitution, the Republic of Poland shall ensure not only freedom for creation but also for functioning of trade unions. Freedom of association is repeated in art. 59.1 of the Constitution and is specified in further provisions of the Constitution (in the Chapter 2. – Freedoms, Rights and Obligations of Persons and Citizens). On the basis of art. 59.2 and 59.3 of the Constitution trade unions have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements, to organize workers' strikes or other forms of protest subject to limitations specified by statute.[2] It shall be stressed that the scope of freedom of association in trade unions may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party (art. 59.4 of the Constitution).

The main body of the international and European law in that field is: the Universal Declaration of Human Rights,[3] the International Labour Organization (hereinafter referred to as the ILO) Convention No. 87 concerning freedom of association and protection of the right to organize,[4] ILO Convention No. 98 concerning right to organize and

[1] English version: Constitution of the Republic of Poland of 2nd April, 1997, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed March 20, 2018, the original: ustawa z dnia 2 kwietnia 1997 Konstytucja Rzeczypospolitej Polskiej, Journal of Laws 1997 No. 78, item 483 as amended.

[2] For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields.

[3] Universal Declaration of Human Rights of 10 December 1948, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, accessed March 20, 2018.

[4] ILO Convention No. 87 of 9 July 1948 concerning freedom of association and protection of the right to organise, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232, accessed March 20, 2018.

collective bargaining convention,[1] ILO Convention No. 135 concerning protection and facilities to be afforded to workers' representatives in the undertaking,[2] European Convention on Human Rights,[3] European Social Charter,[4] European Social Charter (revised).[5]

Above mentioned legal acts guarantee freedom of association in *sensu largo* meaning. It concerns the right to establish a trade union, the right to membership, the right to collective bargaining, the right to strike and the special protection of trade union's representatives. In the context of this paper the most important is the ILO Convention No. 87 concerning freedom of association and protection of the right to organize (hereinafter referred to as the ILO Convention No. 87). In the art. 2 of the ILO Convention No. 87 the right to establish and join trade unions is guaranteed to all workers, without any distinction. Referring to art. 3 of the Convention No. 87, trade unions have right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes freely. Public authorities should refrain from any interferences which would on the one hand restrict this right, or on the other, impede the lawful exercise of above mentioned right. Furthermore, on the basis of art. 5 of the Convention No. 87 trade unions are guaranteed to establish and join federations and confederations and affiliate with international organisations. Therefore, freedom of assotiation is comprised also of an internal aspect. That freedom is to constitute and to be constituted in autonomous manner. Presented interpretiation is in line with the ILO's Committee on Freedom of

[1] ILO Convention No. 98 of 1 July 1949 concerning right to organise and collective bargaining convention, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C098 , accessed March 20, 2018.

[2] ILO Convention No. 135 of 2 June 1971 concerning protection and facilities to be afforded to workers' representatives in the undertaking, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C135, accessed March 20, 2018.

[3] European Convention on Human Rights of 4 November 1950 as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 3, https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed March 20, 2018.

[4]European Social Charter of 18 October 1961 as amended, https://rm.coe.int/168048b059, accessed March 20, 2018.

[5] European Social Charter (revised) of 3 May 1996, https://rm.coe.int/168007cf93, accessed March 20, 2018.

Association.[1] Public authorities shall not interfere in that freedom also not only by administrative decisions but also by legislative actions.

## 2. STATUTORY LAW ON FREEDOM OF ASSOCIATION

Polish collective labour law is regulated in the Labour Code[2] and 5 acts of key importance: on trade unions[3] (hereinafter referred to as the trade unions act), on employers organizations,[4] on solving collective labour disputes,[5] on the Social Dialogue Council and other social dialogue institutions[6] and on information and consultation of employees.[7]

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[1] Por. M. Seweryński, Autonomia partnerów społecznych w stosunkach pracy i jej ograniczenia, (w:) A. Wypych-Żywicka, M. Tomaszewska i J. Stelina (red.), Zbiorowe prawo pracy w XXI wieku, Gdańsk 2010, p. 59.

[2]English version: act of 26 June 1974 Labour code, http://www.en.pollub.pl/files/17/attachment/98_Polish-Labour-Code,1997.pdf, accessed March 20, 2018, the original: ustawa z dnia 26 czerwca 1974 r. Kodeks pracy, uniform text Polish Journal of Laws 2018, item 108 as amended.

[3]English version: act of 23 May 1991 on trade unions, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/2/1/ACT_on_trade_unions.rtf, accessed March 20, 2018, the original: ustawa z dnia 23 maja 1991 r. o związkach zawodowych, uniform text Polish Journal of Laws 2015, item 1881 as amended.

[4]English version: act of 23 May 1991 on employers organizations, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/3/1/ACT%20employers%20organizations.doc, accessed March 20, 2018, the original: ustawa z dnia 23 maja 1991 r. o organizacjach pracodawców, uniform text Polish Journal of Laws 2015, item 2029 as amended.

[5]English version: act of 23 May 1991 on solving collective labour disputes, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/4/1/ACT%20on%20solving%20collective%20labour%20disputes..doc, accessed March 20, 2018, the original: ustawa z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych, uniform text Polish Journal of Laws 2018 , item 399 as amended.

[6] English version: act of 24 July 2015 on the Social Dialogue Council and other social dialogue institutions, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/9/1/ang_ustawa%20o%20RDS%20-%20wersja%20edytowaa_en.docx, accessed March 20, 2018, the original: ustawa z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego, Polish Journal of Laws 2015 , item 1240 as amended.

[7] English version: act of 7 April 2006 on information and consultation of employees https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/6/1/act_on_information.DOC, accessed March 20, 2018, the original: ustawa z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, Polish Journal of Laws 2006 No. 79, item 550 as amended.

Freedom of association, as regards employees, is regulated minutely in the act on trade unions. The peculiarity of Polish law on freedom of association is *numerus clausus* of persons entitled to establish and join trade unions. That legislative technique itself seems to be contrary to the idea of freedom of association. It is legally constructed more like the right than freedom. In art. 2.1 of the trade unions act it is enumerated that the right to establish and join a trade union (the complete right to association) is adressed to: employees, members of agricultural production cooperatives and persons who perform work on the basis of an agency contract, unless they are employers.

Other categories of people of work might exercise only the partial right to association (art. 2.2 – 2.7. of the trade unions act). Those groups are *inter alia*: cottage industry workers (art. 2.2 of the trade unions act), functionaries of the Police, Frontier Guard and Prison Service, firemen of the National Fire Brigades and the employees of the Supreme Chamber of Control (art. 2.6 of the trade unions act), pensioners (art. 2.3 of the trade unions act) and unemployed (art. 2.4 of the trade unions act). There are also categories of workers who may not exercise the right to association (soldiers and functionaries of special services).

Taking under consideration the partial right to association, attention in Poland was drawn to workers employed on the basis of civil contracts, as: contracts of service, specific task contracts and cottage industry work. Basing on regulations from before the Constitutional Tribunal judgment of 2 June 2015[1] (hereinafter referred to as the judgment in the case K 1/13), among above mentioned group the right to association was addressed only to persons who perform cottage work (art. 2.2. of the trade unions act). Moreover, it was only of partial character – cottage workers were entitled only to join a trade union in the establishment in which they were employed.

It has to be stressed that civil contract workers create a numerous group. Currently over 1.5 million Poles works on a civil contract basis,[2]

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[1]Judgment of the Constitutional Tribunal of 2 June 2015 in the case K 1/13, Orzecznictwo Trybunału Konstytucyjnego – Zbiór A 2015 No. 6, item 80.

[2]K. Fejfer, Na jakich umowach pracują Polacy?, http://rynekpracy.org/wiadomosc/976889.html, accessed March 20, 2018, J.K. Kowalski, Polska mapa umów o pracę. Nie wiadomo, ile osób pracuje na śmieciówkach, http://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/699506,polska-

vast majority of them have concluded: contracts of service and specified task contracts. That group of workers were excluded from the right to association, as from almost all rights deriving from labour law.

In the case K 1/13 the Constitutional Tribunal adjudicated that art. 2.1 of the trade unions act is discordant with art. 59.1 of the Constitution in conjunction with art. 12 thereof to the extent to which it restricts the freedom of association to persons performing paid work not mentioned in that provision. At the same time, the Constitutional Tribunal ruled that art. 2.2 of the trade unions act, voiced in the paragraph above, is discordant with art. 59.1 of the Constitution in conjunction with art. 12 thereof. The effects of the judgment are that art. 2.2 of the trade unions act has been derogated, and art. 2.1. thereof shall not be understood in a manner which restricts freedom of association to any category of paid workers.

It has to be mentioned that the judgement in the case K 1/13 was preceded by the recommendation of ILO's Committee on Freedom of Association in the case No. 2888.[1] Polish government was asked to take the necessary steps to ensure that all working people, without any distinction, are guaranteed the right to create and join, according to their choice, to organizations within the meaning of ILO Conventions Nos. 87, 98 and 135.[2] Almost none actions were undertaken until the quoted Constitutional Tribunal judgment in the case K 1/13. The project of the amendment of the trade unions act in which freedom of association is guarenteed to all workers employed on the basis of civil contracts is proceeded by the Polish parliament at the moment.[3]

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mapa-umow-o-prace-nie-wiadomo-ile-osob-pracuje-nasmieciowkach.html, accessed March 20, 2018.

[1] See the case No 2888, *363rd Report of the Committee on Freedom of Association ILO*, International Labour Office Governing Body 313th Session, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176577.pdf, accessed March 20, 2018.

[2] Described in Polish labour law doctrine by E. Podgórska-Rakiel, *Rekomendacje MOP dotyczące wolności koalicji związkowej i ochrony działaczy*, Monitor Prawa Pracy, 2013, nr 2, p. 69-73, E. Podgórska-Rakiel, *Konieczność nowelizacji prawa polskiego w kwestii wolności związkowych z perspektywy Międzynarodowej Organizacji Pracy*, Monitor Prawa Pracy, 2014, nr 10, p. 511.

[3] Projekt z dnia 12 października 2017 r. ustawy o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw z projektami aktów wykonawczych, Druk nr 1933,

## 3. STATUTORY LAW ON UNION STRUCTURES

Alleged illegal limitation of freedom of association was not the only problem of the Polish trade union law. It shall be underlined that Polish law regulates structures of trade unions in a meticulous manner. Detailed regulation concerns not only issues of trade union establishment, registration procedure, or legal personality but also a legal model of union structures. Rules of Polish law in those fields are very precise and absolute.

The principle is that a trade union might be established by minimum 10 persons excercising the complete right of association. That threshold is accordant with the Constituion and international law. It brings no legal questions nor practical complications.

The issue is that almost all competences of trade unions at the employer level are attributed to a strictly defined unit: 'works union organization'. That solution is a result of a chosen model of Polish trade unions at the employer level. It is an inside-employer model, in which a works union organization associates all members of a trade union employed by a given employer. A works union organization operates inside an employer's works. What is extremely important at this point of the paper, referring to art. $25^1$ of the trade unions act, competences of a works union organization are restricted only to trade union organizations which associate at least 10 employees, cottage workers or functionaries working for the particular employer, in which that organization operates. Therefore, trade union organization excercises absolutely no competences, if it associates less than 10 persons of above mentioned categories.

It shall be indicated that rights and competences of works union organizations are very broad. *E.g.* an employer is obligated to provide a works union organization with a room and technical devices (art. 33 of the trade unions act). If a works union organization associates more than 150 members, an employer is obligated to exempt at least one of an organization's management members from a duty to provide work (in art. 31 of the trade unions act proportion of organization's members and activists exempted from above mentioned duty is set out). It has to be underlined that also all other competences connected with trade union

http://orka.sejm.gov.pl/Druki8ka.nsf/0/429C067FDC4EC236C12581BD00426427/%24File/1933.pdf, accessed March 20, 2018.

individual and collective representation of workers at the level of employer are credited only to a works union organization. There are possibilities of nominating neighter a union delegate nor a shop steward.

The one and only exemption is so-called 'inter-works union organization' (art. 34 – $34^2$ of the trade unions act). The concept is that minimum threshold of 10 trade union members might be counted from more than 1 employer, if a trade union notifies to all concerned employers establishment of an inter-works union organization. Therefore, theoretically a legally empowered trade union organization might be established at an employer employing 1 employee. On the condition that the employee will be associated with other 9 employees working for another employers and an organization created by them will notify existence of an inter-works union organization to all employers. Legal provisions on a 'works union organization' are as a rule acordingly applied to 'inter-works union organization'. In practice, an inter-works union organization come true in capital groups, big employers situated close to each other and in situations in which employess have very strong common interest.

That model was criticized in Polish labour law doctrine. Zbigniew Hajn criticized it in the most representative and vivid manner by defining the phenomenon as *'starutory model of organizaing Polish trade union movement'*.[1] Notwithstanding, the minimum threshold of 10 members was adjudicated by the Constitutional Tribunal as not discortant to the Constitution.[2] The codification commission on labour law, nominated on 15 September 2016,[3] have accomplishedthe project of Collective Labour Law Code. It is said that the project comprises of a union delegate proposal. Nevertheless, the project has not been even published and chances for it to be put into effect are hard to be estimated at the moment.

[1] Z. Hajn, *Ustawowy model organizacji polskiego ruchu związkowego i jego wpływ na zbiorowe stosunki pracy* (w:) M. Matey-Tyrowicz, L. Naważki, B. Wagner, *Prawo pracy a wyzwania XXI wieku. Księga Jubileuszowa profesora Tadeusza Zielińskiego*, Warszawa 2002, p. 426.

[2] Judgment of the Constitutional Tribunal of 24 February 2015 in the case K 54/02, Orzecznictwo Trybunału Konstytucyjnego – Zbiór A 2004 No. 2, item 10.

[3] *Nowa Komisja Kodyfikacyjna Prawa Pracy*, the Ministry for Family, Labour and Social Policy, https://www.mpips.gov.pl/aktualnosci-wszystkie/prawo-pracy/art,8248,nowa-komisja-kodyfikacyjna-prawa-pracy.html, accessed March 20, 2018.

## 4. SOCIAL IMPLICATIONS OF STATUTORY LAW ON UNION STRUCTURES

Social implications of the problem are partly related to the number of workers employed by small employers. Polish labour law does not define a small employer. For the purposes of this paper, taking under consideration allegations from previous subsection, as a small employer is considered an employer employing less than 10 employees.

Polish labour market is dominated by private employers. They employ approx. 11.9 million people working in relation to 3.4 million people working in the public sector (according to data for 2016).[1] Among all private employers dominate entrepreneurs. The number of people working in an enterprise sector is approx. 9.4 million (according to data for 2015).[2] Other working in the private sector, are employed in entities that do not run business activity – associations, foundations, *et cet.* and by natural persons – home employers.

In group of enterprises, as well as in other groups of employers of the private sector, dominate small entities. Over 96% of all enterprises are microenterprises (defined in the European Union as enterprises employing less than 10 employees, with an annual turnover and/or balance less sheet than EUR 2 million). Only in the group of microenterprises, there are approx. 3.7 million working people[3] (data on microenterprises according to data for 2015). [4] This number includes all working people, including also employers. However, it can be estimated that employers in this group are approx. 0.6 million.[5] The remaining

[1] Central Statistical Office of Poland, *Rocznik Statystyczny Pracy 2017*, Warszawa 2017, p. 120, http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5515/7/5/1/rocznik_statystyczny_pracy_2017.pdf, accessed March 20, 2018.

[2] Polish Agency for Entrepreneurship Development*, Raport o stanie sektora małych i średnich przedsiębiorstw w Polsce 2017*, Warszawa 2017, p. 23, https://www.parp.gov.pl/images/PARP_publications/pdf/raport%20o%20stanie%20sektora%20msp%20w%20polsce_2017.pdf, accessed March 20, 2018.

[3] In Polish statistics a definition of working people (pol. pracujący) covers almost all economiclyy active persons, including even employers. More narrow is a definition of employed, which covers generally all workers (employees, civil contracts workers and functionaries).

[4] *Raport…, 23.*

[5] Author's estimations on the basis of *Raport…,* p. 22.

approx. 3.1 million working people are mainly employees and civil contract workers, including self-employed.

It can be estimated also that about 2.5 million of people work in a private non-enterprises sector.[1] Small entities also dominate among that group as well. For example, about 75% of NGOs employ up to 9 workers, 32% of the above-mentioned the organization employs no more than 2 workers, and approx. 18% employ one worker (according to data for 2015[2]). Based on the above data, it can be assumed that approx. 4 million workers provide work for small employers.

Thus, app. 4 million of workers are placed at establishments in which an in-house works union organization cannot be created and an inter-works union organizations might be created only theoretically. Incompability of the Polish model of union structures with employers structures is confirmed by aresearch conducted by a research team under direction of Juliusz Gardawski (see Table 1, data for 2001, but it have not changed until novadays).

**Table 1. Appearence of trade unions according toemployment level and ownership in 2001 (approximately, in %)**

| **Type of employer** | **Appearence of trade unions** | | |
|---|---|---|---|
| | **Public sector** | **Privatized sector** | **Private sector** |
| **0–50 employees** | 50 | 0 | 0 |
| **51–250 employees** | 75 | 75 | 33 |
| **251 and more employees** | 100 | 100 | 33 |

*Source*: author's elaboration on the basis of: J. Gardawski, *Związki zawodowe na rozdrożu*, Warszawa 2001, p. 60–64.

The described legal model of union structures at the employer level is of course not the only reason for the extremely low rate of trade unions appearance in small employers. Other factors are sociological

[1] Author's estimations on the basis of *Rocznik…*, p. 120 and *Raport…,* p. 22-23.
[2] P. Adamiak, B. Charycka, M. Gumkowska, *Kondycja sektora organizacji pozarządowych w Polsce 2015. Raport z badań,* Warszawa 2016, p. 49-58, http://www.nck.pl/upload/attachments/318004/Raport_Klon_Kondycja_2015.pdf, accessed March 20, 2018.

issues, globalization, development and diversification of new forms of employment, demographic shifts and general decline in unionization worldwide. However, the trade union model adopted in the trade unions favors the above mentioned trends.

## CONCLUSIONS

Summarizing, the thesis that Polish statutory collective labour law is a significant obstacle to trade union development in Poland is legitimate.

The very broad group of workers employed on the basis of civil contracts could not exercise freedom of association fo decades. The situation has started to change after the judgment of the Constitutional Tribunal in the case K 1/13.

The described legal model of union structures in Poland is not suited to structures of contemporary employers. In this connection for app. 4 million of workers employed by small employers a possibility to join a trade union is only law in books. They might not exercise freedom of association in practice.

## BIBLIOGRAPHY

**Books**

1. Maria Matey-Tyrowicz and Lesław Nawacki and Barbara Wagner, *Prawo pracy a wyzwania XXI wieku. Księga Jubileuszowa profesora Tadeusza Zielińskiego*, Warszawa 2002.
2. Alina Wypych-Żywicka and Monika Tomaszewska and Jakub Stelina (red.), *Zbiorowe prawo pracy w XXI wieku*, Gdańsk 2010.

**E-books**

1. Piotr Adamiak and Beata Charycka and Gumkowska Marta, *Kondycja sektora organizacji pozarządowych w Polsce 2015. Raport z badań,* Warszawa 2016, http://www.nck.pl/upload/attachments/318004/Raport_Klon_Kondycja_2015.pdf, accessed March 20, 2018.

**Articles in a print journal**

1. Podgórska-Rakiel Ewa, „Konieczność nowelizacji prawa polskiego w kwestii wolności związkowych z perspektywy Międzynarodowej Organizacji Pracy", *Monitor Prawa Pracy* no. 10 (2014).
2. Podgórska-Rakiel Ewa, „Rekomendacje MOP dotyczące wolności koalicji związkowej i ochrony działaczy", *Monitor Prawa Pracy* no 2 (2013).

**Legislation**

1. Universal Declaration of Human Rights of 10 December 1948, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, accessed March 20, 2018.
2. ILO Convention No. 87 of 9 July 1948 concerning freedom of association and protection of the right to organise, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232, accessed March 20, 2018.
3. ILO Convention No. 98 of 1 July 1949 concerning right to organise and collective bargaining convention, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C098 , accessed March 20, 2018.
4. ILO Convention No. 135 of 2 June 1971 concerning protection and facilities to be afforded to workers' representatives in the undertaking, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C135, accessed March 20, 2018.
5. European Convention on Human Rights of 4 November 1950 as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 3 https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed March 20, 2018.
6. European Social Charter of 18 October 1961 as amended, https://rm.coe.int/168048b059, accessed March 20, 2018.

7. European Social Charter (revised) of 3 May 1996, https://rm.coe.int/168007cf93, accessed March 20, 2018.
8. Constitution of the Republic of Poland of 2nd April, 1997, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed March 20, 2018, the original: Journal of Laws 1997 No. 78, item 483 as amended.
9. Act of 26 June 1974 Labour code, http://www.en.pollub.pl/files/17/attachment/98_Polish-Labour-Code,1997.pdf, accessed March 20, 2018, the original: ustawa z dnia 26 czerwca 1974 r. Kodeks pracy, uniform text Polish Journal of Laws 2018, item 108 as amended.
10. Act of 23 May 1991 on trade unions, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/2/1/ACT_on_trade_unions.rtf, accessed March 20, 2018, the original: ustawa z dnia 23 maja 1991 r. o związkach zawodowych, uniform text Polish Journal of Laws 2015, item 1881 as amended.
11. Act of 23 May 1991 on employers organizations, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/3/1/ACT%20employers%20organizations.doc, accessed March 20, 2018, the original: ustawa z dnia 23 maja 1991 r. o organizacjach pracodawców, uniform text Polish Journal of Laws 2015, item 2029 as amended.
12. Act of 23 May 1991 on solving collective labour disputes, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/4/1/ACT%20on%20solving%20collective%20labour%20disputes..doc, accessed March 20, 2018, the original: ustawa z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiorowych, uniform text Polish Journal of Laws 2018 , item 399 as amended.
13. Act of 7 April 2006 on information and consultation of employees https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/6/1/act_on_information.DOC, accessed March 20, 2018, the original: ustawa z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, Polish Journal of Laws 2006 No. 79, item 550 as amended.

14. Act of 24 July 2015 on the Social Dialogue Council and other social dialogue institutions, https://www.mpips.gov.pl/download/gfx/mpips/en/defaultopisy/42/9/1/ang_ustawa%20o%20RDS%20-%20wersja%20edytowaa_en.docx, accessed March 20, 2018, the original: ustawa z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego, Polish Journal of Laws 2015 , item 1240 as amended.
15. Projekt z dnia 12 października 2017 r. ustawy o zmianie ustawy o związkach zawodowych oraz niektórych innych ustaw z projektami aktów wykonawczych, Druk nr 1933, http://orka.sejm.gov.pl/Druki8ka.nsf/0/429C067FDC4EC236C12581BD00426427/%24File/1933.pdf, accessed March 20, 2018.

**Case Law**

1. Judgment of the Constitutional Tribunal of 24 February 2004 in the case K 54/02, Orzecznictwo Trybunału Konstytucyjnego – Zbiór A 2004 No. 2, item 10.
2. Judgment of the Constitutional Tribunal of 2 June 2015 in the case K 1/13, Orzecznictwo Trybunału Konstytucyjnego – Zbiór A 2015 No. 6, item 80.

**Official documents**

1. *363rd Report of the Committee on Freedom of Association ILO,* International Labour Office Governing Body 313th Session, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176577.pdf, accessed March 20, 2018.
2. Central Statistical Office of Poland, *Rocznik Statystyczny Pracy 2017*, Warszawa 2017, http://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5515/7/5/1/rocznik_statystyczny_pracy_2017.pdf, accessed March 20, 2018.
3. Polish Agency for Entrepreneurship Development, *Raport o stanie sektora małych i średnich przedsiębiorstw w Polsce 2017*, Warszawa 2017, p. 23,

https://www.parp.gov.pl/images/PARP_publications/pdf/raport%20o%20stanie%20sektora%20msp%20w%20polsce_2017.pdf, accessed March 20, 2018.

**News**

1. Kamil Fejfer, „Na jakich umowach pracują Polacy?", *Rynekpracy.org* http://rynekpracy.org/wiadomosc/976889.html, accessed March 20, 2018.
2. Janusz Kowalski, „Polska mapa umów o pracę. Nie wiadomo, ile osób pracuje na śmieciówkach", *Gazeta Prawna online*, http://serwisy.gazetaprawna.pl/praca-i-kariera/artykuly/699506,polska-mapa-umow-o-prace-nie-wiadomo-ile-osob-pracuje-nasmieciowkach.html, accessed March 20, 2018.
3. Ministry for Family, Labour and Social Policy, "Nowa Komisja Kodyfikacyjna Prawa Pracy", https://www.mpips.gov.pl/aktualnosci-wszystkie/prawo-pracy/art,8248,nowa-komisja-kodyfikacyjna-prawa-pracy.html, accessed March 20, 2018.

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# PRIORITIZATION OF INSOLVENCY IN THE UNIVERSAL LEGAL PICTURE. NEW LEGAL VIEWS PASSED THROUGH THE FILTER OF EQUITY, SOLIDARITY AND SOCIAL RESPONSIBILITY

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***Abstract:***

*Currently, the institution of insolvency comprises new valences, which we can call equity valences, which restore to a certain extent the balance between the economic dimension and the social dimension of this institution, because modern normative proposes aim at supporting the continuation of the debtors' business, preserving jobs and covering the debts, with emphasis on amicable debt renegotiation procedures, reorganization and turnaround procedures, and as such, the norms that regulate the procedures of insolvency prevention and insolvency acquire a clear social nature.*

*Insolvency law has exceeded the borders of commercial law and has expanded beyond the borders of commercial law and on natural persons and territorial and administrative units, being currently harmonized with the Monist system implemented by the new Civil Code but also driven, in its evolution, by principles promoted at European Union level, and also at international level.*

*The common law of contracts and that of insolvency interact with each other and influence each other, however, insolvency has a special legal regime, as the regulator has devised levers required for the rescue of the insolvent yet still viable debtor, using, for this purpose, the contractual relationships established before the time when the procedure was opened. Moreover, the new concept is based on principles that visualise the contract in the sense of a more flexible relationship between the contracting parties, principles meant to govern the new theory of the contractual law: the principle of contractual equality, the principle of contractual balance, the principle of contractual fraternity, the principle of social utility (and the inferred principles: the principle of legal security, and the principle of freedom and accountability), but also the demonstrative principle of contractual solidarity.*

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***Key words:*** *insolvency; special law; principle of contractual freedom; principle of irrevocability of contracts; contractual balance; solidarity.*

## INTRODUCTION

Through this study, we are aiming at outlining a new image of the insolvency institution, by approaching it in an interdisciplinary and complex manner, reconfigured by the economic and social realities, mentioning especially its favourable position in the universal legal picture in relation to the social dimension that unavoidably marks the evolution of insolvency as institution of law passed through the filter of equity.

In fact, the social and economic realities are the ones that continuously reconfigure the normative form and generate a slow or sudden transformation in the legal content, by fragmentations and fusions of the law branches, many of the law institutions "escaping" from the traditional law branches and systems and creating its own trajectory of legislative identification and harmonization, by claiming its own principles, procedures and resources of exclusion and filtration of the rules coming from outside and specific to other law branches, such as in the case of insolvency law.

We cannot deny that the insolvency law has been remarkably expanded in recent years, both at national level, and at the EU and international level, and that legislators show a constant preoccupation to modernize this field. Consequently, nowadays, the classical insolvency institution detached from the commercial law is outlined and supplemented in its dynamics by Law no. 151/2015[1] on the insolvency of

[1] Originally, Law no. 151/2015 on the insolvency of natural persons, published in the Official Journal of Romania, Part I, no. 464 of 26 June 2015, should have come into force on 26 December 2015. The first postponement was made through Government Emergency Ordinance no. 61/2015 for 31 December 2016, followed by Government Emergency Ordinance no. 98/2016, which extended the deadline of its entry onto force to 1 August 2017, meanwhile, the Methodological Norms for the application of Law no. 151/2015 were approved. Nevertheless, the application of the Law regarding the insolvency of natural persons faced a new and last postponement of its entry into force, more specifically 1 January 2018, according to Government Ordinance 6/2017, published in the Official Journal of Romania no. 614 of 28 July 2017, due to the fact that the complexity of the field regulated by this law was invoked, as well as the point of view of the Superior Council of Magistracy which highlighted that a rigorous

natural persons, but also through the norms regarding the insolvency of the territorial and administrative units, provided by Government Emergency Ordinance no. 46/2013, as approved by Law no. 35/2016[1], which provisions reflect and strengthen the trends promoted at European level. It is not only at European level that the best and most viable solutions are sought concerning the approach of the insolvency phenomenon, but also at global level, and currently, the United Nations Commission on International Trade Law has included in its strategic action plan a project for the improvement of the Model Law in the field of international insolvency, considering the need to facilitate the international insolvency proceedings aimed at multinationals, but also at small and medium-sized enterprises, as well as proposals for the improvement, restructuring and interpretation of the Model Law, the 53rd meeting being scheduled for May 2018 at New York.[2] This reality reflected at global level becomes another reason for the awareness of the concerns related to rescue, and also a foundation for the acceptance of the judicial reorganization procedure as a priority ad necessary measure in the current and future domestic context, the global financial waves creating difficulties even for sound companies.

## I. INSOLVENCY – NEW LEGAL VISUALIZATIONS

### 1.1. OUTLINING A *JOINT CORPUS* – THE INSOLVENCY CODE

The unification trend is reflected even in the manner of devising Law no. 85/2014 on prevention insolvency procedures and on insolvency procedure, deemed, in the specialised literature, as being a veritable Insolvency Code, which proposes an integrative vision and includes in a single normative corpus the general normative legislation, applicable to all economic entities, the special legislation, applicable to credit institutions and insurance companies, groups of companies, as well as regulations on the cross-border insolvency, to which insolvency prevention tools are added, more specifically the ad-hoc mandate and the agreement with the creditors, benefiting, at the same time, from the

preparation of the administrative capacity of the courts required to apply the procedures of the insolvency of natural persons was necessary.

[1] Order no. 219/ 24.03. 2016 of the Minister of Finance

[2]http://www.uncitral.org/uncitral/fr/commission/working_groups/5Insolvency.html

existence of its own principles[1] that can be seen across its entire structure, and its own procedures and resources for the exclusion and filtration of rules coming from outside and specific to other law branches.

Moreover, we have in perspective, why not, a re-dimensioning of the so-called code, by outlining a new and much more complex Insolvency Code, which englobes legislative novelties, such as Law no. 151/2015 on the insolvency of natural persons, and the insolvency of territorial and administrative units respectively, regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016, which regulations can be approached in analogy to the current Insolvency Code, developing, at the same time, principles and practices founded at European Union level and at global level. A genuine Insolvency Code would claim its status through a legal visualisation, or by creating a joint *corpus* of regulations on insolvency respectively, approached in an integrative vision, at least in terms of purpose and perspective, since the insolvency phenomenon manifests a gradual imposition in the economic and social space and proves to be, at the same time, a tool for the support and revival of the economic market, investments and employment.[2]

This view finds its foundation in the essence of the modern normative goals of insolvency for all the legal subjects to which it is addressed in order to identify a balance between the interests of the debtor and those of the creditors through their constructive harmonization which is reflected in the judicial reorganization regulated by the Law no. 85/2014 on prevention insolvency procedures and on insolvency procedure, *the financial recovery* according to Government Emergency Ordinance no. 46/2013 on the financial crisis and the insolvency of territorial and administrative units, approved by Law no. 35/2016, as well as the well-deserved *fresh-start* granted to natural persons, as regulated by Law no. 151/2015 on the insolvency of natural persons, passing

[1] Currently, Law no. 85/2014 lists thirteen principles that govern the new regulation, which are taken over from among the Principles of the World Bank, the European Union principles on insolvency, and from the UNCITRAL Legislative Guide on Insolvency Law. Their integrative function reflects the Romanian legislator's interest to implement, at internal level, the entire "insolvency architecture", due to the fact that these principles can be found in the entire normative structure of the Insolvency Code, certainly adapted to the structure, purpose, concept and formulation differences.

[2] See Ionel Didea, Diana Maria Ilie, "*Direcția extinderii fenomenului „insolvență" – conturarea noului Cod al insolvenței prin filtrul economico-social actual*" , Curierul Judiciar no. 1 (2017): 16-25.

through the current economic and social filter the importance and need to approach these mechanisms promoted both in the national, and in the EU and international context.

## 1.2. INSOLVENCY LAW – BETWEEN UNIFICATION AND FRAGMENTATION

In relation to the unification trend by devising a joint corpus of the insolvency regulation, we are going even further and dare raise this legal institution in the rank of peculiar, autonomous law,[1] or at least in the process of becoming such law. The outlining of a new legal discipline, or even of a veritable branch of the legal system, has a detailed and long-lasting course, as it is, for example, the case of the insolvency institution that gradually manages to assert itself with a new legal status, exceeding the stage of a law institution corseted in the provisions of the Code of Commerce, with its repeal and entry into force of the new Civil Code. The Monist concept triggered a legislative revival and resizing, since, from 1 October, 2011 some regulatory acts, both in the private and in the public domain, including the law on the insolvency prevention procedures and the insolvency procedure, have been amended and harmonized with the provisions of the New Civil Code, the new pillars that support civil law – for the professional and enterprise – being assimilated and recognized in the content of all regulatory acts at internal level.

Consequently, unlike the fragmentation trend, which provided indeed an in-depth analysis, law returned to unity, seeking to achieve normative consistency, with the entry into force of the new Civil Code, in 2011. This movement towards unity, this normative absorption led to the brutal disappearance of certain law branches, such as the family law and commercial law, due to the view according to which legal norms are closely interrelated and form a whole, an organic ensemble, and the unification creates an internal, functional and well-balanced normative consistency, based on the interdependencies between these branches of the law. This scientific approach of the legal phenomenon in a unitary,

[1] Ionel Didea and Diana Maria Ilie, "*Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular - dreptul insolvenței - urmare abrogării Codului Comercial*," Curierul Judiciar no. 8 (2017): 425-434.

complex and borderless manner, of re(coagulation) according to a recent doctrinal opinion,[1] caused very many controversies, antithetic doctrinal opinions related to the survival of law branches, especially the commercial law, absorbed, in fact, by the civil law by "returning to their origins".[2] Moreover, reputable commercial law specialists have recently requested the Romanian Parliament and Government to carry out an analysis concerning the repeal of the normative acts for the application of the Civil Code, through which the commercial law designations were replaced by designations specific to the civil law and the use of traditional designations of "trading companies" "commercial agreements" was resumed, the fulfilment of this desideratum being "*an important step in the achievement of a legal regulation appropriate to the economic (commercial) activity through the adoption of a new Commercial Code, for the safeguarding of Romania's prestige in the European Union and worldwide"*.[3]

Paradoxically, this unification proposed by a new Civil Code, by opening the frontiers between the aforementioned law branches, allowed, in fact, for the construction of other law branches that have "escaped" from the commercial law branch as mere legal institutions, but have afterwards substantiated their own regulatory "code", gradually claiming their position of special, peculiar law, while the specialised literature highlighted the situation of peculiar laws and their future development with the disappearance of the commercial law, including, among others, the banking law, the insurance law, the transport law, the consumption law, and last, but not least, the insolvency law.[4]

The fact remains that we are facing a continuous resizing of law by cohesions with other sciences and connexions with the economic, social

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[1] Ovidiu Podaru, "*Dreptul, între fragmentare și (re)coagulare*," Dreptul no. 4 (2017), 10-17.

[2]See Ionel Didea and Diana Maria Ilie, Roxana-Denisa Vidican, *"The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities*", Revista Agora International Journal of Juridical Sciences, no. 2, (2017), http://univagora.ro/jour/index.php/aijjs/article/view/3155.

[3]Stanciu D. Cărpenaru, "*Pentru o intrare în normalitate a reglementării juridice privind activitatea economică (comercială), pentru salvgardarea prestigiului României în Uniunea Europeană și în lume"*, Dreptul no. 6 (2017): 42-45.

[4] Marian Nicolae, *Unificarea dreptului obligațiilor civile și comerciale* (Bucharest: Universul Juridic, 2015), 643-644.

and political realities and trends, oscillating between the law fragmentation tendency, which provides the in-depth legal interpretation, and the desire to achieve unity, approached in distinctive manners and perspectives. In fact, a unification process can generate another normative fragmentation and vice versa.

Nevertheless, this special insolvency law, which tends to be outlined in its dynamics, sometimes faces a new potential fragmentation and dissemination of the normative acts that have already formed a joint corpus. Mention should be made of the Government's initiative to lay, in the near future, the foundations of an Economic Code of Romania,[1] viewed as a revolutionary economic and fiscal measure whose main objective is to improve the business environment, as well as the increase in all Romanians' wellbeing. This fusion prospect aims at including all laws specific to the economic field, especially the Fiscal Code, the Fiscal Procedure Code, the Law on the Establishment of Trading Companies, the Tax Evasion Law. Nevertheless, Law no. 85/2014 on the insolvency prevention procedures and insolvency procedures is also a law with an economic nature, but having only the category of professional traders in the centre of interest of this new legislative code. In this case, does insolvency risk to undergo another legislative resizing? Such a normative construction substantiates, in fact, the opinions developed in the specialised literature, according to which the commercial law maintains its existence by outlining a new law, oscillating between naming it economic law, company law, or business law. Consequently, an Economic Code in Romania would be a multidisciplinary, complex approach, including, in addition to the norms specific to the commercial law, other legal norms established in the business sphere (tax law, administrative law, procedural law norms, labour law, insolvency law, etc.), creating a new legal reality. This opinion is also supported in the foreign legal literature[2] which is also supported by Romanian

[1] Alexandra Sandru, "Ce știm despre Codul Economic...", *Ziare.com*, 29 January, 2018, http://www.ziare.com/economie/criza-economica-romania/ce-stim-despre-codul-economic-prin-care-psd-spune-ca-va-ajuta-si-respecta-romanii-1499582.

[2] In France, part of the doctrine deems that the business law includes the commercial law, the latter being a sub-assembly of the business law. for instance, French authors Brigitte Hess-Fallon, Anne-Marie Simon, Droit commercial et des affaires, Paris, 1996), deem that due to its multidisciplinarity, the business law cannot be limited to the norms included in the Code of Commerce, because, in addition to the commercial law, it includes: labour law rules, public law norms, through the intervention of the state in the

doctrinaires, according to which, "commercial law is a business law with a multidisciplinary nature, including both legal norms pertaining to the private law, as well as to the public law, and this nature is incontestable."[1]

Imagining such a legislative resizing, we would be in the presence of a new dissemination of the normative acts that outline the insolvency legislation, and we can also perceive, in this respect, the emergence of other special normative codes, among which this *Economic Code of Romania*, which should include the insolvency of professional traders, a *Banking Insolvency Law*, which should embed both norms on the bankruptcy of credit institutions provided in Law no. 85/2014, as well as the special turnaround regulations, provided by Government Emergency Ordinance no. 99/2006 credit institutions and capital adequacy, which are proper financial restructuring and stabilization mechanisms, but also a *Consumer's Protection Code* that should cumulate, in addition to Law no. 151/2015 on the procedure of insolvency of natural persons, the new tools, important over-indebted consumer protection mechanisms, which supplement, as a matter of fact, the law on the insolvency of natural persons and represent an expression of social responsibility, namely: Government Ordinance no. 38/2015 on alternative dispute settlement between consumers and traders, substantiated with the purpose of establishing a procedure for the alternative settlement of individual disputes voluntarily submitted by consumers against traders and for the provision of a high level of consumer protection and smooth market operation, Law no. 77/2016 on the discharge of mortgage-backed debts through title transfer over an immovable property, which gives consumers the right to settle their debts arising from credit contracts, by transferring the title of the mortgaged real property to the creditor unless the contracting parties agree otherwise, and the Law on mortgage-backed consumer loan contracts[2], legislation aiming at transposing Directive

economy by programmes, international conventions, criminal law norms, such as tax evasion, etc. - Nicolae, *Unificarea dreptului,* 623-624.

[1] Dorin Clocotici and Gheorghe Gheorghiu, "*Delimitarea actelor de drept civil față de actele juridice cu caracter comercial"*, in Revista de Drept Comercial no. 6 (1998): 43-44.

[2] Although it was declared unconstitutional, the Law on the conversion of foreign exchange loans becomes applicable through the actual application of the unpredictability mechanism. Through Decision no. 62 of 7 February 2017 concerning the objection on the grounds of unconstitutionality of the provisions of the Law

2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property.[1] Thus, we are talking about the possibility given to individual debtors to be discharged of debts, by co-participating in good faith and creating a consumer protection system, which is meant to support the individual debtor's reinsertion into the social and economic circuit, in an organized manner, which is necessary in the current economic context, given the European policy promoted in relation to the exoneration of debts as a result of the alarming increase in the over-indebtedness cases.

In our opinion, a new dissemination of the normative acts that have found the foundation of their evolution in the basis of certain joint EU and international principles and that can only be interpreted in an unitary manner, in a logic of legislative harmonization, could generate a national destabilization, but which, we have to admit, might be beneficial in the future for its subjects, combining, in a multidisciplinary manner, normative acts specific to a certain category of interest. However, it is hard to admit and imagine the insolvency institution as a mere chapter of the Economic Code of Romania, as Law no. 85/2014 is redefined by restricting targeted subjects or is simply repealed, as in the case of the Commercial Code.

Consequently, in our opinion, it is useful for such a legal structure, which tends towards an autonomous law, i.e. the insolvency law, to keep its identity and evolution outlined *in globo*, which is, as a matter of fact, supplemented by the provisions of the new Civil Code,[2] insofar as they do not contravene them, its dependency and subordination to the civil law being incontestable. However, the common law gives way to the imperative of turning around distressed debtors, as the insolvency law

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supplementing Government Emergency ordinance no. 50/2010 on consumer loan contracts, the Constitutional Court expanded the application of Decision no. 623 of 25 October 2016 on Law no. 77/2016 on the discharge of mortgage-backed debts through title transfer over an immovable property and retained the scope of the unpredictability theory in the matter of loan contracts granted in Swiss Francs as well.

[1]See Lucian Bercea, "*Instrumentele normative de protecție a consumatorului supraîndatorat",* in Revista Română de Drept al Afacerilor no. 5 (2016): 15.

[2] According to art. 342 para. (1) of Law no. 85/2014 on the insolvency prevention procedures and insolvency procedures, "the provisions of this law shall be supplemented, insofar as they do not contravene, by the provisions of the Code of Civil Procedure and the provisions of the Civil Code".

creates the levers required to fulfil the general interest purpose, by defeating the principle of contractual freedom, the irrevocability principle, generating positive effects for the entire social and economic circuit and flow, objectives that were dynamically and inevitably outlined in the national and international economic context, on the background of the increasing promotion of the idea of cooperation, loyalty, consistency and tolerance, vision that is also reflected in the new approach of contract through the express regulation of unpredictability in the new Civil Code.

## II. THE COMMON LAW GIVES WAY TO THE IMPERATIVE OF TURNING AROUND DISTRESSED DEBTORS

### 2.1. DEFEATING THE AUTONOMY OF WILL – THE CONTRACTUAL FREEDOM PRINCIPLE

The special legal regime of contracts in progress at the moment where the insolvency procedure is opened creates the framework required to give viable debtors the chance to recover, either by interruption certain contractual relationships whose fulfilment is too expensive, unprofitable, worsening the debtor's economic instability, or by continuing the contractual relationships which are absolutely necessary for the debtor's economic sustainability, measures viewed as proper recovery levers for the debtor, given the well-known reticence still present and manifested in relation to the general insolvency procedure. We are talking, in fact, of breaches of the principles of the common law of contracts by the insolvency procedure, namely the breach of the contractual freedom principle and of the principle of the irrevocability of contracts, the common law giving way to the imperative of turning around distressed debtors.

Due to purpose pertaining to the essence of insolvency, the principles of the civil law are broken, and the insolvency law norms become, in fact, incompatible with certain principles of the common law, when the insolvency procedure is initiated. Consequently, the common law gives way to the imperative of turning around distressed debtor, which is why the doctrine named the insolvency law "the rebellious

daughter of civil law".[1] In this context, insolvency overcomes all the obstacles in order to achieve its ultimate goal.

Thus, the contract benefits from legal protection provided by the Insolvency Code, which protection is not absolute, however, because it is initially subjected to the analysis of the insolvency practitioner, who has such right of choosing to keep or terminate contracts, based on his experience and professionalism that allows him to make appropriate and responsible decisions concerning the fate of contracts, which measure can be subsequently censored by the creditors' committee or assembly, following the analysis of the usefulness of such a measure and last, but not least, a measure the lawfulness of which is subject to the assessment of the receiver.

Certainly, the decision of the insolvency practitioner who seeks a balance meant to ensure the purpose of the procedure, especially the one highlighted by the new national and international regulations, namely to give another chance to the viable debtor,[2] is a difficult one, if we take into account the partners' divergent interests, given that creditors most frequently seek to terminate contracts and obtain amounts as big as possible in the bankruptcy estate. Nevertheless, in the insolvency procedure, the contract becomes a strategic tool for the maximization of the debtor's wealth, which requires derogations from the common law, the legislator justifying such derogations by invoking the general interest of the procedure, which is inferred from the succession of interests, more specifically, rescuing the debtor, keeping the activity and the employees, covering the liability, and finally achieving the social and economic purpose required by the contemporary realities. For these reasons, the doctrine deems that art. 123 of the Insolvency Code establishes as principle the continuation of the contracts of the insolvent debtor,

[1] Ion Turcu, Andreea Szombati, "*Dreptul insolvenței. Fiica rebelă a dreptului civil",* Revista Uniunii Naționale a Practicienilor în Insolvență din România "Phoenix", no. 40-41 (2012): 3.

[2] See the interview given to the Publication Universul Juridic on 11 January 2018 by Viorica Munteanu, UNPIR President, Brașov Branch – *"What matters is that we, the practitioners focus on prevention"*, in which she mentions that "the reorganization, the agreement with the creditors and the ad-hoc mandate are important tools in the provision of an efficient insolvency prevention, and practitioners should focus on prevention, should enhance monitoring and should increase media coverage" - https://www.unpir.ro/interviu-conteaza-ca-noi-practicienii-sa-punem-un-accent-pe-preventie-viorica-munteanu-membru-al-consiliului-national-de-conducere-unpir/.

allowing the official receiver or liquidator to request the contractor to execute the contract, even against the latter's wish and despite the debtor's previous defaults. This assessment derives from the principle of the maximization of the debtor's wealth, listed in art. 4 item 1 of the Insolvency Law.[1] The ultimate purpose that should be considered by the insolvency practitioner is to maximize the value of the debtor's wealth.

Moreover, the modern reply in the substantiation of the contract is the *theory of contractual solidarity*, according to which the contract is "a small society in which each must work for the achievement of a joint purpose, the sum of the individual purposes pursued by each, as in any civil or commercial society"[2]. Starting from this analogy, the idea of a fair distribution of losses, specific to the company, was outlined, due to the fact that it might be more equitable, in the case of the non-fulfilment of a contract due to force majeure, to divide the consequences between the debtor and the creditor.[3] This opinion is substantiated in practice in institutions such as damage, unpredictability, penalty clause, and also insolvency which also invokes unpredictability in the content of art. 123 of Law no. 85/2014, institutions that allow for the re-establishment of the contractual balance, the economic recovery and turnaround.

By breaking the contractual freedom principle, the insolvency law sanctions by nullity the contractual clauses meant to lead either to the termination of the contract, or to close-out netting procedures or to the requiring the early repayment due to the initiation of the procedure, and limits the impact of the intuitu personae nature. Consequently, the contractual relationship is protected and strengthened through a special law, applicable as a priority, in the form of the insolvency practitioner's option, within the limit and under the terms required by the law, a right recognized by virtue of the nature and public order purpose of insolvency. Thus, the clauses that provide for the termination (cancellation, annulment) of the contract due to the initiation of the

[1] See Florentina Folea, "Situația contractelor în curs", in *Tratat practic de insolvență,* Radu Bufan (scientific coordinator), (Bucharest: Hamangiu, 2014), 553 and the following.

[2] Portalis, "Discours preliminaire pronounce lors de la presentation du Conseil d'Etat du projet de la comission du gouvernement", reviewed in *Drept civil.Partea generală conform Noului Cod Civil,* by Ernest Lupan, Szilard Sztranyiczki, Emod Veress. Rikhard-Arpad Pantilimon (Bucharest: C.H. Beck, 2012), 96.

[3] Sache Neculaescu, Livia Mocanu, Ilioara Genoiu, Gheorghe Gheorghiu, Adrian Țuțuianu, *Instituții de drept civil* (Bucharest: Universul Juridic, 2016), 96-97.

procedure, but also the worsening of the debtor's contractual situation by close-out netting procedures or by requesting the early repayment, lose their efficacy when the insolvency procedure is initiated, and the nullity of these clauses cannot be covered by a derogatory clause included in the contract, or by an agreement of the parties concluded after opening the procedure, since the public interest prevails over the parties' will, and thus the contract loses its nature of "law of the parties".

However, the insolvency practitioner's right to choose is not absolute, and is censored by legal limits, depending on the specificity of each contract, which also benefits from rules that supplement the Civil Code. In fact, the law of insolvency itself has increased the responsibility of the insolvency practitioner by establishing clear obligations and certain engagements that prevent him from acting in bad faith, more specifically favouring one of the parties by exercising his option right. Thus, according to art. 123 para. (2) of Law no. 85/2014, a provision without any equivalent in the previous regulation, "if the execution of the contract is requested, the receiver/liquidator shall specify, on a quarterly basis, in his activity reports, whether the debtor has the funds required to pay the equivalent value of the goods supplied or services provided by the co-contractor"[1]. Moreover, keeping a contract in the context of anticipating a successful reorganization, which reorganization fails in the stage of voting and confirming the reorganization plan, cannot compel the receiver to continue the execution of the contract after the date when the company becomes insolvent. Moreover, according to art. 182 of the Insolvency Code "the receiver/liquidator may be held accountable for exercising his duties in bad faith or with gross negligence. At the same time, the breach of the principle of contractual freedom is temporary, because the insolvency law establishes, in art. 123 para. (3) the return to the contractual freedom if the fault in its non-fulfilment appears after maintaining the contract: "After maintaining the contract, the contractor may request the termination of the contract due to the debtor's fault, and the request will be solved by the receiver". Consequently, contracts, once

[1] The doctrine deems that this information obligation regulated by para. (2) of art. 123, although it does not have the force of the 'vigilance obligation' regulated in the French law, which gives the insolvency practitioner a personal responsibility related to the payment by the contractors, of the current debts arising under forcibly continued contracts, is, however, a main means of increasing the accountability of the practitioner in relation to the decisions made and monitoring their consequences throughout the procedure. - Folea, "Situația contractelor în curs", 560.

entered into, will be reintroduced into the legal regime of the common law of the contracts, and may be terminated, all the more so that, due to the fact that they are ongoing contracts, they will generate current debts, which benefit from a priority regime, because they are generated during the insolvency procedure (art. 133 para. 4 of Law no. 85/2014).

The same concept related to the violation of the *pacta sunt servanda* principle can also be found in the modern laws regarding the insolvency of natural persons, whose double purpose, in addition to the protection of creditors, is to rescue the bona fide debtor, giving him a second chance, or a well-deserved fresh-start. Thus, only a few countries still keep the *pacta sunt servanda* concept and and give absolute priority to the fulfilment of consumers' contractual obligations. This is reflected in the countries' degree of implementing in their systems the *moral hazard* concept in order to allow for the cancellation of part or all personal debts without paying them.[1] Consequently, similarly to corporate debtors, individual debtors can also face problems beyond their control that can lead the debtor beyond the he limit of supportability, which entitles the debtor to resort to insolvency as a rescue measure.

### 2.2. THE INSOLVENCY LAW BREAKS THE PRINCIPLE OF THE IRREVOCABILITY OF CONTRACTS

As mentioned hereinbefore, in order to achieve the insolvency purpose of helping the debtor recover and covering its liability, it is necessary, in certain cases, to maintain certain contractual relationships. In order to meet this requirement, the insolvency procedure defeats the binding force of the contract. By virtue of the special legal regime, the choice to maintain certain contracts exempts from penalties certain previous non-fulfilments of the debtor, because they cannot be a reason for the contractor' refusal to fulfil the object of the contract, more specifically providing services, supplying goods or executing works. We are thus talking about breaking the exception of non-performance for patrimonial obligations owed before prior to the opening of the proceedings by the debtor, which obligations will constitute the object of requests for the admission of the debt, and the contractor cannot initiate an action for cancellation or termination based on such non-performance by the debtor. Nevertheless, after maintaining the contract, the latter will

[1] See Florin Moțiu, Daniela Deteșan, "Insolvența persoanei fizice", in *Tratat practic de insolvență,* Radu Bufan (scientific coordinator), (Bucharest: Hamangiu, 2014), 1025.

continue according to the agreement of the parties, the common contract law and the legal regime specific to each contract. We are again taking into account a temporary breach of a principle, i.e. the principle of the irrevocability of the contract, through a paralysis of the mechanism of exception of non-performance[1], by requiring the insolvent debtor to continue the fulfilment, by virtue of the general interest that prevails over the personal interest of one of the contracting parties.[2] Such limitations of the binding force of the contract are also provided in the case of successive performance contracts. According to para. (9) of art. 123, in the case of a contract that provides periodic payments by the debtor, maintaining the contract will not imply overdue payments for the periods preceding the initiation of the procedure, and for such overdue payments, the registration of a claim against the assets of the debtor can be made. In fact, this regulation is correlated to one of the effects of the initiation of the insolvency procedure, namely the suspension of the legal and out-of-court actions for the collection of the receivables on the debtor's assets. The regulation in para. (9) of art. 123 also solves a problem analysed in this context, i.e. if the debtor's previous non-performance can be of any nature or just financial. In the light of the legal text, the conclusion is clear, namely that the paralysis of the exception of non-performance of the contract or of the request to terminate it can only be made if the debtor's non-performance is related to the payment of an amount of money, where non-performance cannot be of any nature, but only financial, unlike the French law that uses the notion of "previous engagements".

In this context, we believe that the emergence of a "parallel civil law" cannot be invoked, because we are in the presence of exceptions provided by the law in an express and limitative manner. In fact, the specialized literature[3] mentioned that "the principles of law are the fundamental prescriptions that characterise the creation of law and its

[1] Unlike the old Civil Code, the current Civil Code expressly regulates this exception, including it among the reasons for non-performance of contractual obligations. Thus, according to art. 1556 paragraph (1) of the new Civil Code "where the obligations arising out of a synallagmatic contract are due, and one of the parties does not execute or does not provide the fulfilment of the obligation, the other party may, to an appropriate extent, refuse to execute its own obligation, unless the law, the will of the parties or the usage indicates that the other party has the obligation to perform first".
[2] Turcu, Szombati, "*Dreptul insolvenței. Fiica rebelă a dreptului civil",* 4.
[3] Nicolae Popa, *Teoria generală a dreptului* (Bucharest: All Beck, 2002), 110.

explanation, but are subject to an internal as well as an external dialectics. The internal dialectics is related to the ensemble of the internal connections characteristic of the juridical system, to the interferences of its component parts, while the external dialectics is related to the dependence of the principles on the social conditions as a whole, on the structure of the society." Consequently, in its regulation, law cannot escape the external dialectics, namely the social conditions and needs that influence and often subordinate standard law principles.

## CONCLUSIONS

In breach of the principles of common law, the legislator opted for special regulations able to provide tools for the viable debtor's economic recovery, with positive effects on the entire social and economic circuit and flux. Sometimes, the joint sacrifice is felt less compared to the individual sacrifice, all the more so that the satisfaction of a joint sacrifice is that of the revival of the national economy, because one bankruptcy can trigger chain bankruptcies, while a successful reorganization can lead to the stabilization of the entire business chain and to the development of other enterprises.

Insolvency is undoubtedly a product of the intertwining of legal, economic and social factors, which transcend traditional law branches and create a viable economy "resuscitation" mechanism, present in the centre of interest of national, EU and international bodies.

## BIBLIOGRAPHY

### Books

1. Neculaescu, Sache, Mocanu, Livia, Genoiu, Ilioara, Gheorghiu, Gheorghe and Adrian Țuțuianu. *Instituții de drept civil*. Bucharest: Universul Juridic, 2016.
2. Lupan, Ernest, Sztranyiczki, Szilard, Pantilimon, Emod Veress and Rikhard-Arpad. *Drept civil.Partea generală conform Noului Cod Civil*. Bucharest: C.H. Beck, 2012.
3. Nicolae, Marian. *Unificarea dreptului obligațiilor civile și comerciale*. Bucharest: Universul Juridic, 2015.
4. Popa, Nicolae. *Teoria generală a dreptului*. Bucharest: All Beck, 2002.

**Chapter or other part of an edited book**

1. Folea, Florentina. "Situația contractelor în curs". in *Tratat practic de insolvență,* Radu Bufan (scientific coordinator). Bucharest: Hamangiu, 2014.
2. Moțiu, FLorin and Daniela Deteșan. "Insolvența persoanei fizice", in *Tratat practic de insolvență,* Radu Bufan (scientific coordinator). Bucharest: Hamangiu, 2014.

**Articles in a print journal**

1. Bercea, Lucian, "*Instrumentele normative de protecție a consumatorului supraîndatorat",* in Revista Română de Drept al Afacerilor no. 5 (2016): 15.
2. Cărpenaru, Stanciu D., "*Pentru o intrare în normalitate a reglementării juridice privind activitatea economică (comercială), pentru salvgardarea prestigiului României în Uniunea Europeană și în lume",* Dreptul no. 6 (2017): 42-45.
3. Clocotici, Dorin, and Gheorghe Gheorghiu, "*Delimitarea actelor de drept civil față de actele juridice cu caracter comercial",* in Revista de Drept Comercial no. 6 (1998): 43-44.
4. Didea, Ionel, and Diana Maria Ilie. "*Direcția extinderii fenomenului „insolvență" – conturarea noului Cod al insolvenței prin filtrul economico-social actual*". Curierul Judiciar no. 1 (2017): 16-25.
5. Didea, Ionel, and Diana Maria Ilie. "*Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular - dreptul insolvenței - urmare abrogării Codului Comercial*". Curierul Judiciar no. 8 (2017): 425-434.
6. Didea, Ionel, Ilie, Diana Maria, and Roxana-Denisa Vidican. *"The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities*". Agora International Journal of Juridical Sciences Magazine, no. 2, (2017), http://univagora.ro/jour/index.php/aijjs/article/view/3155.

7. Miloș, Simona Maria, and Alina Zechiu. *"Sumarul Congresului INSOL Europe, Varșovia, 5-8 October 2017"*, in Phoenix - revista de insolvență, no. 62 (October - December 2017): 5-6, https://www.unpir.ro/oldsite/phoenix/pdf/revista62.pdf.
8. Podaru, Ovidiu, "*Dreptul, între fragmentare și (re)coagulare"*. Dreptul no. 4 (2017), 10-17.
9. Turcu, Ion, and Andreea Szombati. "*Dreptul insolvenței. Fiica rebelă a dreptului civil".* Revista Uniunii Naționale a Practicienilor în Insolvență din România "Phoenix", no. 40-41 (2012): 3.

**Legislation**

1. Law no. 151/2015 on the insolvency of natural persons.
2. Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of territorial and administrative units, approved by Law no. 35/2016. Law no. 85/2014 on prevention insolvency procedures and on insolvency procedure.
3. Law no. 77/2016 on the discharge of mortgage-backed debts through title transfer over an immovable property.
4. Government Ordinance no. 38/2015 regarding the alternative settlement of disputes between consumers and traders.

**News or magazine articles**

1. Munteanu, Viorica, Președinte UNPIR, Filiala Brașov – *"Contează ca noi, practicienii, săpunem accent pe prevenție"*, in the content of which it is mentioned that "the reorganization, the agreement with the creditors and the ad-hoc mandate are important tools in the provision of an efficient insolvency prevention, and practitioners should focus on prevention, should enhance monitoring and should increase media coverage"- https://www.unpir.ro/interviu-conteaza-ca-noi-practicienii-sa-punem-un-accent-pe-preventie-viorica-munteanu-membru-al-consiliului-national-de-conducere-unpir/.
2. Sandru, Alexandra, "Ce știm despre Codul Economic...", *Ziare.com*, 29 ianuarie, 2018 -

http://www.ziare.com/economie/criza-economica-romania/ce-stim-despre-codul-economic-prin-care-psd-spune-ca-va-ajuta-si-respecta-romanii-1499582.

**Websites**

1. http://www.uncitral.org/uncitral/fr/commission/working_groups/5Insolvency.htmSl.

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# THE DISCIPLINARY ACTION AGAINST THE BAILIFF

**Andreea TABACU**[1]

***Abstract:***

*The disciplinary liability of the bailiff does not have the benefit of detailed regulations regarding actions taken by holders stipulated by Law no. 188/2000, however the few rules in force allow the analysis of this specific legal regime, in order to determine a good knowledge of the applicable procedures in a field so sensitive and important for public order.*

***Key words:*** *Bailiff, disciplinary liability, disciplinary action, holder, procedure*

## 1. PRESENTATION AND LEGISLATIVE INSTRUMENTS

Law no. 188/200 regarding the bailiffs[2] does not include detailed regulations regarding the disciplinary action that can be taken against them. On the one hand, it provides a minimal set of applicable rules, on the other hand, however, it refers to the Law Enforcement Regulation, which sets the legal procedure for judging disciplinary offences[3]. The enforcement regulation of Law no. 188/2000 regarding bailiffs[4] has been approved by Order no. 210/2001, which includes a series of norms on disciplinary action.

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[2]Republished in Official Monitor of Romania, I Part, nr. 738 from 20.10.2011, with subsequent changes.

[3]Art. 48 alin. 6 from Law nr. 188/2000.

[4]Published in Official Monitor of Romania, I Part, nr. 64 from 06.02.2001, with subsequent changes.

The law uses the notion of *disciplinary action*, which, reported to its meaning provided by the procedural common law[1], reveals the entire complex of legal instruments at the disposal of holders and other individuals entitled to determine the engagement level of bailiffs' disciplinary liability.

The analyzed action is similar to that stipulated by labour law[2], where the disciplinary action is reported to the employer's prerogative to apply a sanction[3], a prerogative that is grounded in the individual labour contract. It ends with the sanction decision, its outcome being the application of the said sanction upon the subject of the disciplinary action[4]. In contrast with the legal process, the respective action is not jurisdictional, since it is completed at the employer's level.[5]

The key distictions between the two categories of disciplinary actions (against bailiffs and against employees[6], respectively) derive from the specificity of the liberal profession of the bailiff, according to its current status[7]. The bailiff carries out activities of public interest[8], provides public services and performs acts of public authority[9] under the coordination and control of the Ministry of Justice[10] and professional bodies.

The law states that the acts performed by bailiffs are subject to the control of competent courts, while their activities are regulated by

[1] V.M Ciobanu, M. Nicolae, coordinators, *Noul Cod de procedură civilă, comentat şi adnotat, vol. I* art. 1-526 (Bucharest: Universul Juridic, 2013), 107; M. Tăbârcă, *Drept procesual civil, vol. I, Teoria generală, conform Noului Cod de procedură civilă* (Bucharest: Universul Juridic, 2013), 159.

[2]C.Nenu*, Contractul individual de muncă* (Bucharest: C.H. Beck, 2014), 101-107

[3] C. Nenu, *Contractul individual...*, 99

[4] A. Drăghici, A. Puran,"Aspecte de doctrină şi jurisprudenţă privind posibilitatea instanţei de judecată de a înlocui sancţiunea disciplinară dispusă de angajator", *Curierul Judiciar* no. 4 (2014): 205-206

[5] Al. Ţiclea, *Răspunderea disciplinară în raporturile de muncă, Legislaţie, Doctrină, Jurisprudenţă* (Bucharest: C.H. Beck, 2017), 241.

[6] A. Puran, A. Singh, "The effects of disciplinary research", *Valahia University, Law Study, Vol. XIX, Issue 1* (2012): 422-429.

[7] A. Puran, A. Singh, „General aspects regarding the misbehaviour- the only ground of disciplinary liability", *National and European Context in Juridical Sciences* (2012): 386.

[8] A. Drăghici, *Deontologia funcţionarului public* (Piteşti: Paralela 45, 2005), 93-94

[9] Art. 2 from Law nr. 188/2000.

[10] Art. 4 from Law nr. 188/2000.

professional bodies, according to the legal norms[1]. Therefore, a distinction is made between the procedure of ensuring the lawfulness of execution acts, which is under the competence of the execution court where the challenge on enforcement is filed, and the procedure of ensuring the observance of provisions regarding the professional life of the bailiff, which refers to a larger field also including documents drawn up by the respective professional. Thus, the professional control exerted by the Ministry of Justice through its specialized general inspectors, as well as by the National Union of Bailiffs, through its management board has as objectives the following: the organization and functioning of the bailiff's chambers and bureaus, the regulation of bailiffs' behaviour in work relationships with public authorities, natural and legal persons, as well as the quality of acts and activities carried out by bailiffs[2]; in this last case, however, the annulment of said acts is not possible, the only solution being the engagement of disciplinary liability. Specialized literature[3] has noted that the two types of control (the professional one, exerted upon the bailiffs' activities, and the jurisdictional one, exerted by the execution court upon the execution acts themselves) have different purposes: the latter aims at protecting a private interest of the person affected by the execution act or by the challenge on enforcement leading to the restoration of previous status, while the professional control has in view the protection of the general interest, the increase in the professional prestige, as well as in the quality of public services provided by the bailiff, without directly referring to one of its acts or being entitled to determine the annulment or the establishment of damages caused to parties involved in the execution relation within the control procedure. As a result, there is an essential difference between the control exerted by the execution court and the control exerted by professional bodies regarding execution acts in terms of consequences upon the respective acts. Depending on court verdicts, the completion of the control procedure is possible without a disciplinary sanction being applied[4].

The purpose of the disciplinary action relative to the incurrence of the bailiff's liability for committing the offences laid down by the law

[1] Art. 60 from Law nr. 188/2000.
[2] I. Gârbuleț, „Controlul profesional asupra activității executorilor judecătorești. Elemente de drept comparat", *RRES*, no.3 (2015): 46.
[3] I. Gârbuleț, „Controlul profesional", 46-47.
[4] I. Gârbuleț, „Controlul profesional", 47.

primarily aims at ensuring the order necessary to the practice of the profession of bailiff in accordance with its importance and scope, secondly at guaranteeing the observance of the law and thirdly at making the professionals aware of the fact that the pursuit of the profession of bailiff involves a predictible and constant work discipline.

If with regard to the offences laid down by article 47 of Law no. 188/2000, which might incur the bailiffs' disciplinary liability, the jurisprudence may manifest its active and creative role, when it comes to the field of the disciplinary action procedure, even if some aspects are still not regulated, the law court will apply the special provisions of Law no. 188/2000, of Order no. 210/2001 and also the articles of the Code of |Civil Procedure referring to the law of the bailiffs.[1]

## 2. THE HOLDERS OF THE DISCIPLINARY ACTION

The law stipulates that the disciplinary action is exercised by the Minister of Justice of by the Board of Directors of the Bailiffs Chamber. Therefore, the respective bodies are entitled to be informed about the specific situation that can lead to the incurrence of the disciplinary liability: on the one hand, the Minister of Justice is the head of the ministry which, according to the law, ensures the coordination and control over the activity of bailiffs; on the other hand, the Board of Directors, as a professional body, is closest to the particular case of each member of the Bailiffs Chamber.

The Ministry of Justice exercises control over the activity of bailiffs through the intermediary of specialized investigators, according to the law, whenever it is deemed necessary.

In referrence to the control over the activity of bailiffs exercised by the Ministry of Justice through its specialized investigators, Order no. 210/2001 shows that it mainly aims at ensuring the observance of the law in the professional activity of bailiffs, the accurate record keeping, the preservation of the archives, the quality of the acts and works carried out by bailiffs, as well as the appropriate behaviour when performing their duties in realtion with both public authorities and individuals/legal entities.

[1] Art. 72 from Law nr. 188/2000- This law shall be supplemented by the provisions of the Code of Civil Procedure.

The control procedure may also involve the Bailiffs' Union Council or the Board of Directors of the Bailiffs' Chamber, two professional bodies from which the Minister of Justice may require information about the activity of certain bailifs, following complaints received from third parties.

If misconduct is found, the Ministry of Justice will carry out a preliminary inquiry by means of its specialized investigators and will put forward the disciplinary action.

As for the control exercised by the Bailiffs' Union Council, the law implementing regulation stipulates that it has as objectives the following: the organization and functioning of the bailiffs'chambers and bureaus, the professional performance of bailiffs, the proper duty performance of the Board of Directors of the Bailiffs' Chamber, the functioning of the bailiffs' bureaus, the quality of the works carried out by bailiffs, the training of junior bailiffs, the financial and accounting management of the bailiffs' chambers and bureaus, as well as any other problems. The respective control procedure does not mean that the Council can take the lead in engaging the disciplinary action, since the Minister of Justice and the Board of Directors of the Bailiffs' Chamber are the only holders of the disciplinary action. However, according to the afore-mentioned regulation, the Bailiffs' National Union Council can refer the case to the Board of Directors of the Bailiffs' Chamber, by means of its chairman or his deputy.

## 3. THE RESOLUTION JURISDICTION OF THE DISCIPLINARY ACTION

The disciplinary action is judged by the Disciplinary Board of the Bailiffs' Chamber, which includes three members elected by the General Assembly of the Bailiffs' Chamber on a three-year term. According to article 61 from Order no. 210/2001, members of the Disciplinary Board are elected by the General Assembly and then confirmed by the Board of Directors of the Bailiffs' Chamber. The Disciplinary Board appoints its chairman and deputy chairman afterwards.

The Disciplinary Board must carry out its activity independently, without being subordinated to the Board of Directors of Bailiffs' Chamber.

In order to avoid incompatibility situations and to ensure the independence of the Disciplinary Board, Order no. 210/2001 stipulates that the members of the Bailiffs' National Union Council, the chairmen and the deputy chairmen of the board of directors of bailiffs' chambers cannot be involved in disciplinary boards.

In exceptional circumstances, when the establishment of the disciplinary board is not possible, the procedure will be ensured by the chairman of a higher disciplinary board, who will appoint the necessary number of members, choosing out of the alternate members of his/her own board.

According to article 66 from Order no. 210/2001, the disciplinary board has the jurisdiction to hear any bailiff from the respective chamber for the disciplinary offences stipulated by article 47 from Law no. 188/2000.

In the settlement procedure of the disciplinary action, the law also acknowledges the jurisdiction of the higher disciplinary board of the Bailiffs' National Union, whose five-member panel have the competence to hear the appeals brought against the decisions of the disciplinary board of the Bailiffs' Chamber.

## 4. THE SETTLEMENT PROCEDURE OF THE DISCIPLINARY ACTION

The main rules regulating the settlement procedure of the disciplinary action are set out in article 48 from Law no. 188/2000. However, detailed regulations are provided by Order no. 210/2001, as the law itself stipulates that the judgement procedure of disciplinary offences is to be established by the implementing regulation of the law in force.

Since the disciplinary action is exercised by the Minister of Justice or the Board of Directors of the Bailiffs' Chamber and is under the jurisdiction of the Disciplinary Board of the Bailifs' Chamber, the referral or self-referral of offences concern the authorities which are the holders of the action and can put forward the disciplinary action at the disciplinary board.

Depending on the severity of the proposed sanction or measure that can be taken against the bailiff, the law specifically provides that a preliminary investigation is carried out by the competent bodies. Thus, if the possibility of suspension or even exclusion from the ranks ever arises,

article 48 of Lawno. 188/2000 stipulates that the preliminary inquiry is mandatory and is to be carried out by investigators within the specialized department of the Ministry of Justice or by the Board of Directors of Bailiffs' Chamber. Justifiably criticised by the doctrine[1], the provision seems to contradict the very notion of mandatory preliminary inquiry, since it only requires it in certain cases. However, on the one hand, the text creates confusion, because one cannot admit the fact that the sanction or disciplinary measure that might be taken could be anticipated ever since the filing of the referral, in order to know whether the preliminary inquiry is necessary, while on the other hand, leaving the application of the norms regulating the preliminary inquiry at the discretion of the professional bodies (as the case may be) cannot be justified, since the right to a defence is a fundamental principle and must be observed in all situations where the incurrence of the bailiff's liability is taken into account. This is why article 67, paragraph 2 from Order no. 210/2001 somewhat comes to the rescue and says that the preliminary inquiry is mandatory for the disciplinary action to be exercised. Therefore, due to a lack of distinction, the obligation to carry out an investigation covers all cases and mandatorily involves the hearing of the bailiff in cause, as well as the observance of his/her right to defence. Thus, the bailiff is entitled to know the content of his file and to draw up a defensive strategy. However, the investigated bailiff's refusal to make statements or to be present during investigation is written in a report and does not hinder the course of the investigation.

In order to initiate a disciplinary action against a bailiff, the Minister of Justice must take notice. If the disciplinary action is exercised by the Board of Directors of Bailiffs' Chamber, the respective body can act on its own initiative or be referred to by the Bailiffs' National Union Council, by means of its chairman or deputy chairman.

The empowerment of the legal bodies to initiate the disciplinary action can be based on referrals from the parties involved in the foreclosure against bailiffs, which are filed with the Board of Directors of Bailiffs' Chamber. The board is required to verify the parties' referrals against bailiffs within 20 days since their filing and to take corrective

[1] E. Oprina, I. Gârbuleț, *Tratat teoretic și practic de executare silită, volumul 1, Teoria general și procedurile execuțional a conform noului Cod de Procedură Civilă și noului Cod civil* (Bucharest: Universul Juridic, 2013), 213-214.

measures or, depending upon the case, to exercise a disciplinary action, informing the Unions' Council subsequently.

The preliminary investigation must be completed within 60 days since the referral/self-referral, following verification measures taken by the Board of Directors of the Bailiffs' Chamber within 20 days since the filing of the referral. It is carried out by the Ministry of Justice, by means of specialized investigators, or by the Board of Directors of Bailiffs' Chamber. The law provides that these admnistrative bodies investigate the concerned bailiff and inform him/her about the content of the file, whether a disciplinary action is to be intiated or not.

The notion used by the secondary legislator[1] does not allow the connection between the afore-mentioned procedure and the criminal procedure. Law no. 188/2000 indicates that it is complemented by the civil commom law procedure. The intention is not to carry out an investigation following a severe procedure such as the criminal one, but to check out the facts indicated in the referral or self-referral, while observing the fundamental principles of contradiction and right to defence.

Following the completion of this stage and taking into account the fact that the disciplinary action must be exercised within a year since becoming aware of the existence of an offence and no longer than three years since the moment the actual offence took place, the specialized investigators or the Board of Directors are to decide upon initiating a discipinary action or not. The Disciplinary Board is to be referred or not, depending on the respective decision.

The principle of contradiction governs the disciplinary action procedure, therefore all parties involved must be summoned before the Disciplinary Board of the Bailiffs' Chamber. After the referral of the Disciplinary Board, its chairman registers the file, sets the date of the hearing and summons the parties involved and the witnesses, if case may be. If the summoned bailiff fails to appear before the Disciplinary Board, the procedure is not hindered and can be legally carried out in absentia.

The law does not say that hearings are public, however it stipulates that any bailiff within a certain Chamber can assist to the hearings held at the headquarters of the respective Chamber.

Much like a body with jurisdiction powers, the Disciplinary Board keeps records of its works by means of a secretary, who is

[1] Investigating.

responsible with drafting all documents drawn up by the Board[1]. Although they cannot be called hearing reports, since the law does not assimilate the Disciplinary Board with a body with jurisdiction powers, the minutes concluded at each hearing term must include the reasons for the postponement of the trial.

The bailiff against whom the disciplinary action is taken has the right to know all the documents in his/her file, to request evidence in his/her defence and to be assissted by a lawyer.

The law provides that, at the hearing term, the chairman of the Disciplinary Board presents the contents of the referral, after which the parties involved and possible witnesses are heard and other pieces of evidence necessary to solve the case are brought before the board. The statements are recorded in writing and signed by all parties, as well as by the chairman of the board.

After evidence is brought in before the board, in-depth debates are held and the chairman invites all parties to take the floor. When necessary, the chairman can invite other people attending the debates to actively participate, after their identity is established.

If the board finds that the bailiff in cause has indeed committed the offence under investigation, it decides to apply one of the sanctions provided by the law. If the bailiff is found not guilty, the board decides to close to case.

The enforcement regulation of the law provides that the Disciplinary Board's decision is taken by the majority of the assembly's votes and includes: the file number, the names of the board members, board secretary, the names and, if case may be, the domicile or the headquarters of the parties involved, the parties' claims, a short description of the disciplinary offence, the evidence brought before the board, the laws and regulations applied, the solution and the date of the decision, the indication of the appeal and the mention whether the decision was made in the presence or absence of the parties. Also, the decision is signed by the chairman of the board and by the secretary.

In order to ensure that the principles of contradiction and of the right to defence, as well as the fundamental idea of a fair trial are all observed, the law stipulates that the decision must be motivated and communicated to the parties involved within 15 days. The Board of

[1] A. Tabacu, *Drept procesual civil, Legislaţie, Jurisprudenţă internă şi internaţională* (Bucharest: Universul Juridic, 2015), 403

Directors has the obligation to inform both the Board of the Bailiffs' National Union and the Ministry of Justice about the measures enforced by the Disciplinary Board.

The parties involved may file an appeal against the decision of the Disciplinary Board with the Higher Disciplinary Board of the Bailiffs' National Union, within 15 days since the communication of the said decision.

The Higher Disciplinary Board has a panel of five members and pronounces a final decision for the administrative appeal system. However, the decision can be challenged at the court of appeal.

The enforcement regulation also refers to the costs of the entire procedure, indicating that the expenses related to the resolution of the case are covered by the Bailiffs' Chamber if the case is dismissed, and by the bailiff if the case is admitted, respectively.

## CONCLUSIONS

The activity carried out by the bailiff is of public interest, he/she draws up acts of public authority, thus being a vital participant in the process of justice rendering. Therefore, his/her disciplinary liability must be acknowledged and regulated by clear and predictible norms, which, on the one hand, should allow the observance of the law in the exercise of the profession, and on the other hand, should ensure the creation of a professional body that is fully aware of the importance of the said profession, impacting upon the entire society.

## BIBLIOGRAPHY

### Books

1. Ciobanu, V.M and M. Nicolae, coordinators. *Noul Cod de procedură civilă, comentat şi adnotat, vol. I* art. 1-526. Bucharest: Universul Juridic, 2013.
2. Drăghici, A.. *Deontologia funcționarului public.* Pitești: Paralela 45, 2005.
3. Nenu, C. *Contractul individual de muncă.* Bucharest: C.H. Beck, 2014.

4. Oprina, E. and I. Gârbuleț. *Tratat teoretic şi practic de executare silită, volumul 1, Teoria general şi procedurile execuțional a conform noului Cod de Procedură Civilă şi noului Cod civil.* Bucharest: Universul Juridic, 2013.
5. Tabacu, A. *Drept procesual civil, Legislaţie, Jurisprudenţă internă şi internaţională.* Bucharest: Universul Juridic, 2015.
6. Tăbârcă, M. *Drept procesual civil, vol. I, Teoria generală, conform Noului Cod de procedură civilă.* Bucharest: Universul Juridic, 2013.
7. Țiclea, Al. *Răspunderea disciplinară în raporturile de muncă, Legislaţie, Doctrină, Jurisprudenţă.* Bucharest: C.H. Beck, 2017.

**Articles in a print journal**

1. Drăghici, A., and A. Puran,"Aspecte de doctrină și jurisprudență privind posibilitatea instanței de judecată de a înlocui sancțiunea disciplinară dispusă de angajator", *Curierul Judiciar no. 4* (2014): 205-206
2. Puran, A., and A. Singh, "The effects of disciplinary research", *Valahia University, Law Study, Vol. XIX, Issue 1* (2012): 422-429.
3. Puran, A. and A. Singh, „General aspects regarding the misbehaviour- the only ground of disciplinary liability", *National and European Context in Juridical Sciences* (2012): 383-404.
4. Gârbuleț, I., „Controlul profesional asupra activității executorilor judecătorești. Elemente de drept comparat", *RRES, no.3* (2015): 46.

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# CONSIDERATIONS REGARDING THE PSYCHOLOGICAL COUNSELING OF THE MINOR DURING THE FORCED EXECUTION PHASE

**Nora Andreea DAGHIE**[1]

***Abstract:***

*Article 913 of the Civil Procedure Code stipulates two situations in which the bailiff will notice the existence of an impediment to enforcement: when the minor himself refuses to leave the debtor, that is, when the minor has aversion to the creditor.*

*Faced with either of the two hypotheses, the bailiff will not put pressure on the minor (he will not use force), but will draw up a report of the findings, which he will communicate to the parties and the representative of the Directorate General for Social Assistance and Child Protection, who will notify the competent court for a psychological counseling program appropriate to the child's age. According to the law, the psychological counseling program can not exceed 3 months.*

*Starting from the purpose of adopting the new forced execution procedure for juveniles, we analyze the extent to which the current regulation of psychological counseling in the framework of forced execution respects the principle of the minor's superior interest.*

***Key words:*** *minor; forced execution phase; psychological counseling; the principle of the minor's superior interest; trauma*

## INTRODUCTION

Analysing ECHR case law, we will find that the obligation of the national authorities to take measures to facilitate contact by the creditor parent with the minor belongs to the State's positive obligations in accordance with Article 8 of the Convention, in respect of which the State enjoys a margin of appreciation, as it is not an absolute obligation.

For example: "In relation to the State's obligation to implement positive measures, the Court has held that Article 8 includes for parents a right that steps be taken to reunite them with their children and an

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obligation on the national authorities to facilitate such reunions (...). The obligation of the national authorities to take measures to facilitate contact by a non-resident parent with children after divorce is not, however, absolute (...). The establishment of contact may not be able to take place immediately and may require preparatory or phased measures. The cooperation and understanding of all concerned will always be an important ingredient. While national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited, since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention"[1].

In an attempt to respond promptly, to comply with the recommendations received, the 2010 lawmaker introduces, among the preparatory or phased measures, the psychological counselling of the minor during the forced enforcement phase[2].

However, unlike the enforcement of other obligations to do, the enforcement of measures relating to minors has particularities that, in our opinion, require a broader power of appreciation from the court.

As regards the psychological counselling of the minor, the opportunity of taking this measure should be left to the discretion of the court.

Only by reference to the particular circumstances of each case will the best interest of the minor and, consequently, the adequacy of such measure, be determined.

[1] ECHR, case of Sbârnea v. Romania, no. 2040706/83, judgment dated 21 June 2011, paras 105 and 106.

[2] Counselling is an activity aimed at shaping the behavioural actions of the counseled person in a given situation or generally in life and daily activity.
Counselling is an activity initiated by a person seeking help. It gives the client the opportunity to identify what disturbs him/her, to explore and understand himself/herself. The counselling process will help him/her identify his/her thoughts, emotions and behaviours that, having been realised, make him/her feel full of resources and decide change. In this regard, see Alina Cristiana Cîrjă, *Psycho-pedagogical counselling. Examples of good practice* (Bucharest: Pro Universitaria, 2016), 7-8.

## DE LEGE LATA REGULATION

The minor, as a subject and, at the same time, as an object of certain provisions of a judgment, is not among the participants in the forced enforcement as listed in Article 644 of the Code of Civil Procedure. However, the place and role of the minor within the forced enforcement of certain provisions contained in the judgments that concern them are essential because these coordinates allow the identification of rights and the protection of the minor's best interest, including in this final phase of the civil trial[1].

The legal provisions dedicated to the enforcement of judgments concerning minors provide as follows: the minor's right, upon enforcement, to compulsory participation of a representative of the Directorate General for Social Assistance and Child Protection and, where necessary, of a psychologist; the minor's right not to be bullied and not to be subject to pressure for enforcement; the minor's right to refuse to leave the debtor; the minor's freedom to show aversion to the creditor. However, this list lacks the minor's right to psychological counselling. The omission is justified. In the Romanian lawmaker's view, the psychological counselling is mandatory.

Pursuant to Article 913 paras (1)-(4) of the Code of Civil Procedure, if the minor categorically refuses to leave the debtor or shows aversion to the creditor, the bailiff shall draft a report to be served to the parties and to the representative of the Directorate General for Social Assistance and Child Protection.

In its turn, the Directorate General for Social Assistance and Child Protection will refer the matter to the competent court at the minor's location so that it orders, depending on the child's age, a psychological counselling programme, for a period of maximum 3 months.

At the end of the programme, the psychologist appointed by the court will prepare a report to be served to the court, the bailiff and the Directorate General for Social Assistance and Child Protection.

After receiving the psychologist's report, the bailiff will resume the forced enforcement procedure and, if the enforcement still cannot be

[1] Dumitru Marcel Gavriș, „Articles 910-914 of the Code of Civil Procedure" in *New Code of Civil Procedure. Comment on articles*, ed. Gabriel Boroi (coordinator), (Bucharest: Hamangiu, 2016), 721.

performed because of the minor's refusal, the creditor may request the court to sanction the debtor parent a second time by applying penalties.

## REFLECTIONS ON THE REGULATION

1. The court should be able to judge on the adequacy of psychological counselling during the forced enforcement phase.

In the Romanian national law, psychological counselling is provided both within forced enforcement, pursuant to the procedure governed by Articles 910-913 of the Code of Civil Procedure, as well as outside forced enforcement, pursuant to Article 18 para. (4) of Law No. 272/2004, republished, on the protection and promotion of children's rights, but without these two procedures being correlated, as would be desirable from the point of view of observing the principle of the best interests of the child[1].

Thus, we can imagine the situation where the minor is successively or even simultaneously subjected to two different procedures of psychological counselling, both outside and within forced enforcement.

We can also imagine the situation where a final report has already been drafted following the minor's participation in several psychotherapy sessions, outside the framework of forced enforcement, in which the psychologist recorded that the child's refusal is determined solely by the behaviour of the creditor parent.

If the lawmaker allowed the court to assess the suitability of the psychological counselling at this stage of forced enforcement, the traumatisation of the minor could be avoided and the risk of failure of this procedure would be greatly diminished.

2. If the court decided upon the necessity of undergoing a psychological counselling programme for the minor, it should be able to impose the parents' participation in the manner chosen by the psychologist.

In the current legislation, parents do not participate in the psychological counselling sessions, although the psychological

[1] Anca-Magda Voiculescu,"Psychological counselling of the minor within forced enforcement. Current regulation in the light of ECHR. Correlation with other special procedures in the matter of child protection*", RRES*, no.1 (January 2017): 73.

counselling procedure is part of the forced enforcement procedure that takes place between the creditor parent and the debtor parent, not against the minor (the only one subject to the counselling procedure).

It is well known that children's problems are often caused by parents. They need to vent their affects in contact with someone able to help them, for it is hard for them to force their children to endure something that will cause them suffering and cannot be avoided. In other words, the two parents must "humanise their separation, say it in words, and not just keep it inside, in depression or excitement that the child feels as the shaking of parents' security"[1]. It is important for them to truly take responsibility for the separation and to be able to carry out a preparation effort.

The complete rupture of relationships between parents, when they cease to be allies, is extremely damaging to the children's mental health, which is reflected in their behaviour, in the disturbance of psychic functions such as attention, memory, perception, communication with the others[2].

3. The duration of psychological counselling within forced enforcement must not be predetermined by the lawmaker. The psychologist appointed by the court, relating to the specific circumstances of each case, will freely assess the number of psychotherapy sessions necessary to regain emotional balance.

4. The conclusions of the psychological counselling report ordered in forced enforcement should allow the court to reassess the measures contained in the instrument permitting enforcement, in relation to the best interests of the child and the current state of affairs[3].

The entire legal arrangement stemming from ECHR case law clearly provides that the main beneficiary of legal protection is the child

[1] Françoise Dolto, *When parents separate. How to prevent children's suffering* (Bucharest: Trei, 2016), 24.

[2] See Dmitry Semenik, *Divorce: how to prevent and how to get by* (Bucharest: Sophia, 2011), 200.

[3] In the initial view of the lawmaker, the DGASPC representative referred the matter to the court so as to rule on the measures concerning the minor, which could not be enforced (Article 901 para. (5) of the original form of the Code of Civil Procedure, prior to the adoption of the implementing law). This solution was judged to be much more rational in light of the minor's best interest. See Ioan Leș, *New Code of Civil Procedure. Comment on articles* (Bucharest: C.H. Beck, 2013), 336.

himself/herself, who is entitled (and not bound) to maintain personal relations with his/her parents.

As a result of the application of the vector principle of the minor's best interest governing all aspects relating to minors, the court will, in the judgment it will render, among the relevant criteria, specifically hold the child's affective relations with each of his/her parents, as the parent which hosts the child does not only provide a living space, but must also provide him/her with an affective and cognitive environment that he/she needs. The emotional connection between the parent hosting the child and the child is extremely important, because it must provide cognitive, moral and educational guidance, which requires his/her availability, protection, responsibility, attention, valorisation, moral support, emotional and intellectual presence[1].

Currently, the lawmaker makes no distinction depending on the conclusions of the psychological counselling report. The bailiff will have to resume the forced enforcement even if the minor maintains his/her initial refusal, even if the court-appointed psychologist determines that it is not in the minor's interest to maintain the personal relations programme in the form set by the instrument permitting enforcement and even if it is established that the only party guilty for the child's refusal is the very creditor parent who initiated the forced enforcement.

Consequently, the conclusion of the doctrine[2] is just, a doctrine according to which the absence of any practical consequence of the conclusions of the psychological counselling report (apparently ordered in favour of the child) is more like a sanction imposed *de plano* upon the child, who is unnecessarily ordered by the lawmaker to unilaterally obey a formal programme of psychological counselling within a traumatising forced enforcement procedure, without the conclusions of the counselling report at the end of this procedure having any relevance.

## PROPOSAL FOR LEGE FERENDA

As we are particularly concerned with preventing difficulties due to unconscious suffering of children, we consider it a remedy to require a

[1] In this regard, see Huedin Court of First Instance, Civ. Judgments, Civil Judgment no. 19/14.01.2016, in Diana Flavia Barbur, *Divorce and division of common property. Judicial practice* (Bucharest: Hamangiu, 2017), 154-156.
[2] Voiculescu,"Psychological", 82.

preliminary procedure in the form of a psychological counselling programme for the whole family, prior to registration of the application for divorce before the court[1].

The right to refer the matter to the court is not an absolute right, as it is compatible with implied limitations imposed by the State, in so far as they do not restrict the access granted to a person in court, so that the right in question is affected in its very substance, except where limitations pursue a legitimate aim and there is a reasonable proportionality between the means used and the aim pursued[2].

The proof of performance of such prior procedure must be attached to the writ of summons. The applicant's failure to submit the final report, drafted by the psychologist who performed the psychological counselling sessions, will be sanctioned with the inadmissibility of the writ of summons, given the preliminary and imperative nature of public order of the procedure in question.

The plea of inadmissibility of the writ of summons stemming from the failure to perform the preliminary procedure will be raised by the court of its own motion.

Regardless of age, children are logical beings. That is why parents should explain to them the difference between the spouses' mutual commitments and the parents' commitments to their children.

People need to listen to someone talking to them and to their children about divorce[3]. When children come together with their parents to a psychologist practice, confirming misunderstandings, previous annoyances, and begin by saying: "We will divorce", explaining clearly to their children the consequences of their decision, the situation is easier to accept and manage.

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[1] The proposed solution is in line with ECHR case law. In this respect, the considerations of the European Court of Human Rights in the case of Fuşcă v. Romania (no. 34630/07, judgment dated 13 July 2010, paras 43 and 45) are significant: "(...) the Court finds it very difficult to believe that the focus on the ordinary civil enforcement proceedings could have improved the situation. It considers that the factual situation indicated clearly that a softer and more sensitive approach towards the child was needed for the successful enforcement of the visiting rights. (...) The Court considers that assistance in counselling or psychological support services might, usefully, be pursued in order to ensure that opportunities for maintaining the child's relationship with the applicant are not lost into the future".

[2] Corneliu Bîrsan, *European Convention on Human Rights*. *Comment on articles* (Bucharest: C.H. Beck, 2005), 461.

[3] Dolto, *When parents separate. How to prevent children's suffering*, 23.

Family life is the first school of emotions. Here we learn to recognise our own emotions and the reactions of others to our emotions, how to think of these emotions and how to choose reactions, how to read and express our hopes and fears[1]. In the family, this melting pot of relationships, values and feelings, the child receives the strength and main impetus of his development.

Paediatricians and psychoanalysts consider it essential that all children are warned at the beginning of the procedure about what is being prepared and at the end of the procedure about what has been decided, even if it is about children who are not yet able to walk. The children must hear precise words about the decisions taken by their parents and approved by the judge or imposed by the latter upon the parents[2]. Within themselves, children need to still love both parents, and if nothing is explained to them, the separation of their parents destabilises them, destroys their inner balance.

There are several forms to express the lack of inner balance: restless-nervous, anxious-shy, and sad-dreamy children, all of whom have, in their own way, a damaged sense of their own value; those in the first category feel unwanted, the children in the second category feel abandoned, and those in the third category feel excluded[3].

We can therefore consider that we have a noble mission to help these children, through our entire legal conception, by showing them that they can be fully assured of the fact that we give them our tolerant appreciation, our participation full of interest and our understanding full of goodwill.

## BIBLIOGRAPHY

### Books

1. Barbur, Diana Flavia. *Divorce and division of common property. Judicial practice.* Bucharest: Hamangiu, 2017.

[1] Alina Cristiana Cîrjă, *Assistance and protection of children's rights in the educational area* (Bucharest: Pro Universitaria, 2016), 13.
[2] Dolto, *When parents separate. How to prevent children's suffering*, 23.
[3] Henning Köhler, *About anxious, sad and restless children* (Bucharest: Univers Enciclopedic Gold, 2013), 187.

2. Bîrsan, Corneliu. *European Convention on Human Rights*. *Comment on articles.* Bucharest: C.H. Beck, 2005.
3. Cîrjă, Alina Cristiana. *Psycho-pedagogical counselling. Examples of good practice*. Bucharest: Pro Universitaria, 2016.
4. Cîrjă, Alina Cristiana. *Assistance and protection of children's rights in the educational area*. Bucharest: Pro Universitaria, 2016.
5. Dolto, Françoise. *When parents separate. How to prevent children's suffering*. Bucharest: Trei, 2016.
6. Gavriș, Dumitru Marcel. „Articles 910-914 of the Code of Civil Procedure" in *New Code of Civil Procedure. Comment on articles*, edited by Gabriel Boroi (coordinator). Bucharest: Hamangiu.
7. Köhler, Henning. *About anxious, sad and restless children*, Bucharest: Univers Enciclopedic Gold, 2013.
8. Leș, Ioan. *New Code of Civil Procedure. Comment on articles*, Bucharest: C.H. Beck, 2013.
9. Semenik, Dmitry. *Divorce: how to prevent and how to get by*, Bucharest: Sophia, 2011.

**Articles in a print journal**

1. Voiculescu, Anca-Magda. "Psychological counselling of the minor within forced enforcement. Current regulation in the light of ECHR. Correlation with other special procedures in the matter of child protection*", RRES*, no.1 (January 2017): 69-88.

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# BRIEF 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 PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA

**Ramona DUMINICĂ**[1]
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***Abstract:***

*In the context of its application, starting with 25th May 2018, the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, entered into force in 2016, we consider as appropriate the clarification of the concept of "personal data".*

*The study starts with an analysis of the concept in the light of the Regulation (EU) 2016/679 which tries to settle certain of the ambiguities existing until now and expands the category of the personal data for certain situations, for instance, in the area of sensitive data. The notion is being approached also by relation to the doctrine and especially by presenting the interpretations given throughout time to the notion of "personal data" by the CJEU in its jurisprudence.*

***Key words:*** *personal data; common data; sensitive data; Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data; CJEU jurisprudence.*

## INTRODUCTION

Starting from the fact that a good definition of the terms used is helpful in the discovery of the area of the statements, in the

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identification of the nature of the judicial institutions and, therefore, in the insurance of a better application of the norm, the current study aims the clarification of the concept of "personal data".

Starting with 25th of May 2018 the application throughout the European Union of the Regulation (EU) 2016/679 on the unification of the legislations of EU Member States for the protection of natural persons with regard to the processing of personal data and on the free movement of such data[1], refers, before all, to the definition of the concept used. Are the IP addresses personal data? What happens with the unique identifiers for each device or with the biometric identifiers? Does the "genetic data" have a personal feature? These are just a few questions to which our study is aiming to answer.

The definition of a concept is both a condition of the scientific precision, as well as one of the social efficiency of a legal norm. The definition consists in providing a clear meaning for the notions used in the construction of the legal text, which shall contribute to its clarity. In this regard, it has been stated that "the first of the conditions insuring the practicability of a legal concept shall be its definition"[2], this is why "the definition of a legal concept shall always be normative, constructive and systemic and non-additive, and the proximity and specific difference used in defining such a concept must be legal rather than factual"[3].

## 1.THE ANALYSIS OF THE DEFINITION OF "PERSONAL DATA" IN ACCORDANCE WITH THE REGULATION (EU) 2016/679

The literature[4] has stated that the personal data accompany the individual before his birth (for instance, the genetic features such as the DNA), throughout his biological existence characterizing his civil life

[1] See: Irina Alexe, Nicolae-Dragoş Ploeşteanu and Daniel-Mihail Şandru (coord.), *Protecţia datelor cu character personal. Impactul protecţiei datelor personale asupra mediului de afaceri. Evaluări ale experienţelor româneşti şi noile provocări ale Regulamentului (UE) 2016/679* (Bucharest: Universitară, 2017), 19.
[2] J. Dabin, *Théorie générale du droit* (Paris: Dalloz, 1969), 268.
[3] D. C. Dănişor, "Juridicizarea conceptelor", in *Dreptul* 3 (2011): 52-69.
[4] S. Şandru, *Protecţia datelor personale şi viaţa privată* (Bucharest: Hamangiu, 2016), 192.

(name, surname, domicile or residence, civil status), sociological (ethnicity, race), socio-economical (position, work place), political (membership in a political party or political opinions), philosophical (moral, religious or philosophical ideas) and technological (phone number, email, IP address). Moreover, in certain cases, they refer to the memory of a person, being connected to some individual features generating a legal protection for the personal data even after the death of the person.

Legislatively, in accordance with Art 3 Para 1 Let a) of the Law No 677/2001[1] the personal data are defined "as being any information referring to the natural person identified or identifiable; an identifiable person refers to that person who can be identified, directly or indirectly, especially by referring to an identification number or to one or numerous elements specific for his physical, physiological, psychical, economic, cultural or social identity".

The current legal definition represents an integral takeover of Art 2 Let a) of the Directive No 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[2]. In a revised and modified form, the definition is also found in Art 4 Para 1 of the Regulation No 679/27 April 2016[3].

Thus, the personal data refer to "any information regarding an identified or identifiable natural person ("concerned person"); an identifiable natural person is the person who can be identified, directly or indirectly, especially by referring to a certain element of identification, such as a name, an ID number, location data, an online identifier, or to one or multiple elements specific to his own physical, physiological, genetic, physical, economic, cultural or social identity".

[1] Law No 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, published in the Official Gazette, Part 1, No 790/12 December 2001, with subsequent modifications.
[2] Directive No 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in the Official Journal of the European Communities L 281 din 1995.
[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), published in the Official Journal of the European Union L 119 of 2016.

### 1.1.The first main element of the definition: "any information

From the use of the wording "any information" it clearly results the intention of the communitarian legislator to draft a broader concept of the personal data. Regarding the nature of the information, the concept of personal data aims any objective or subjective information regarding a natural person. Therefore, or the information to be classified as "personal data" it is not necessary to be true or proven[1].

By relation to the content of the information, the concept of personal data refers to all personal information considered as "sensitive data", but also to more general information endangering the private and family life of the person, such as the activity regarding work relations or the economic or social behavior of the person. Not least, the concept of personal data refers to the information available under any form, regardless it is numerical, graphical, photographical or acoustical. It comprises information written on paper, such as the information kept in a computer using a binary code or stored on a video tape[2].

### 1.2.The second element of the definition: "identified or identifiable natural person"

The natural person is the man seen in his individuality, as owner of rights and obligations. Any person shall have the quality as subject of law, the law offering for each individual the legal personality.

The doctrine has stated that "the legal personality is a skill, a virtue of the human being. Potentially, it exists in each individual; it is the vocation to be an active or passive owner of subjective rights. After that it is an absolute and permanent generality"[3]. According to Art 6 of the Universal Declaration of Human Rights "Everyone has the right to recognition everywhere as a person before the law".

In our national law, the notion of legal personality is in a tight relation with that of the general legal capacity and especially with that of civil capacity. The civil capacity represents "that part of the legal capacity consisting in the ability of the natural person to acquire and

[1] Opinion No 4/2007 on the concept of personal data, 01248/07/RO, WP 136, www.dataprotection.ro.
[2] Opinion No 4/2007 on the concept of personal data, 01248/07/RO, WP 136, www.dataprotection.ro.
[3] O. Ungureanu and C. Munteanu, *Drept civil. Persoanele în reglementarea noului Cod Civil* (Bucharest: Hamangiu, 2015), 9.

perform civil rights and obligations and in his ability to acquire and perform civil subjective rights, as well as to take responsibility and perform civil obligations by concluding legal documents"[1]. Its structure comprises the capacity of use and exercise. According to the national legislation, the civil capacity of use of the natural person is acquired at birth. This rule is being stated by Art 35 Para 1 of the Civil Code. As exception, the rights of the child are being recognized at his conception, but only if he is born alive (Art 36 Para 1 of the Civil Code). The cessation of the quality as subject of law occurs, according to Art 32 Para 2 of the Civil Code, at the death of the person. From the corroboration of these provisions with Art 49 of the Civil Code it results that the death may be physically ascertained or legally declared.

Therefore, based on the Regulation, the personal data mainly refer to living individuals, identified or identifiable, because the dead individual no longer represents a natural person in the meaning of the civil law. But, the data regarding the dead person can, still, under certain cases, indirectly enjoy a certain protection. Also, for unborn children we consider that, as exception, the provisions regarding the protection of data shall be applied for them with the condition to be born alive.

Generally, a natural person can be considered as "identified" when he is individualized within the relationships involving specific elements such as name, domicile, civil status[2], etc. On the other hand, the natural person is "identifiable" when, even if the person has not yet been identified, this thing is possible directly or indirectly.

Unlike the former directive, the Regulation No 679/2016 shapes the notion of identifiable person. The new regulation preserves two main criteria, but also brings novelties in the identification of the person. If under the auspices of the former regulation, the first criterion was the ID number, in the new regulation we find new elements, namely: name, location data and the online identifier. Regarding the second criterion, precisely the specific identity elements referring to the physical, physiological, economic, cultural and social data and adds the elements specific to the genetic identity[3].

The legal definition of the personal data reveals clearly that the IP addresses, the IDs of the mobile devices and other such are personal data

[1] G. Boroi, *Drept civil. Partea generală. Persoanele* (Bucharest: Hamangiu, 2008), 475.
[2] E. Chelaru, *Drept civil. Persoanele* (Bucharest: C.H. Beck, 2016), 90.
[3] V. Stoica, "*Ce sunt datele cu caracter personal?*" www.universuljuridic.ro.

and are being protected. Also, it clearly defines the "genetic data"[1], "biometric data"[2] and "data concerning health"[3].

Starting from the previously analyzed legal texts, the recent legal literature[4] has come to the conclusion that the "personal data refer to a notion having as proximity another notion with a wider area of application, namely the notion of information". The specific difference between the personal data and the other information shall be determined by the object of the information. We are talking about any type of information referring to an identified or identifiable natural person (…). Thus, the specific difference which shapes in the wider area of the notion of information a special category of information, namely the personal data, is the amount of all the personality elements, and not only the amount of the aspects preserved by the two criteria for the identification of the natural person.

## 2. THE CLASSIFICATION OF THE PERSONAL DATA

At the doctrinal level[5], the personal data have been divided according to multiple criteria. Among these, we shall refer to the following classifications:

a) Depending on the degree of legal protection provided, shall be distinguished between the *common personal data* (general, usual, common), for instance: name, address, working place and the *sensitive personal data* (special, extraordinary), such as: ethnicity, political

[1] "*Genetic data means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question*" [Art. 4 Para 13 of the Regulation (EU) 2016/679].

[2] "*Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioral characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data*" [Art 4 Para14 of the Regulation (EU) 2016/679].

[3] "*Data concerning health means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status*" [Art 4 Para 15 of the Regulation (EU) 2016/679].

[4] V. Stoica, "*Ce sunt datele cu caracter personal?*" www.universuljuridic.ro.

[5] Șandru, *Protecția datelor personale și viața privată*, 193-194.

opinions, religious or philosophical beliefs, trade union membership, data concerning health or sexual life, genetic and biometric data etc.;

b) Depending on the nature of the information, the data shall be *objective* (position or fortune of an individual) or *subjective* (political opinions, religious beliefs, etc.);

c) Depending on the source of information, the data shall be *exclusively personal* (biometric data) or *generated by third parties and attributed to an individual* (phone number).

## 3.THE NOTION OF PERSONAL DATA IN THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

Over time, the CJEU has interpreted the notion of personal data in numerous cases, the common element consisting in providing a wider meaning to it.

By synthesizing the Court's jurisprudence in this area[1], it can be concluded that from its perspective there are personal data the following:

- The name of a person and phone number or other information concerning work conditions or hobbies [2];
- The address[3];
- The information regarding the fact that a person suffered a leg injury and work half norm for health reasons[4];
- The amounts of money paid by certain institutions and its beneficiaries[5];
- The incomes registered from work or from capital and the patrimony of the natural persons[6];
- Biometric data[1];

[1] G. Zanfir, *Protecția datelor personale. Drepturile persoanei vizate* (Bucharest: C. H. Beck, 2015), 22-23.
[2] CJEU, Decision of 6 November 2003, C-101/01 Bodil Lindqvist, Rec., p. 1-12971, Para 24.
[3] CJEU, Decision of 7 May 2009, C-553/07 Rijkeboer, Rep., p. 1-3889, Para 42.
[4] CJEU, Decision of 6 November 2003, C-101/01 Bodil Linqvist, Para 51.
[5] CJEU, Decision of 16 December 2008, C-524/06 *Heinz Huber,* Rep., p. 1-9705, Para 20 and 43.
[6]CJEU, Decision of 16 December 2008, C-73/07 *Satakunnan Markkinaporssi and Satamedia,* Rep., p. 1-9831, Para 35 and 37.

- GPS and traffic data[2];
- Date of birth, citizenship, gender, ethnicity, religion and mother tongue[3];
- IP address[4].

Not least, the Court has recently stated in the case *Peter Nowak v Data Protection Commissioner*[5] that Art 2 Let a) concerning the notion of personal data stated by the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data shall be interpreted in the meaning that, under conditions such as the ones presented in the main litigation, the written answers provided by a candidate during a professional examination and possible observations made by the examiner referring to those answers are personal data, in the meaning of this document.

## CONCLUSIONS

The current analysis allows us to conclude that the legal definitions, but also the jurisprudential ones, given to the notion of personal data have two common elements: the generality of their definition and the fact that they start from the central notion of identity.

Regarding the Regulation No 679/2016, together with other novelties brought by it in this area, it has the credit of clarifying a series of legal ambiguities related to the concept of personal data. Specifically, the Regulation expressly states the fact that the notion of personal data shall include the online identifiers and the location data. Also, it inserts a new concept of pseudonymous data, namely those personal data which have been subjected to certain technological measures (e.g.: encryption) for a natural person to be identified directly, without using other supplementary information.

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[1] CJEU, Decision of 17 October 2013, C-291/12 *Schwartz v Stadt Bochum,* Para 27.
[2] CJEU, Decision of 8 April 2014 in the cases C-293/12 and C-594/12 *Digital Rights Ireland, Para* 26 and 29.
[3] CJEU, Decision of 17 July 2014 in the cases C-141/12 and C-372/12 *Minister voor Immigratie,* Para 38.
[4] CJEU, Decision of 24 November 2011, C-70/10 *Scarlet Extended v SABAM*, Para 51.
[5] CJEU, Decision of 20 December 2017, C-434/16, *Peter Nowak v Data Protection Commissioner.*

Finally, the new provisions state specific definitions for the "genetic data", the "biometric data" and the "data concerning health". These categories of information are being treated as "sensitive personal data" and are given a special protection by the Regulation.

## BIBLIOGRAPHY

### Books

1. Alexe, Irina, Ploeşteanu, Nicolae-Dragoş, Şandru, Daniel-Mihail (coord.). *Protecţia datelor cu character personal. Impactul protecţiei datelor personale asupra mediului de afaceri. Evaluări ale experienţelor româneşti şi noile provocări ale Regulamentului (UE) 2016/679*. Bucharest: Universitară, 2017.
2. Boroi, Gabriel. *Drept civil. Partea generală. Persoanele*. Bucharest: Hamangiu, 2008.
3. Chelaru, Eugen. *Drept civil. Persoanele*. Bucharest: C. H. Beck, 2016.
4. Dabin, Jean. *Théorie générale du droit*. Paris: Dalloz, 1969.
5. Dănișor, Dan Claudiu. "Juridicizarea conceptelor". *Dreptul* no. 3 (2011): 52-69.
6. Stoica, Valeriu. "*Ce sunt datele cu caracter personal?*" www.universuljuridic.ro
7. Șandru, Simona. *Protecția datelor personale și viața privată*. Bucharest: Hamangiu, 2016.
8. Ungureanu, Ovidiu and Munteanu, Cornelia. *Drept civil. Persoanele în reglementarea noului Cod Civil*. Bucharest: Hamangiu, 2015.
9. Zanfir, Gabriela. *Protecţia datelor personale. Drepturile persoanei vizate*. Bucharest: C. H. Beck, 2015.

# THE NOTION OF SPECIAL CONTRACT IN THE ROMANIAN LAW, STARTING WITH THE ROMAN LAW UNTIL THE POST-1989 REVOLUTION PERIOD

**Dumitru VĂDUVA**[1]

***Abstract:***

*The understanding of the special contracts, of their role and of the general theory of the contract in the organization of the economic trades, also refers to the relation between them starting from the Roman law and until the post-1989 Revolution period.*

*The Romanian law, which originates from the Roman law, has known, throughout the above mentioned period, evolutions of the application of the fundamental concepts of the civil law, close to the ones from the western European legislations, but also original ones, especially in the economic relations between the economic agents (undertakings) during the socialist period, which performed their economic trades based on the national plan and only in subsidiary based on the legal relations established by the Civil Code of 1864 and the Commercial Code of 1807, very close to the French Civil and Commercial Codes. During this period, only small undertakings and individuals, to a very limited level, because of the absence of their economic base by the nationalization of the enterprises or the collectivization of the lands, performed their economic trades based on the rules of the contractual law stated by the Civil Code.*

*Despite this limitation in the application of the rules of the private law, by the efforts of the doctrine and legal practice, the application of the concept specific to obligations in the private law have preserved their vigor, refreshed by the update to the market economy after the Romanian Revolution of 1898.*

***Key words:*** *special contracts; general theory of obligations; common law for the contracts*

## INTRODUCTION

A priori, the wording of special contracts suggests that these are derogative contracts in relation to the "general contract".

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Really, this name is misleading because there is no such thing as a "general contract", towards which the special contracts to be derogative. Between them there is no application of the rule "*specialia generalibus derogant*".

In order to avoid this apparent signification of the "special contracts", the doctrine has proposed the name of "civil contracts"[1], by suppressing the adjective "special" attached to the substantive of "contracts" or "the main civil contracts" or "special civil contracts", divided into "big civil contracts" and "small civil contracts"[2] .

The understanding of the special contracts, especially of their role and of the general theory of the contract in the organization of the economic trades, refers to the relations between them starting with the Roman law until the pre-modern period (1) in the modern law (2) and after the instauration of the market economy in Romania (3).

## 1.SPECIAL CONTRACTS AND THE GENERAL THEORY OF THE CONTRACTS FROM THE ROMAN LAW TO THE MODERN TIMES

### 1.1.The Roman law did not met the general theory of the contracts, but only the special contracts

#### 1.1.1.The Roman law, as innovator for the contracts as instruments of the economic trades, was not aware of the general theory of the contract

The economic trades were born only from special contracts. Their base was represented by the formalities specific to that category of contracts. The simplest conventions (pacts), agreements of will between the parties without the compliance with the legal formalities (nudo pacta) had no legal force because they were not sanctioned by the recognition of the action in justice. *Ex nudo pacto action non nascitur*. The contracts recognized by the old Roman law were the formal ones: *verbis* (for whose conclusion was necessary the fulfillment of rigorous formalities consisting in saying a few words, for instance *spondere, fidepromittere*

[1] Titus Prescure and Andreea Ciurea, *Contracte civile* (Bucharest: Hamangiu, 2007), preface
[2] George Plastara, *Contracte civile speciale* (Bucharest: Socec, 1943), 55

etc.), *litteris* (for whose conclusion the pater familias registered in the private ledger the legal act, for instance *expensilatio*). For both cases, the contract was unilateral. Later, the formality necessary for the emergence of the obligation consisted in *tradition*, handing over the asset. Only four real contracts were recognized and identified: *mutuum*, *commodatum*, *depositum* and *pledge*. During the Republic (2nd century B.C – 2nd century A.D), the classic law, when the economic trades became much more numerous, has recognized a number of 4 consensual contracts (*emptio-veditio*, *location-conductio*, *societas* and *mandatum*). The latter ones were established by the simple agreement of will, *solo consensus*, without being necessary the fulfillment of certain formalities, such as the saying of certain words or the registration in the ledgers of the pater familias (*litteris* agreements). Together with these contracts, it also emerged the notion of bilateral obligations, synalagmatic, from the Greek term *synalagma*[1].

**1.1.2.The consensual contracts above mentioned have represented an intermediary step in the evolution of the law to the known status of modern law, in which the contracts are based on the will**

For the Romans, the establishment of the contracts based on the will of the parties was recognized only with a particular feature, for the above mentioned consensual contracts. The liberation of the contracts from formalism, as their base, did not follow this thread. The next important stage of the evolution of the notion of contract, placed around the end of the first century of our era, was the recognition, under certain conditions, of the contracts unnamed by the Praetorian law, without being recognized by taking into account the will of the parties, but the idea of performing them with good-will (*bona fides*) and the protection by granting the right to action for the solution of the contract. The Praetor recognized for the synalagmatic agreements the right to action, naming it *condictio incerti*, later transformed into action *praescriptis verbis*, even if were concluded with the violation of the legal formalities for the named contracts, if there was a bona fides performance of the obligation by one of the parties, found in one of the following legal situations: *do ut des* (I do that you do, e.g. the exchange); *do ut facias* (I give that you may do,

[1] Claire Bouglé, Emmanuelle Chevreau and Yves Mausen, Histoire du droit des obligations, 2e Edition. (Paris: Lexis Nexis, 2011), 3-94

e.g. special purpose donation); *facio ut des* (*I do that you may give*); *facio ut facias* (I do that you may do, e.g. trade). The emergence of the obligation out of an unnamed contract was recognized also if there was the performance of the agreement by one of the parties, in good-faith. The fulfillment of these two conditions represented the base for the recognition of the mandatory force of the simple agreements, "nude pacts", and not the will of the parties.

**1.1.3.Until the fall of the Roman Empire, the contracts were subordinated to a special law, "the special law of the contracts"**

As exception, under the above mentioned conditions, the Praetor recognized the mandatory force also for the simple conventions (nude pacts), thus achieving a small step towards the recognition, over centuries, of the principle of the contractual freedom and of power sharing, thus contributing to the idea on the free conclusion of any agreement, not just of those stated by the law (special contracts of the Roman law) using the simple consent, to whose definition the modern law has reached.

**1.2.During the Middles Ages was forged the idea of the general theory of the contract**

**1.2.1.As opposing, the general theory of the contract, a novelty forged during a millennium, starting with the canonic law and completed by the precursors of the modern law, shall recognize any form of agreement, not just the named ones, which it bases on the parties' will.**

Its roots are deep in the Roman law, valorized by the canonic jurists, and after that by the ones of the Enlightenment period, dominated by the individualist philosophy and the school of liberal economists.

The emergence of the concept of a contract based on the parties' will has been forged throughout time, starting with the Praetorian law, which has recognized the four types of consensual contracts, an obvious evolution, because by removing the formalities specific to formal contracts, born only from unilateral obligations, the suppleness of the consensual contracts has allowed the birth of the synalagmatic obligations only the simple agreement, based on the parties' good-faith

and not will, which could have been expressed between absents or by proxies, accompanied by conditions and deadlines.

**1.2.2.After the rediscovery of the Roman law (11th century), the canonic law has valorized the notion of consensual contracts from the Praetorian law, but changed its base**

It recognized the mandatory force of the engagement taken by a person by own will, expressed under a consensual form, *pacta sunt servanda*. The coercive force was insured not by the good-faith, namely by loyalty and trust, which justified the action recognized by the Praetor (e.g. *bona fides*), but by the sanction for the violation of the agreement. Thus, it has been recognized the freedom to conclude any legal operation based on the person's will. The natural law has freed the theory of the consensual convention, as source of obligations, from the religious load by recognizing that the will of the person legally relates it and therefore the violation of the agreement shall be legally sanctioned. Loisel's formula (1609) made history: "*the oxen are chain-linked and the people are word-linked*".

**1.2.3.From this principle, the time has forged a very well structured common regime of contracts**

Thus, at the end of the feudal era, the right to action of a person has been recognized, if the obligation claimed to be sanctioned was based on the agreement of will (consent), freely expressed by a capable person, for a judicial operation (object) and based on a real and legal cause. This is the general theory of the contract.

In order for the theory of the natural law to reach perfection, in the form stated by the modern law, was necessary the existence of a certain environment: the illuminist philosophy and the idea of the liberal economy. The Enlightenment, with its philosophy of freedom and equity between individuals, has brought the idea of contractual freedom and strengthen the notion of a subjective right of a person, invented from the beginning of the medieval law (first stated by the canonic law). Every person shall be free to conclude any legal operation without being compelled to fulfill certain formalities.

The recognition of this freedom and of the subjective law has changed the physiognomy of the Roman law in the area of contracts. First of all, during the middle Ages the canonic law has invented the

notion of subjective law, not recognized by the Roman law and then changed its relation with the legal action. In the Roman law, the legal action represented the means for the recognition of the "subjective right", precisely of the claims of a contract. Subsequently, starting with the Middle Age this relation has changed. The subjective right comprised the prerogative of the legal action. In this way, the image of the objective and subjective law has reformed. Who had a subjective right, namely his claim was legally grounded, also had the right to action.

The concept of liberal economists, preceding the capitalist revolution, which encouraged the freedom of every person to conclude any contract, named or unnamed, the only formality required for its validity being the free expressed consent, *solo consensus obligat*, contributed to the forging of the general theory of the contract. The individualist conception of that time did not allowed supplementary legal measures for the protection of the debtor, other than the ones of the general capacity, by considering that the fairest contract is the one consented by him, because nobody knows better what his interests are.

### 3.The common modern law for the contracts and special contracts

The modern civil codes have stated the double level of the legal regulation of the contracts: a general one, the general theory of the contract, and a special one, the one of the special contracts.

This form of regulation, first settled by the French Civil Code of 1804, the Napoleonic Code, translated into law the ideas of the liberal and individualist society, synthesized in the works of the 17$^{th}$-18$^{th}$ centuries jurists, of whom the most important ones being Jean Domat[1] and Robert-Joseph Pothier[2].

[1] Jean Domat, "Lois civiles dans leur ordre naturel" in *Les principaux contracts spéciaux* (Jean Huet) (Paris: LGDJ, 2001), 18

[2] Robert-Joseph Pothier, *Traite des obligations* (Paris: Dalloz, 2011), 20. First edition printed in 1761

**3.1.The modern civil codes, including the Romanian Civil Code of 1864, state the general theory of the contract (a) and the special contracts (b) having a mutual influence (c)**

a) *The Romanian Civil Code of 1864 has stated the general theory of the contract* – being organized in the chapter dedicated to the general theory of the obligations. The general theory of the contract defined the contract, the conditions for its conclusion, its effects and performance.

b) *Also, the Romanian Civil Code of 1864 stated ten classic special contracts*. For some of them there have been developed variations or species, such as the location contract with two species (the location of assets and the location of the services, with their own subdivisions), the random contracts with two species (gambling and the life-income agreement) etc. These contracts are classified as classic, because they were taken from the Roman law and used throughout time, including by the modern law, which has adjusted them in order to be in accordance with the general theory of the contract.

c) *The mutual influence between the general theory of the contract and the special contracts* – the general theory of the contract is inspired by all special contracts, being their type ($c_1$) which prevails over them ($c_2$).

d) $c_1$) The theory of the contract has not been built out of nothing, but based on the preexistent models. Because most of the economic trades were concluded based on the sales contract or by services, by synalagmatic or onerous contracts, the general theory of the contract has been established on the logic of these judicial operations, especially on the one of the sales contract, this being the most used one between relatives or friends, being in fact free of charge. The general theory is a theory of the synalagmatic and onerous contracts, having as object: legal operations characterized by the obligation to give, the transfer of an material or immaterial asset; or by the obligation to do, the provision of an asset or the provision of services; or the obligation not to do, which is also an obligation to do. For instance, at the moment of the Civil Code of 1864 few rules for the sale (including the transfer of incorporeal assets, regulated as a subset of the sale) were not applied for the general theory of the contract. Only the obligation to guarantee for the salesman has this feature, but they are not essential, being simple obligations related to the nature of the sale. Likewise, the service contracts, the second pillar of the

special contracts, represent a subset whose elements have been abstracted and absorbed into the general theory of the contract.

$c_2$) The prevalence of the general theory of the contract. Though there is no express statement, the existence of the general theory of the contract, the proximity of special contracts, was understood that the latter are just the applications of the first. Same for the unnamed contracts, which had no express recognition, but only a contractual freedom stated by Art 5 of the Civil Code of 1864, which implicitly accepted them. The general theory of the contract prevailed to the special contracts because it stated the regime for every contract, as already shown. The special contracts only fixed the rule of the general theory of the contract with the specificity of an operation of economic trade.

Thus, the rules of the general theory of the contract are reiterated, under an adjusted form, in the sales contract, whose fundamental obligation is the transfer of property, the obligation of to give, in exchange for the price, this contract having few rules which are not found in the general theory of the contract. In return, the service contracts, whose fundamental obligation is to do, have more specificities regarding the establishment of the object, often being only determinable only the extent of the service and the price, or regarding the risk of losing the asset; these are not derogative, the general theory of the contract stating that the asset may very well be determinable if the criteria for its determination are being fulfilled. Also, the real or random contracts are particular applications of the general theory of the contract, stating certain derogative rules, imprinted by the unilateral and gratuitous feature, for the first category, or of the inadmissibility of their performance by constraint for certain contracts of the second category etc. Finally, even the gratuitous services (gratuitous non-interested contracts) are applications of the general theory of the contract, this feature providing only certain specificities which may be considered as derogative, but not essential, such as the aggravation of the liability of the beneficiary of the free service, such as the borrowing person, or the diminution of the liability for the provider of the service, for instance the depositary.

More relevant on the adjustment of the general theory of the contract to its applications, at the time of the adoption of the Civil Code of 1864, the special contracts represent those contracts with a gratuitous title referring to a liberality, namely the donation. Being a contract, this is

an application of the theory of the contract, but the liberality limits it to certain derogative rules and from this reason it has a more detailed regulation, the legislator punctually interfering in order to state the rules derogating from the general theory, based on the logic of the synalagmatic and onerous economic trades.

**3.2.In the modern law, the contracts are no longer special, but merely applications of the general theory of the contract**

Starting with the modern law, the special contracts no longer have the role established by the Roman law, where the named contracts were the only instruments to be used for economic trades.

For exemplification, the Civil Code of 1864 stated a situation similar to that of the special contracts from the Roman law. In the Romanian code, the transfer under a gratuitous title of the assets or the patrimony cannot be performed by any contract, but only through the legal instruments expressly stated by the law, as well as the Roman law limited, this time for every economic trade, the instruments used for this purpose. According to Art 800 of the Civil Code of 1864, "No person shall be able to use his possessions, under a gratuitous title, by other means than the ones stated by the law for donations between livings or by will"[1]. The donation and the will are special legal acts (contract, namely a unilateral legal act) because they are the only legal instruments which can be used by a person benefiting of his assets.

As opposing, in the modern law, the special contracts have nothing special. They are simple examples of the general theory of the contract, by its adjustment to the most used legal operations.

How can one explain the fact that almost all special contracts of the Roman law have been taken by the modern civil codes, without preserving their feature as special?

The explanation is found in the statement of the principle of liberality of the contracts presented by the modern codes. It has been recognized in Art 5 of the Civil Code of 1864: "It cannot be derogated from by conventions or particular provisions, laws of public order and good morals". The contractual freedom refers to the individual's freedom in concluding any form of contract, with any content (not just the named ones) and with any person. For the exercise of this freedom, a model

[1] This rule has been taken by Art 984 Para 2 of the new Civil Code

contract had to be organized that would be applicable to all contracts: the general contract theory.

On the other hand, for the most important economic trades, the modern civil codes have valorized specific instruments known for centuries, without recognizing the role as exhaustive rules of the special contracts, but just as examples of particular rules applicable to the most used legal operations, which based the logic of the rules of the general theory of contracts. Especially the sales contract, and in general the synalagmatic and onerous contracts, being known from the Roman law, have offered to the legislator the technique to create a general and abstract model of the contract, applicable for all contracts, the common law of contracts.

This structure of the rules of the contracts on two levels and their logic has been taken by the new Civil Code, with certain quantitative and qualitative modifications.

## BIBLIOGRAPHY

### Books

1. Domat, Jean, "Lois civiles dans leur ordre naturel" in *Les principaux contracts spéciaux* (Jean Huet). Paris: LGDJ, 2001
2. Plastara, George, *Contracte civile special*. Bucharest: Socec, 1943
3. Pothier, Robert-Joseph, *Traite des obligations*. Paris: Dalloz, 2011
4. Prescure, Titus, and Andreea Ciurea, *Contracte civile*. Bucharest: Hamangiu, 2007

# ANOTHER MEANING OF THE NOTION OF HOME - THE FAMILY HOME, AN ESSENTIAL ELEMENT OF THE IMPERATIVE PRIMARY REGIME

**Carmen Oana MIHĂILĂ** [1]

***Abstract:***

*Inspired by the French regulation, the Romanian Civil Code has created for the first time a very important legal regime for the family home and for the goods furnishing and decorating it.*

*For the living environment is vital for the normality and balance of family life, the provisions on family dwelling come to protect the spouses and their children.*

*An element integrated by the legislator in the primary regime (imperative norms governing the patrimonial relations between spouses and between them and third parties, irrespective of the matrimonial regime), the special protection of the family dwelling aims at ensuring a balance, a real equality of spouses by avoiding abuses of one of them that could lead to destabilization of the family.*

*The paper deals with the regime of legal acts concerning the family home, the nature of these acts, the duration and conditions of protection, the rights of the spouses on the rented dwelling, the limitation of these rights, as well as the comparative theoretical and practical elements of France or Quebec.*

***Key words****: family home; real estate; moveable assets; consent; co-management; rented accommodation*

## THE FAMILY HOUSE, LEGAL NOVELTY, PART OF THE PRIMARY REGIME. DEFINING ELEMENTS

Family interests must be combined with the desire to protect the independence of spouses. Hence, the family house is important for the existence of family cohesion.

The obligation of the spouses to live together is provided by the Civil Code in art. 309. The law does not, however, require them to have a common domicile or a common residence.

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However, the family house should not be mistaken for the spouses' common domicile.

In order to be able to make the correct distinction between the two terms, domicile, and family home, it is necessary to define them. Thus, domicile is regulated in art. 87 as the place where the individual "declares that he has the main home", the residence being the place where "the individual has his secondary home". Art. 89 paragraph 2 Civil Code states that "the establishment or change of residence only operates when the person occupying or moving to a particular place has done so with the intention of having the main home there." "A natural person can have at the same time only one home and one residence, even when he has more houses "- art. 86 par. 2. G.E.O. 97/2005[1] on the registration, domicile, residence and identity documents of the Romanian citizens stipulates that "the domicile of the natural person is at the address where he declares that he has the main residence".

The notion of home is also given a legal definition in the Home Act 114/1996[2]. This is a "construction made up of one or more living quarters with the necessary premises, facilities and utilities that satisfy the living requirements of a person or family." And from this definition we understand that the home meets the living requirements, "it is not only able to satisfy these requirements." [3]

According to the Romanian legislator, the home of the family is the common dwelling of the spouses or, in the absence, the dwelling of the spouse who has the children (Article 321 Civil Code). It can not be derogated by the spouses' convention from this rule. It has been argued that the family home is a notion of fact, not by right, because with regard to the imperative primary regime[4], the place where the family actually

[1]The Official Gazette no 719/12 October 2011

[2]The Official Gazette no 393/31 December 1997, last amendment by Law 143/2017 For details on housing taxation, see Cîrmaciu, Diana, "Considerations on the Local Tax System," in the Journal of the Law Faculty of Oradea, ProUniversitaria, no. 1 (2017): 13-21

[3]Miron Gavril, Popescu, *Regimul matrimonial primar imperativ în reglementarea actualului Cod civil român* (București: Universul Juridic, 2018), 97

[4]The imperative primary regime governs, in addition to the legal regime of family home, the obligations of spouses on marriage expenses, their professional and patrimonial independence, banking autonomy, the right to information, the conventional and judicial mandate, the judicial authorization, the limitation of the powers of one of the spouses in the interest of the family.

lives is important[1]. The spouses must give this destination tothe house where they carry out their family life.

Family home is a stricter concept than the notion of conjugal residence. It will be protected even if the spouses are actually separated or have separate homes and even during the divorce proceedings, which can create many inconveniences.

The qualification as family dwelling is done in the literature[2] based on two criteria: an objective one, namely the existence of the real estate in which the spouses reside, and a subjective one which concerns the spouse's will to give the destination of dwelling of the family of the real estate in which they reside. The Romanian law, unlike the French law, uses the name of real estate.

The rule provides the possibility for each of the spouses to request the consideration as family home in the land book, even if they are not the owner of the real estate (the non-proprietary spouse has thus control over the acts concluded by the other spouse regarding the family home). The purpose of the consideration is to carry out the procedure of opposability to third parties (Article 902 paragraph 2 point 5 Civil Code mentions the "destination of a building as the family dwelling" among the acts or deeds registered in the land book). Most of the times, third-party creditors have in the family home building the only guarantee of the repayment of claims, which is why the marking in the land book is particularly important. This operation creates the special regime of protection of the family dwelling. The note in the land book does not bring any change regarding the owner of the property right.

As far as the legal nature of the family dwelling is concerned, it is not necessary for it to be the common property of the spouses. It is not even required to be owned as property, so other titles such as usufruct, rental, or bailment[3] can be discussed.

In the case of a marriage ending in divorce, the court will rule on the family home upon request, as provided by art. 918 par. 1 letter Procedural Civil Code. The norms relating to family home and the goods that decorate or furnish it are applicable to marriages in existence at the

[1] Flavius-Antoniu Baias and Eugen Chelaru and Rodica Constantinovoci and Ioan Macovei, *Noul Cod civil. Comentariu pe articole* (București: C.H. Beck, 2012), 261
[2]Florian Emese, *Regimuri matrimoniale* (Bucharest: Ed. C.H. Beck, 2015), 30-31
[3]Florian Emese, "Protection of family housing during marriage in the regulation of the new Civil Code", *Pandectele Române* no 7 (2011): 52

date of entry into force of the Civil Code if the acts are concluded after 1 October 2011.

## THE REGIME OF LEGAL ACTS CONCERNING FAMILY HOME

Article 322 Civil Code establishes the rule of joint management in respect of the acts relating to family home. These rights are exercised by both spouses, whether they are real rights or rights of claims (sale, exchange, donation, rental, sub-lease)[1].

The law requires the **written consent** of the other spouse. In the doctrine, there were different views on the ad probationem or ad validitatem written form required. The dominant orientation is in the sense of the requirement of the written form as an ad-probation condition, thus the non-observance of this condition attracting the inadmissibility of proving the consent with another means of proof. Furthermore, the sanction of absolute nullity is not imposed.[2]

This provision is considered to be a case of restricting the powers of the other spouse, which is more evident if the building is only the property of the latter (it can even be considered a restriction of the right of property protected by law). The non-proprietary spouse does not, however, become part of the legal act on family home. Another is the situation where the spouses are co-owners of the property, in which case the consent is given in this capacity (in authentic form - ad validitatem condition) - art. 346 pararagraph 1 Civil Code.

The matrimonial regime under which the spouses are married does not matter, these rules also apply to the separation regime.

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[1]Gabriela Cristina Frențiu, „Comment of art. 322 Civil Code", in *Noul Cod civil, Comentarii, Doctrină și Jurisprudență*, vol. I (Bucharest: Hamangiu, 2012), 434

[2]Marieta Avram and Laura Marina Andrei, *Instituția familiei în Noul Cod civil. Manual pentru uzul formatorilor SNG* (Bucharest, 2010), 161
http://www.grefieri.ro/Docs/20100623InstitutiaFamilieiInNoulCodCivil.pdf
For a contrary opinion, the ad validitatem form is required since it is stipulated that "without the written consent of the other spouse, none of the spouses can dispose of", see Miron Gavril Popescu, *Regimul matrimonial primar imperativ în reglementarea actualului Cod civil român*, 110

The proprietary spouse may, however, dispose of the dwelling of the family by will (without the need for such consent)[1].

In the case of an unjustified refusal of the spouse to consent to the conclusion of the documents regarding the family home, the guardianship court may be authorized to conclude the act (Article 322 paragraph 3 of the Civil Code). However, if one of the spouses is unable to express his or her consent, the other spouse may request the guardianship court to represent him, under the conditions of Art. 315, governing the judicial mandate.

It is not qualified as a refuse if the resigning spouse loses the right to the family home he /she used to won on the basis of the lease, an accessory to the individual labor contract. The principle of freedom to practice the profession may not be violated, "even if the family is deprived of the family home"[2].

This can be pursued by the creditors for the debts contracted in connection with the family home, spouses or one of them, having the consent of the other[3].

Article 322 also subjects to the same legal regime, in addition to the family home, **the goods that furnish or decorate the family home**,

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[1]The surviving spouse has the right to occupy the house in which he/she lived until the inheritance was opened, if this house is part of the property of the inheritance, according to art. 973 Civil Code. It will also inherit the furniture and the household items that have been affected by the spouses' common use if they do not compete with the descendants of the deceased.

[2] Baias and Chelaru and Constantinovoci and Macovei, *Noul Cod civil, Comentariu pe articole*, Comment art. 322, 263

[3]In the case note Kušionová (C–34/13, Monika Kušionová v. Smart Capital, decision of 10 September 2014).
http://curia.europa.eu/juris/document/document.jsf?text=&docid=157486&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=368433) The CJEU tells us that "a family home can be foreclosed, but not under any circumstances, and the unlimited liability principle of the debtor goes into collision with this consumer right at the family home. If, for example, mortgages were made after 1 October 2011 on the family home, or if there were dispositions of this home after the same date (for example, at the pressure of the bank or collector of receivables, the family home was sold to cover part of the claim) and one of the spouses did not expressly consent to it, then the disposition can be challenged with invalidity."
*For details see Gheorghe Piperea, "Enforced enforcement on the family home of the consumer. Case Kušionová. Right to family home" (t.n.) (2014) https://www.juridice.ro/343861/executarea-silita-asupra-locuintei-familiale-a-consumatorului-cauza-kusionova-dreptul-la-locuinta-familiala.html*

imposing an exception to the rule established in the art. 346 par. 2 Civil Code: "any spouse may dispose alone, for consideration, of common movable goods whose alienation is not subject to the law, other advertising formalities." In the case of goods, too, it does not matter if only one of the spouses is the owner or they own the goods in groups or by portion. A part of the doctrine considered this as an exaggerated restriction, suggesting that the value and destination of the goods in question should be taken into account, for example, only those items of strict necessity and those intended for joint use by family members[1]. Under the regime of the separation of goods, the spouse would no longer be able to dispose of his own movable property that furnishes or decorates the common home.

The documents relating to the **house owned with lease title**, which affect such use or concern the movement of movable property from the dwelling, may also be concluded only with the written consent of the other spouse. [2] "Every spouse has a leasehold right, even if only one of them is the holder of the contract or the contract is concluded before marriage." This provision of art. 323 is derogatory from the common law[3]. Art. 323 Civil Code states in par. 2 that the rules of art. 322 shall apply accordingly. Both spouses or only one of them may be the holders of the lease contract. In the case of a denial of consent, the rules on the authorization of the court or the judicial mandate apply by analogy. Also, in terms of the rented dwelling there was a doctrine about a discussion of the situation of the company accommodation or the protocol accommodation. Due to the fact that the law does not distinguish and they can be qualified by spouses as the family home. However, it can not be concluded that the consent of the other spouse in the case of the loss of the right to reside as a result of resignation is required[4].

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[1]Alexandru Bacaci and Viorica Claudia Dumitrache and Cristina Codruța Hageanu, *Dreptul familiei*, ed. a 7 - a (Bucharest: C.H. Beck, 2012), 66

[2] Frențiu, „Comment article 323 Civil Code", *Noul Cod civil, Comentarii, Doctrină și Jurisprudență*, 438-439; Cristina Nicolescu, "The patrimonial cohesion of the couple - the finality of the primary matrimonial regime (II)" (t.n.), *Curierul Judiciar* no. 7 (2008): 65

[3]Sorina Lucreția Drăgan, "Family home" (t.n.) in *Revista Fiat Justitia, vol. 6*, issue 2, (2012): 67

[4]For details see Frențiu, „Commment article 323 Civil Code", *Noul Cod civil, Comentarii, Doctrină și Jurisprudență*, 439

The termination of the residential tenancy agreement made by one of the spouses does not affect the other. Similarly, neither the renunciation to the renewal of this contract nor the assignment of the contract shall take effect unless the consent of the other spouse is granted.

The Romanian law also regulates the situations regarding the effects of the death of one of the spouses in relation to the leasehold right on the rented dwelling, but also the manner of awarding the lease in the event of marriage dissolution (Articles 323, 324 of the Civil Code). Thus, in the event of death, the surviving spouse will continue to exercise his leasehold right if he does not renounce it within 30 days of the date of the death registration (Article 323 paragraph 3 in conjunction with Article 1834, paragraph 1). By that legislation the legislator intended to protect the surviving spouse who was not the holder of the owner of the lease contract.

If the marriage is terminated, if the spouses do not get along, the court (the court in charge of the divorce request or from the place where the property is located if it is a claim introduced after the divorce[1]) will award to one of them the benefit of the lease contract according to the "superior interest of the minor children[2], the fault in the dissolution of the marriage, and the former spouses' own housing opportunities" (Article 324 paragraph 1). Under the award procedure, the lessor will also be quoted to ensure the enforceability to the court's solution [3].

The spouses cannot derogate by the matrimonial convention from the criteria established by law. Usually, the common dwelling will be assigned to the parent where the child is domiciled or, in special cases, to the parent to whom the child was entrusted. However, there are opinions that these criteria could lead to unfair solutions of courts. The spouse to whom the children are entrusted may have a different dwelling as opposed to the other spouse and thus, if the housing interests of the minor

[1]Frențiu, „Commment article 324 Civil Code", in *Noul Cod civil, Comentarii, Doctrină și Jurisprudență*, 441

[2]Mihaela Teacă,"Protection of minors - The support of state institution in protecting the best interest of the child", in the *Journal of the Law Faculty of Oradea*, no.1 (2017): 163-166

[3]Marieta Avram and Laura Marina Andrei, *Instituția familiei în Noul Cod civil. Manual pentru uzul formatorilor SNG*, 170

children are not affected, the other may be awarded the benefit of the lease contract[1].

Another element of novelty is found in art. 324 par. 2: "The spouse who has been awarded the benefit of the lease contract is obliged to pay the other spouse an indemnity to cover establishment costs in another home, unless the divorce has been pronounced due to the sole fault of the latter." The quantum of the indemnity shall be determined by agreement between the spouses or by the guardianship court. Attributing the benefit of the marital dwelling is a temporary measure that will cease at the date of the final decision of the partition.

## SANCTION OF ACTS CONCLUDED WITH THE VIOLATION OF LEGAL PROVISIONS IN THE MATTER OF FAMILY HOME

The **sanction** that intervenes in the case of the conclusion of the documents relating to the home family and the goods decorating it, without the consent of the other spouse is the relative nullity of the act thus concluded. However, some subtleties are required.

If the non-proprietary spouse has not given his/her consent to the conclusion of the documents relating to the real estate registered in the land book as the home of the family, it may take action to annul the act within 1 year since he/she has become aware of the conclusion of the act, but not later than 1 year since the date of the termination of the matrimonial regime. The limitation period of 1-year mentioned above is derogation from common law and flows from a subjective moment, [2] to the date of the conclusion of the act (which can be proved by any means of proof). The jurisdiction is of the court in which the spouse is domiciled, who has concluded the act with disregard of the refusal of the consent of the other spouse, or in whose territorial jurisdiction the real estate is situated, depending on the object of the act[3].

[1]Teodor Bodoaşcă, "Contributions to studying the current legal status of the spouses' housing rights resulting from renting a house" (t.n.) in *Dreptul*, no 1 (2003): 75
[2]Baias, Chelaru, Constantinovoci and Macovei, *Noul Cod civil, Comentariu pe articole*, Comment art. 322, 264
[3]Florina Morozan, *Drept procesual civil*, vol. I (Oradea: Universitatea din Oradea, 2014), 175

With respect to relative nullity, the act concluded with the violation of the legal provisions may be confirmed by the other spouse. It is stated in the doctrine that the action for annulment can only be brought by the spouse, not by the heirs or creditors due to the intuitu-personae character of the action.

If the registration in the land book was not recorded and the acquiring third party was in good faith, it cannot be affected (unless it is otherwise proven that it acknowledged the character of home of the family of the house in question), so that the spouse can ask for the other spouse only damages[1]. A similar regime applies to furniture decorating the family home.

The action for annulment, either on the family home or on the property that furnishes or decorates it, can only be introduced if the registration stated by law in the Land Book has been made or if the acquiring third party was in bad faith. If the family home is the group property of the spouses, and one of them does not consent to the acts concluded, our doctrine and also the French one have concluded that we can find ourselves in the case of a cumulus of actions in respect of annulment[2]. One in which the provisions of Art. 322 of the family home matter, the other from the legal community matter would be applicable. In the first case, the action for annulment is prescribed within 1 year, in the second case within 3 years. Following the French jurisprudence, perhaps the spouse will choose the more favorable provision.

With regard to the conclusion of acts relating to **the goods that furnish or decorate the family home**, the same sanctioning regime shall apply, stating that according to art. 937 par. 1 Civil Code ("the person who, in good faith, concludes with a non-owner a translative property transaction act for consideration having as object a movable asset becomes the owner of that good from the time of its effective possession").

[1]Civil decision no 1538/2013, in Bogdan Dumitru Moloman and Ciprian Ureche Lazăr, *Noul Cod Civil, Cartea a II-a. Despre familie. Art. 258-534* (Bucharest: Universul Juridic, 2016), 201

[2]Baias, Chelaru, Constantinovoci and Macovei, *Noul Cod civil Comentariu pe articole, comment art. 322*, 265; Marieta Avram and Cristina Nicolescu, *Regimuri matrimoniale* (București: Hamangiu, 2010), 132-133; François Terré and Philippe Simler, *Les régimes matrimoniaux* (Paris: Dalloz, 1989), 49

# FAMILY HOME IN THE FRENCH LAW

Family home has a role in the "normality" of family life, that is why it is important that the material residence and life community coincide[1].

The legal framework for the protection of family home in the French law is Art. 215 of the Civil Code[2]. By regulation, a derogatory character from the common law is established. This concept is important not only in matters of matrimonial regimes but also in divorce, divorce settlement, temporary or urgent measures in the case of preferential assignment, or in the matter of the right of the surviving spouse to home, in the field of successions.

The **family home** can be owned with the right of ownership, usufruct, or lease. The French law refers to the place established and agreed by the spouses (Article 215 paragraph 2 of the Civil Code). In case of difficulty, the judge has to decide by determining *in concreto* the establishment of the dwelling, taking into account the place where they live together with their children[3].

A distinction must be made between the marital residence which we find in art. 108 of the French Civil Code (spouses can have a distinct, separate residence, without prejudice to the living community rules).

Protection of the family home extends to **the goods that furnish and decorate the family home**, according to art. 215 par. 3. It is not of importance that they have a utilitarian or ornamental function, derogating from the provisions of article 222 of the French Civil Code. As opposed to the Romanian Civil Code, in France, the consent does not have to embody the written form.

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[1]This is why judges give special attention to cohabitation in the French jurisprudence when it comes to determining a community of life (in the French practice, too, there are situations in which it is accepted that cohabitation is not enough to establish the community of life of spouses, and, moreover, fictitious marriages are carefully pursued so that the cohabitation is not the only essential element) Rép. civ. Dalloz, May 2009, 8 https://actu.dalloz-etudiant.fr/fileadmin/.../pdfs/civ07-mariage4effets2009-2.pdf

[2]Code Napoléon, Code civil français, 1804, full text on http://codes.droit.org/CodV3/civil.pdf, last amendment, 3.01.2018, accessed on 14.03.2018

[3]The French court considered part of the family home the studio located in the same building, where the husband retired to rest because the common home was too noisy, Juris-Data, no 2005-28.7306, Paris, 31 August 2005, obs. Bernard Beignier

As regards the acts concerned, the French case-law is concerned, more than the nature of the acts, with their effect on the couple. Thus, the contested act must have as a direct or indirect consequence the deprivation of one of the spouses from the family home or the decorating furniture. An example of the French case-law is that of a contract for the sale of the common dwelling with the reservation of usufruct (in favor of only one of the spouses) even though the spouses were actually separated and were going through the divorce proceedings, even though the good in question was their own good. [1]

The French law introduces, for acts relating to the family home and the goods that furnish or decorate it, a co-management system comparable to that applicable to acts considered to be of great gravity (1422, 1424, 1428 French Civil Code - the administration of the community of goods and own goods).

When the family home is based on a right in rem, the spouse cannot, even if he/she is the owner, conclude a sale, mortgage, lease, usufruct, without the consent of the other. These acts are considered to destroy or reduce the personal rights of the other spouse on the family home[2].

The consent of the spouse in the case of the family home takes into consideration both the act and the conditions stipulated in the act[3].

Concerning the form of expression of the consent, as we have shown before, the French law does not impose the written form. In one case, it was shown that the mere presence of the wife in the house when a real estate agency visited the apartment does not signify the consent to

[1]Cour de cassation, chambre civile 1, 16 juin 1992
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007029409&fastReqId=508965613&fastPos=20

[2]Bernard Vareille, „Cours de Droit patrimonial de la famille, Leçon n° 2: Le régime primaire impératif", *Université Numérique Juridique Francophone*, 11
http://197.14.51.10:81/pmb/COURS ET TUTORIAL/DROIT/Droit Prive/Droit patrimonial de la famille.pdf

[3]Thus, a contract for the sale of the house which was sold for a lower price than that agreed upon when the spouse gave the consent, Bacaci, Dumitrache and Hageanu, *Dreptul familiei*, 66
A part of the French doctrine considered this obligation excessive, especially when it is not real estate property in group property or co-ownership but own property, Terré and Simler, *Les régimes matrimoniaux*, 112

the conclusion by the other spouse of a promise to sell the common dwelling, owned in co-ownership.

The rental of the family home is seen as a disposition in the French case law. The rental of the building, house of the family requires the consent of both spouses, even if they have separated in fact, because the lease document is part of the acts mentioned in art. 215 par. 3 French Civil Code (the provisions of Article 215 paragraph 3 must be corroborated with those of Article 1751 of the French Civil Code, which refer to the right of the partner to ask the court to terminate the civil partnership awarding the benefit of the lease contract for the dwelling in which they actually resided). The lessor is summoned to court and the judge will decide according to the social and family interests of the parties. However, in the French doctrine there are different opinions, in the sense that the non-proprietary partner, unlike the non-proprietary spouse, cannot oppose the termination of the leasing contract of the house in which they live together. The former spouse, the joint holder of the lease contract may apply for it after divorce, although he/she has left the home because of the marital crisis, since he/she has not requested the termination of the lease contract. [1]

The actions on foreclosure or forced sale are not paralyzed, and the family home can be foreclosed. Thus, in a case, in order to stop the proceedings initiated by the spouse's creditor in connection with the dwelling purchased by the spouse during the marriage (the separation regime), was qualified as the family home, but the French Cassation Court did not allow the application of the provisions of art. 215 par. 3, the house not being evaded from foreclosure[2]. In the French doctrine there were opinions contrary to these jurisprudential solutions[3]. Also, in the Code on consumer proctection it is stated that the procedure of property foreclosure can be suspended if the over-indebtedness procedure

[1]Cour de cassation chambre civile 3, 1 avril 2009
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020483891&fastReqId=958426106&fastPos=5
[2]Cour de cassation, chambre civile 3, 12 octobre 1977
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006998869&fastReqId=1834437889&fastPos=13
[3]René Savatier, "La protection civile du logement de la famille dans le concept juridique d'habitation familiale," in Mélanges Hébraud, Univ Toulouse (1981): 799

is opened[1]. If the owner spose mortgaged the house of the family, his own good, before marriage, his engagement is valid, even if the other spouse's consent does not exist.

**SANCTION**

In case of lack of consent, the act thus concluded may be canceled. The declaration of invalidity belongs to the spouse who did not give his / her consent at the conclusion of the act. This should have been introduced within one year from the acknowledgment of the conclusion of the act, but no later than one year after the dissolution of the matrimonial regime, according to art. 215 par. 3 French Civil Code. The criminal clause attached to a promise to sell the family home made by one of the spouses without the consent of the other (even if the spouses were married under the regime of the separation of goods) is affected by invalidity[2].

**THE FAMILY HOME IN THE QUÉBEC LAW**
**THE LAW OF QUÉBEC PROVINCE.**
**REGULATION. CONDITIONS. FORBIDDEN ACTS**

The Québec lawmaker too wanted to protect the place where the spouses and their children spend their family life. The family home is protected even if one of the spouses is the sole owner of it, the legislator wishing to ensure that the family does not lose their normal living environment. The applicable regulation is the Québec Province Civil Code, Section II, "De la résidence familiale", art. 401-413. These provisions apply to married persons, excluding those who live in a de facto union (the civil union has been recognized in Québec since 2002).

Article 395 of the Civil Code of Québec is the one that determines the conditions under which a building becomes the home of the family. Thus, the spouses are the ones who give it this destination, and a criterion in the absence of an express choice is the home where the

[1]Stéphanie Tissot, "Effectivite des droits des creanciers et protection du patrimoine familial" (Thèse pour le doctorat en droit privé, 2015): 68
[2]Cour de cassation, chambre civile 1, 3 mars 2010
https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021928349&fastReqId=120142954&fastPos=1

family members live and carry out their normal activities specific to everyday life. The jurisprudence and doctrine have concluded that it is not necessary for spouses to have a common life in their family home so that the latter keeps its destination, being very easy for a spouse to leave his/her home so that the other spouse loses the benefits that this status contains. [1] The Court of Appeal ruled that family home can be considered as the real estate acquired by the spouse after the factual separation.

If the immovable property is the property of one of the spouses, the designation as the home of the family does not confer to the other spouse a real right over the property.

According to art. 404 of the Civil Code of Québec., the spouse who owns a building with fewer than 5 rooms, serving as the residence of the family, cannot, without the written consent of the other, alienate in whole or in part, rent, encumber with a real right the family home.

The same prohibition is maintained in accordance with Article 401 of the Civil Code of Québec and for household furniture in the family home. Both the goods furnishing the home and those decorating it, for example, paintings, works of art (but not collections) are included. The goods furnishing or decorating the professional office of one of the spouses are not included in this category if the spouse has established their place of residence in the house of the family and if such property is affected to use only by that spouse[2]. These goods cannot be alienated, mortgaged or transported from the family home (Article 401 paragraph 1 Civil Code of Québec). The notion of transport has generated controversy in the Québec doctrine, arguing that it is difficult to consider such a contract to be void, since the property can be returned to the home. The alienation concerns both the acts for consideration and those free of charge[3].

In the case of divorce or annulment of the marriage, the court may grant to one of the spouses or to an heir thereof the property or the use of the household goods, according to art. 410 par. 1Cb Civil Code of Québec.

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**1** Mireille D.- Castelli and Dominique Goubau, *Le droit de la famille du Québec*, 5e édition (Les Presses de l'Université Laval , 2005), 107

[2]Ernest Caparros, "Le régime primaire dans le nouveau Code civil du Québec: quelques remarques critiques" *Les Cahiers de droit, vol. 22*, numéro 2, Faculté de droit de l'Université Laval, Quebec (1981): 330

[3]D.- Castelli and Goubau, *Le droit de la famille du Québec*,110

Neither in relation to the lease contract, the spouse even the single holder of the contract may divest its right or terminate it. The other spouse has the right to request the annulment of these acts (Article 403 Civil Code of Québec).

In divorce, the court may determine the award of the lease contract.

Article 405 Civil Code of Québec establishes that the spouse who owns a building which has five or more rooms, which serves as family home, even in part, cannot alienate or rent the building or the part which serves as the home of the family. Unlike the situation analyzed above, in art. 401, in this case it is possible to conclude acts of encumbrance with a real right, for example the spouse can take a mortgage loan, involving the building home of the family, without the need for the consent of the other.

The spouse who did not give his consent at the conclusion of the act may require the buyer to conclude a lease contract under the conditions of the common law. The condition is to register as a family home. Also, the spouse who has not given his / her consent may request the annulment of the act (Article 405 Civil Code of Québec).

The spouse who has a right to usufruct or to use the family home may not have these rights without the consent of the other spouse.

The registration as family home may be made by any of the spouses (even without informing the other of the fact) and may result from a statement made to that effect, contained in an act for advertising (in a land registry or declaration made by the spouses to the owner of the property in the case of a lease contract, in the contract for the purchase of the real estate, either by notary act or by private signature).

**SANCTION**

The spouse who has not given his or her consent to family-related documents and the goods that decorate or furnish it may request the cancellation of the act if the property has been registered as a family home or may ratify it. The legal regulation emphasizes that pecuniary acts concluded with third parties in good faith cannot be affected (Article 402, paragraph 2, Civil Code of Québec). The limitation period is 3 years from the date when the affected spouse became aware of the conclusion of the act (does not apply during the life in community of the spouses-Article 2906 Civil Code of Québec).

Also, the spouse who has suffered an injury by concluding the act without his/her consent is entitled to claim damages from the other spouse or from a third person.

When deciding to divorce or annul marriage, the court will determine the assignment of the use of the common home in principle to the spouse who has received the custody of the children (especially if the ownership of the building is common). The awarding criteria are provided by art. 410 Civil Code of Québec.

Article 500 Civil Code of Québec provides that the judge may order one of the spouses to leave the family home during the separation procedure, but also temporarily retaining it, even if it has been previously used jointly.

However, it is possible for the non-proprietary spouse to receive the benefit of the grant of the common home if he is the one to whom the children are entrusted (Article 410 paragraph 2 of the Civil Code of Québec). The assignment of the right to use the common home is done by agreement of the parties and if it is not possible, the decision of the court intervenes. In some situations, the spouse who received this benefit may be required to pay certain amounts of money, even in installments. The judicial award of ownership is governed by the rules of the sales contract.

In the case of unmarried civil partners[1] who have a common home, the jurisprudence provides us with some cases of assignment in case of separation, if the good is common property or only the property of one of them, as the case may be[2]. The best interest of the child seems

[1] The civil partners are co-owned individuals, therefore each of them retains the rights of an exclusive owner of the good.

[2] The Supreme Court granted a temporary right to use the family home to the partner to whom the children were entrusted in return for the payment of all inherent costs. The 3-year term for this right is the one related to the minor child's upbringing to full age. See for details Stéphanie Charest, „L'attribution d'un droit d'usage exclusif de la « résidence familiale » à un conjoint non marié ayant la garde des enfants au québec: comparaison avec les provinces de common law", *Revue du notariat, vol. 116*, numéro 2 (2014): 293
https://www.erudit.org/fr/revues/notariat/2014-v116-n2-notariat03461/1043668ar.pdf
In another case, it was decided that the maintenance of the minor child who suffers from autism in the home where he/she grew up, which is the family home, is not in his/her interest, since his mother and his caretaker workplace were now in another city. Thus, it was not a sufficient reason to assign the family home. Moreover, if staying in the

the main reason why one of the civil partners could receive the benefit of the home similar to the provision applicable to married persons.

## CONCLUSIONS

The protection of the family home is closely related to the relationship husband/wife, of what the notion of marriage, family signifies.

The family home occupies an important place among the concepts promoted by contemporary legislation, and this is increasingly evident in various branches of law[1]. It has a particularly special function in the family system because in the context of a marriage, account is taken of the destination of the family home.

There can be easily observed similarities of regulation among the three analyzed states. The primary regime and family home in this case are increasingly important elements in the family evolution in recent years. The aim of family law today is to protect the spouses and their children from the economic and social point of view.

In the field of family home, even though there is not much judicial practice in our country compared to France or Québec, the Romanian legislator surprised the defining elements of the notion as an

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common home makes the child exposed to the ongoing quarrels of parents, assignment will not be made on this consideration.

Another judge refused to consider that the child's interest is higher than that of the parent, not being a sufficient reason for assigning the use of the common home, citing the lack of regulation in this respect.

By decision Droit de la famille – 111682, 2011 QCCA 1153, The Court of Appeals of Québec had to solve a case for assigning the family home to the non-proprietary spouse. Thus, the question arises whether the mother who takes care of the minor child after the husband has left his marital residence after 22 years of marriage and then remarried, can receive the benefit of the family home even if she is not the owner. The tribunal decided to expel the mother at the request of the former husband, on the grounds that 4 years have elapsed since the separation, this term being sufficient for the minor to adapt to the changes made. It has also been stated that this measure can only be temporary, as long as the child's best interests have to be taken into account. Finally, the court ruled in favor of the former husband, even if it turned out that the mother had no income. Thus, the husband 's right to property is defended in Charest, „L'attribution d'un droit d'usage exclusif de la « résidence familiale » à un conjoint non marié ayant la garde des enfants au québec : comparaison avec les provinces de common law": 295

[1]François Terré and Philippe Simler, *Les régimes matrimoniaux,* 7ème éd. (Paris: Dalloz, 2015), 61.

element that creates a juxtaposition between the individual interest and the and family interest seen as a whole.

## BIBLIOGRAPHY

### Books

1. Avram, Marieta and Laura Marina Andrei, *Instituția familiei în Noul Cod civil. Manual pentru uzul formatorilor SNG*. Bucharest, 2010.
2. Avram, Marieta, and Cristina Nicolescu. *Regimuri matrimoniale*. Bucharest: Hamangiu, 2010.
3. Bacaci, Alexandru, Dumitrache, Viorica Claudia and Cristina Codruța Hageanu. *Dreptul familiei*, ed. a 7 – a. Bucharest:C.H. Beck, 2012.
4. Baias, Flavius-Antoniu, and Chelaru, Eugen and Constantinovoci, Rodica and Ioan Macovei. *Noul Cod civil. Comentariu pe articole*. Bucharest: C.H. Beck, 2012.
5. D.- Castelli, Mireille, and Dominique Goubau. *Le droit de la famille du Québec,* 5e édition. Quebec: Les Presses de l'Université Laval, 2005.
6. Florian, Emese. *Regimuri matrimoniale*. București: C.H. Beck, 2015.
7. Frențiu, Gabriela Cristina, *Comment art. 322 Civil Code, in Noul Cod civil, Comentarii, Doctrină și Jurisprudență*, vol. I. Bucharest: Hamangiu, 2012.
8. Moloman, Bogdan Dumitru, and Lazăr Ciprian Ureche. *Noul Cod Civil, Cartea a II-a. Despre familie. Art. 258-534.* Bucharest: Universul Juridic, 2016.
9. Morozan, Florina. *Drept procesual civil*, vol. I. Oradea: Universitatea din Oradea, 2014.
10. Popescu, Miron Gavril. *Regimul matrimonial primar imperativ în reglementarea actualului Cod civil român*. Bucharest: Universul Juridic, 2018.
11. Terré, François and Philippe Simler. *Les régimes matrimoniaux*. Paris: Dalloz, 1989.

12. Vareille, Bernard. *Cours de Droit patrimonial de la famille, Leçon n° 2: Le régime primaire impératif*. Université Numérique Juridique Francophone.

**Articles in a print journal**

1. Bodoaşcă, Teodor, "Contributions to studying the current legal status of the spouses' housing rights resulting from renting a house" (t.n.) in *Dreptul* no. 1 (2003): 75.
2. Caparros, Ernest, "Le régime primaire dans le nouveau Code civil du Québec: Quelques remarques critiques", *Les Cahiers de droit, vol. 22*, numéro 2 (1981): 330.
3. Cîrmaciu, Diana, "Considerations on the Local Tax System," (t.n.) *Journal of the Law Faculty of Oradea*, no. 1 (2017): 13-21.
4. Charest, Stéphanie, „L'attribution d'un droit d'usage exclusif de la «résidence familiale» à un conjoint non marié ayant la garde des enfants au Québec: Comparaison avec les provinces de common law", *Revue du notariat, vol. 116*, numéro 2 (2014): 295.
5. Drăgan, Sorina Lucreția, "Family home" (t.n.), *Revista Fiat Justitia, vol. 6*, issue 2 (2012): 67.
6. Florian, Emese," "Protection of the family home during marriage in the regulation of the new Civil Code"(t.n), in *Pandectele Române* nr. 7 (2011): 52.
7. Nicolescu, Cristina, "The patrimonial cohesion of the couple - the finality of the primary matrimonial regime (II)" (t.n.), *Curierul Judiciar* nr. 7 (2008): 65.
8. Piperea, Gheorghe, "Enforced enforcement on the family home of the consumer. Case Kušionová. Right to family home" (t.n.), (2014) https://www.juridice.ro
9. Savatier, René, "La protection civile du logement de la famille dans le concept juridique d'habitation familiale", *Mélanges Hébraud, Univ Toulouse* (1981): 799.
10. Teacă, Mihaela, "Protection of minors - The support of state institution in protecting the best interest of the child", *Journal of*

*the Law Faculty of Oradea, ProUniversitaria*, no. 1 (2017): 163-166.

**Websites**

1. http://www.grefieri.ro/Docs/20100623InstitutiaFamilieiInNoulCodCivil.pdf
2. http://curia.europa.eu/juris/document/document.jsf?text=&docid=157486&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=368433)
3. https://www.juridice.ro/343861/executarea-silita-asupra-locuintei-familiale-a-consumatorului-cauza-kusionova-dreptul-la-locuinta-familiala.html
4. https://actu.dalloz-etudiant.fr/fileadmin/.../pdfs/civ07-mariage4effets2009-2.pdf
5. http://197.14.51.10:81/pmb/COURS ET TUTORIAL/DROIT/Droit Prive/Droit patrimonial de la famille.pdf

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# ABOUT THE ACTS OF DISPOSITION THAT SERIOUSLY ENDANGER THE FAMILY INTERESTS

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***Abstract:***

*This article analyzes one of the mechanisms established by the legislator to protect family interests - the one established by art. 316 of the Romanian Civil Code, regarding temporarily limiting the right of one of the spouses to dispose of certain assets under the sanction of cancelling the act. In this endeavor, we intend to develop the conditions to be fulfilled to order such a measure, as they were drafted in doctrine, but especially to report to the way the courts invested with such requests have ruled.*

***Key words:*** *act of disposition, family interests, imperative primary regime*

## INTRODUCTION

According to Article 316, paragraph 1 of the Romanian Civil Code[3], "exceptionally, if one of the spouses concludes legal acts by which seriously endangers the family interests, the other spouse may request the guardianship court that, for a certain period of time, the right to dispose of certain goods to be able to be exerted only with his express consent. The duration of this measure may be prolonged, without exceeding a total of 2 years".

In the comments made on this text of law, the doctrine[4] shows that through these provisions there is a judiciary limitation on the right of one

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

[4] Cristina Mihaela Nicolescu (Comentariu la art.316 Cod civil), în Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole. Art.1-2664* (București: C.H. Beck, 2012), 326

of the spouses to dispose of certain goods on his own, even if the applicable matrimonial regime would grant that right. Thus, within the framework of community regimes, the scope of the rules on the common goods co-management is extended and, at the level of the separation of goods, the co-management rule is established, although it is specific to community regimes[1].

This legislative measure is considered[2] as an "effective remedy for individualist tendencies and the thoughtless or even malicious attitudes manifested by one of the spouses".

Starting from the above-mentioned normative content, in the doctrine[3] the following features of the measure ruled by the court were centralized, based on art. 316 Civil Code:

- it is an exceptional measure and may be ruled when it turns out that one of the spouses endangers the family interests;

- it is a temporary measure, which may be ruled for a fixed period of time, which may not exceed two years, including any extensions;

- has a provisional, precarious feature and may be modified or lifted, even before the deadline, if changes occur in the circumstances that led to taking this measure.

Regarding the applicability of the rule that is the subject of our analysis, Law no.71/2011 on the implementation of the Civil Code[4] provides that Art.316 Civil Code will also be an incident in the case of marriages existing on the date of entry into force of the Civil Code if the legal acts seriously endangering the interests the family interests are committed by one of the spouses after that date.

[1] *Idem*

[2] Cristina Nicolescu, "Adaptarea regimului matrimonial în situația de criză familială (IV)", in *Curierul Judiciar* nr.10/2008, 27

[3] Marieta Avram, *Drept civil. Familia*, (Bucureşti: Hamangiu, 2013), 227

[4] Published in the Official Gazette of Romania, Part I, no.409/10 June 2011, as amended and completed.

## 2. CONDITIONS TO BE FULFILLED IN ORDER TO RULE THE JUDICIAL LIMITING OF THE RIGHT OF DISPOSITION OF ONE OF THE SPOUSES

In order to rule the measure provided by art.316 Civil Code, it is necessary to verify the cumulative fulfillment of the following conditions:

- legal acts have been concluded by one of the spouses;
- it is about seriously endangering the family interests;
- there is a causal connection between the legal acts concluded by one of the spouses and the resulting harmful effect over the family interests.

While the syntagma "serious danger" and "family interests" have not been formally interpreted in the civil law, it remains that court shall analyze, depending on the circumstances of the case, whether or not these requirements are met.

Under such circumstances, doctrinal references are more than welcome, which can serve to the magistrate as guidelines in substantiating his solution.

Concerning the conclusion of legal acts seriously endangering the family interests, as an example, it is shown in the literature[1], that "the existence in the husband's history of certain damaging legal acts, his chronic lack of judgment proved by excessive expenses in relation to family resources and needs, especially if they were circumscribed to exclusive claims or passions - aesthetic obsessions, the collection of certain objects of value, etc.-can argue the claim to have restricted his right of disposition". Over this point of view, in the opinion of other authors[2], there can be classified as documents that seriously endanger family interests other acts such as: "transferring amounts of money from the spouses' common accounts to the account of other people, the alienation of common or own goods in order to achieve the financial

[1] Emese Florian, "Regimul matrimonial al separației de bunuri în reglementarea noului Cod civil", in *Pandectele Române* nr.7/2013, article consulted in www.idrept.ro database, (01.05.2018)

[2] Mugurel Marius Oprescu, Mihaela Adriana Oprescu, Marius Șcheaua (coord.), *Noul Cod civil comentat și adnotat. Despre familie. Art.258-534* (București: Rosetti Internațional, 2015), 111

resources to be spent for purposes outside the family interests, wasting the civil fruit produced by the common or own goods".

As a general conclusion, we note that the gravity of the danger is a factual circumstance, in which establishing the magistrate considers the material and living conditions of the spouses, the concrete circumstances in which the damaging acts have been concluded or which lead to the idea that they will be concluded in the future[1].

Similarly to the French law, also for our legal system, it is accepted[2] that one can talk about the applicability of the text of law also when the danger is imminent, being likely to occur in the near future, because the endpoint envisaged by the legislator is a preventive one.

Concerning the notion of family interest, it is shown[3] that, in the absence of a legal definition/explanation, we can consider both patrimonial and extra-patrimonial interests.

Taking into account the above-mentioned doctrinal developments, we also consider it appropriate to relate to some cases settled by the Romanian courts.

Thus, in a case where the freezing of certain immovable goods was requested, in the sense that the right of the defendant spouse over them can be exerted only with the consent of the plaintiff spouse, the magistrate invested to rule[4] found, from the evidence managed in the case, that the land which freezing was requested do not affect the family use, any legal act concluded over them having no direct effect over the family or over its living standard, and that there was no evidence of generating incomes supporting the family. Moreover, the court's conclusion was also supported by the plaintiff's reasoning from the sue petition, justifying the need of freezing the goods by the fact that there is the fear that by eventual alienation of them, the defendant wife would attempt to defraud him in case of a partition. Results that the complainant's concerns targeted more his personal interest and not the effects over the family, an essential condition for ruling the measure

[1] Gabriela Cristina Frențiu, *Comentariile Codului civil. Familia*, (București:Hamangiu, 2012), 156

[2] Cristina Nicolescu, "Adaptarea regimului matrimonial în situația de criză familială (IV)", 27

[3] Mugurel Marius Oprescu, Mihaela Adriana Oprescu, Marius Șcheaua (coord.), *Noul Cod civil comentat și adnotat,* 111

[4] București, district 1 Court of first instance, civil sentence no.869/2015, in www.idrept.ro database, (02.05.2018)

provided by Article 316 of the Civil Code. Against these grounds, the court's conclusion could only be that the action should be dismissed as groundless, since the legal conditions have not been met.

In another civil casefile[1] was required by way of a presidential order to oblige the defendant spouse not to alienate, sell or destroy the goods acquired by the spouses together until the divorce and partition proceedings, which the plaintiff spouse would file. In ruling a resolution in this case, the court took into account the provisions of Article 997 of the Civil Procedure Code[2], which provide that when in favor of the plaintiff there is the right appearance, the judge will be able to rule provisional measures in fast cases, in order to retain a right that would be prejudiced by delay, for preventing an imminent and unrepairable damage, and to remove the obstacles that would arise in the course of execution. Finding that among the goods indicated in the request there was also listed a real estate that was built by the parents of the defendant spouse, who died a few years ago, which was not the home of the family, and in respect of which the spouses did not bring any improvement, the judge decided that the conditions of art.316 Civil Code were not met, thus not endangering the family interests.

## 3. THE EFFECTS OF THE MEASURE RULED BASED ON ARTICLE 316 CIVIL CODE

The main effect of the measure ruled under Article 316 of the Civil Code consists basically in a "forced co-management"[3], in the meaning that the right of the prodigal spouse to dispose of certain goods will be subject to the agreement of the other spouse.

In the doctrine[4] it is shown that the restriction concerns the right of disposition through legal acts *inter-vivos* which, under other conditions and according to the matrimonial regime of the spouses, is exerted by a single spouse, and for spouses married under the regime of the separation

[1] Strehaia-Mehedinți Court of first instance, civil sentence no.203/3015, in www.idrept.ro database, (02.05.2018)
[2] Law no. 134/2010 republished in the Romania Official Gazette, Part I no.247/10 April 2015, as amended and completed
[3] Marieta Avram, *Drept civil. Familia*, 227
[4] Emese Florian, *Regimul matrimonial al separației de bunuri în reglementarea noului Cod civil*, in www.idrept.ro database

of goods, it is stated[1] that the spouse targeted by the restriction will no longer dispose alone and discretionary of certain goods which are his exclusive property.

If the restriction imposed under Article 316 of the Civil Code is not observed, the sanction that intervenes is the relative nullity, which can be invoked only by the prejudiced spouse, within the prescription period of one year from the date when he acknowledged the existence of the damaging act (according to art.316 paragraph 2 of the Civil Code).

With regard to Article 316, paragraph 1, third sentence of the Civil Code, which states that the decision to allow the measure is notified for performing the real estate or movable property formalities, in order to ensure the opposability towards third parties, it was concluded[2] that the effect of cancelling the legal act must be borne only by third parties in bad faith, and the spouse who did not participate to concluding the act should claim damages from the other spouse.

## CONCLUSIONS

This article was a review of a rule applicable to all matrimonial regimes, a rule that has a preventive function, namely to protect family interests. This rule provided by Art. 316 of the Civil Code is very welcome given the situations of marital crisis, when one of the spouses, through the concluded acts, can endanger the family interests.

From the research of the doctrine and jurisprudence it resulted that the restriction imposed on a reckless, wasteful spouse can refer to both own goods and common goods as long as the normative conditions are fulfilled – that through the concluded legal acts the family interests are seriously endangered.

## BIBLIOGRAPHY:

**Books:**

1. Avram, Marieta. *Drept civil. Familia*. București: Hamangiu, 2013
2. Frențiu, Gabriela Cristina. *Comentariile Codului civil. Familia*. București:Hamangiu, 2012

[1] *Idem*
[2] Avram, *Drept civil. Familia*, 227

3. Nicolescu, Cristina Mihaela (Comentariu la art.316 Cod civil), in Baias, Flavius-Antoniu and Chelaru, Eugen and Constantinovici, and Ioan Macovei, Rodica. *Noul Cod civil. Comentariu pe articole. Art.1-2664*. București: C.H. Beck, 2012
4. Oprescu, Mugurel Marius and Oprescu, Mihaela Adriana and Șcheaua, Marius (coord.). *Noul Cod civil comentat și adnotat. Despre familie. Art.258-534*. Bucharest: Rosetti Internațional, 2015

**Articles in a print journal:**

1. Florian, Emese. "Regimul matrimonial al separației de bunuri în reglementarea noului Cod civil", *Pandectele Române*, no.7 (2013)
2. Nicolescu, Cristina. "Adaptarea regimului matrimonial în situația de criză familială (IV)". *Curierul Judiciar*, no.10 (2008)

**Legislation:**

1. Civil Code–Law no.287/2009 republished in the Official Gazette of Romania, Part I, no.505/15 July 2011, as amended and completed.
2. Law no.71/2011 on the implementation of the Civil Code published in the Official Gazette of Romania, Part I, no.409/10 June 2011, as amended and completed.
3. Civil Procedure Code-Law no.134/2010 republished in the Official Gazette of Romania, Part I, no.247/10 April 2015, as amended and completed

**Case Law:**

1. București, district 1 Court of first instance, civil sentence no.869/2015, in www.idrept.ro database, (02.05.2018)
2. Strehaia-Mehedinți Court of first instance, civil sentence no.203/3015, in www.idrept.ro database, (02.05.2018)

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# CONSIDERATIONS ON LEGISLATIVE NEWS ON PEOPLE WITH SPECIAL NEEDS

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***Abstract:***

*Among the categories of vulnerable persons established at the level of the national social assistance system in Romania are also those of people with disabilities. The social evolution has lately imposed some changes in the legislation in various areas. In correlation with the fiscal policy of the state a number of amendments were adopted, including regarding the specific normative for the protection and inclusion of persons with special needs. This paper aims to evaluate the impact that the new provisions will have at society level. The approach will start analyzing the realities that preceded this last legislative change, will review in detail the relevant aspects of the actual change and ultimately point out the reflections that the normative act generated in the practical plan.*

***Key words:*** *people with special needs; legislative changes; the projection of new principles on the rights of people with disabilities*

## INTRODUCTION

In the field of protection of persons with disabilities there is in Romania a special law, namely Law no.448 / 2006. Although at european level the expression regarding these categories of people is changed in such a way that their dignity is not impaired (using the word "people with special needs") in Romania, the initial term of 2006 - persons with disabilities is preserved.

## THE CONTENT OF THE PAPER

The handicap of those may concern physical, sensory, mental, mental or associated aspects. Also in the legal definition found in article 1 is the reason why the state must intervene for the benefit of these persons: the risk of exclusion and discrimination in the attempt to have

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the same chances with persons who do not suffer from any kind of disability.

The social beliefs of disability as a result of labeling appear to be a dominant feature justified by the status of these individuals and can affect all other aspects of life (Manea, 2000)[1]

In terms of state support for people in a situation of inferiority due to a certain type of disability we talk about social services, namely dedicated social benefits.

As the serious handicap and / or the accentuated handicap implies the objective impossibility of the individual concerned to be able to take care of himself, two special institutions are established in the normative act: the personal assistant, respectively the professional personal assistant.

In the first situation, the personal assistant is dedicated exclusively to the person with severe disabilities, while the professional personal assistant is also likely to be employed for the person with disabilities.

Recently, through two successive normative acts, namely emergency ordinance no. 51 of 30.06.2017 and no. 60 of 04.08.2017, a number of amendments were made to the framework normative act.

These are in line with the European Union's social policy that is geared towards providing enough income for a more dignified life, creating an inclusive labor market and ensuring access to quality services. Thus, "Active inclusion requires a decent living by combining social protection measures with measures involving vocational training, offering employment opportunities and access to social services" (Badea in Buzducea, 2010).[2]

First, through emergency ordinance no. 51/2017 the premises for the simplification of the procedure for assessment of children with severe disabilities were created. In fact, the creation of conditions for education, socio-professional adaptation and social integration of children with different types of disabilities is the main objective of any state and local community (Micula, 2014).[3]

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[1] Livius Manea, *Protecţia socială a persoanelor cu disabilităţi* (Bucharest: Media Chance, 2000), 22.

[2] Doru Buzducea, *Asistenţa socială a grupurilor de risc* (Iaşi: Polirom, 2010), 887.

[3] Adina Micula, "Social perception on social integration of people with disabilities", *Revista de asistenţă socială*, 3( 2014), 67.

Seriously disabled children with palliative care will no longer be present at the evaluation committees on a regular basis, and their certificate will be valid until they reach the age of 18. (Article 86, index 1 of the normative act).

On the other hand, it has been possible to create responsibility for the authorities in the field - the Social Assistance and Child Protection Directorate - whose role is now an active one.

Persons with disabilities will receive the social benefit from their own office and will no longer be obliged to submit an application in this respect (Article 57 paragraph 2 of the ordinance)

Discriminatory practices and definitions of the concept of disability present this term as a result of the social context (Barnes & Mercer, 2004).[1] The simplification of the bureaucracy mentioned above will try to remove certain barriers to access the protection for the person with disabilities, precisely in the idea of not being victimized for the second time.

On the material level, it was adopted the exemption of persons with severely psychological and mental disabilities from the payment of the contribution due in the residential centers (art.94, index 1 of the ordinance)

Specifically, a total of 5,150 people with severely mental and mental disabilities across the country will benefit from exemption from the contribution due for disabled adults in residential centers. Initially family members of persons with severily mental and mental disabilities supported the payment of the respective contribution to residential centers. In order to limit the vulnerability of this category of people, this financial facility is foreseen to be covered by the county budgets.

Initially, the maintenance obligation for adults with disabilities assisted in centers was stretched to brothers and sisters, relatives in a straight line, husband and wife. The risk of forced execution for non-payment of this contribution to compassion for people who have a higher degree of kinship, which raises a problem of fairness.

The amendment brought by the normative act narrowed this obligation to husband and wife, parents for children and children for parents (art. 94, index 2 of the ordinance)

[1] Colin Barnes and Geof Mercer (eds), *Implementing the social model of disability, theory and research* (Leeds, London: The Disability Press, 2004), 54.

Establishing social services as close as possible to people with disabilities has become a reality after the development of residential centers (day centers, respite centers and housing protected) was also allowed for local authorities, more specifically - local councils.

The law initially allowed only the General Directorates for Social Assistance and Child Protection (DGASPC) to open such public services, not to local authorities. An application of the principle of subsidiarity in the law of the national social assistance system arises as a result of this new provision (art.51, paragraph 5, ind. 3)

Last but not least, it is to be noted that the mimico-gesture language has been officially recognized as a specific means of communication people with hearing disabilities. The participation of interpreters of this language in various activities for the support of the hearing impaired will become a reality (art. 69 para. 3 of the ordinance).

At the same time, any differences of interpretation caused by the lack of uniformity of the expressions that are practiced in this field will be removed, with this recognition and probably with the related regulations that will follow the interpretive occupation of the mimico-gestural language.

Finally, the philosophy of socio-professional integration of the person with disabilities changed with the entry into force of the provisions of emergency ordinance no. 60/2017. The main existing provision until the adoption of the aforementioned regulation was retained: art. 78 paragraph 2 "Public authorities and institutions, legal entities, public or private, with at least 50 employees, have the obligation to employ disabled persons in at least 4% of the total number of employees."

The alternative to this options were in the old version of the law, which could be materialized in two ways: firstly payment of 50% of the gross minimum income in relation to the number of persons not employed as a result of the calculation procedure applied to the obligation imposed on the employer; second line of contracting services or goods supplied or produced by persons with special needs within authorized establishments. (formerly Article 78, paragraph 3).

The new concept has made it possible to diversify the categories of posts that can be occupied, according to the skills and competences held by people with disabilities. Thus, the option of contracting services or goods from persons with disabilities from outside the institution or

society was removed, but it was established the obligation to organize competitions exclusively dedicated to this category of persons.

Why do we say that we are in the presence of a diversity in raising the typology of occupations covered by people with disabilities? Authorized Protected Units are those entities that employ at least 30% of the existing job structure, staffing only this disadvantaged category.

Within the protected units, manufacturing activities were generally less complex, without usually requiring qualification or specialization.

As such, at these economic operators we are not talking about the actual integration of the people in question, whereas in the case of employment at the level of public institutions or private companies within the limit of 4% (the new form of the law) we have to do with other responsibilities and at the same time with inter-human and professional relationships of another level. Stimulating the employers' orientation towards this option is also somewhat directed by increasing the amount of the payment obligation from 50% to 100% of the gross minimum income in the economy relative to the number of posts to be filled in the refusal of the main obligation mentioned above.

The proposed solution could cause a disadvantage for associations authorized as protected units. They only mediated the sale of products / services at higher prices, few of them actually producing. In this case, only a small part of the profits was redirected to the income of people with disabilities. In other news, difficulties could arise for private and public units with more than 50 employees to set new budgets and to make concrete hiring.

In order to have a picture of the budgetary impact that this new legal provision transmits, we will analyze a single area of activity: security . Since these companies have to be registered with the General Inspectorate of the Romanian Police, subject to an authorization procedure, there is a statistic according to which only 363 security firms out of 1243 licensed (CAEN 8010) declared the number of employees in order to establish the obligation provided by art. 78 of the Framework Law on the Protection of Persons with Disabilities. By correlating the number of their employees with the minimum required by the law, as a consequence of the changes analyzed earlier, there results a number of 3358 disabled persons who should be employed or, if not, the payment to the state budget of contributions amounting to 4,870,318 lei / month.

An another amendment brought by the same emergency ordinance no. 60/2017 aims at a new policy on how to calculate the amount of different forms of social benefits for the disabled adult beneficiary. The law states two time limits, respectively 1.01.2018 and 1.07.2018, from which certain percentage levels correlated with the social reference index will apply.

Therefore, the adult with disabilities benefits under the present law from the following social benefits:

"i) 65% (or 70%) of the social reference indicator provided by Law no. 76/2002 on the unemployment insurance system and the stimulation of employment, with the subsequent modifications and completions, for the adult with severe handicap;

(ii) 50% (or 53%) of the social benchmark provided by Law no. 76/2002, as amended and supplemented, for the adult with severe disabilities;

b) monthly complementary personal budget, regardless of income:

(i) 25% (or 30%) in the social reference indicator provided by Law no. 76/2002, as subsequently amended and supplemented, for the adult with severe disability;

(ii) 20% (or 22%) of the social benchmark provided by Law no. 76/2002, as amended and supplemented, for the adult with severe disabilities;

(iii) 10% (or 12%) of the social reference indicator provided by Law no. 76/2002, with the subsequent amendments and additions, for the adult with an average disability.

The parent, guardian or person responsible for raising and caring for the child with disability based on a special protection measure, established under the law, benefit of social benefits during the period of care, supervision and maintenance, as follows:

a) 50% (or 60%) of the social reference indicator provided by Law no. 76/2002, as subsequently amended and supplemented, in the case of a seriously disabled child;

b) 30% (or 35%) of the social reference indicator provided by Law no. 76/2002, with the subsequent modifications and completions, in the case of the accused child with disabilities;

c) 10% (or 12%) of the social reference indicator provided by Law no. 76/2002, as subsequently amended and supplemented, in the case of a child with an average disability.

If the calculation of the benefits provided result in fractions of money, they are rounded in favor of the beneficiaries.

## CONCLUSION

Making these new legal provisions into practice will certainly generate a new breath in an extremely sensitive area. social benefits to new material realities will probably be a minimal support for people with special needs, at least for the time being.

## BIBLIOGRAPHY

**Books**

1. Barnes,Colin and Geof Mercer (eds). *Implementing the social model of disability, theory and research*. Leeds, London: The Disability Press, 2004.
2. Buzducea, Doru. *Asistenţa socială a grupurilor de risc*, Iaşi: Polirom, 2010.
3. Manea, Livius. *Protecţia socială a persoanelor cu disabilităţi*. Bucharest: Media Chance, 2000.

**Articles in a print journal**

1. Micula, Adina. "Social perception on social integration of people with disabilities*"*. *Revista de asistenţă socială,* 3 (2014): 57-88.

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# THE POWER OF THE STATE AND OF LOCAL ADMINISTRATIVE UNITS TO IMPOSE IN RELATIONS WITH NATURAL AND LEGAL ENTITIES THE EXORBITANT LEGAL REGIME AND RELATED TO THE GOODS MAKING UP THE PRIVATE DOMAIN THEREOF

**Mihai Marian ICU** [1]

***Abstract:***

*After 1990, the distinction between the public domain and the private domain belonging to the State and the Local Administrative Units became obvious. Although the first decade after the events of December 1989 can be characterized as a decade of permissive attitude of the State and Local Administrative Units regarding the exercise of certain rights by natural persons and private law legal entities on the goods from the private domain thereof, starting with 2000, the legal framework defective in the matter has been complemented by various imperative legal norms, the previous permissivity being replaced by "authority", with the imposition of the exorbitant legal regime concerning the goods part of the private domain.*

*The most eloquent example is the legislation on the sale of private property premises belonging to the State and Local Administrative Units adopted after 2000, legislation with a certain specificity, legislation that imposed the exorbitant legal regime also concerning the goods part of the private domain, belonging to these entities. The word negotiation, the concept of negotiation provided in these judicial texts, has quite a different meaning than the usual one, the meaning of the common law, the negotiation within these procedures being in reality an unnegociable offer.*

***Key words:*** *Public Domain; Private Domain; Local Administrative Unit; Natural Persons; Legal Entities; State; Administration.*

Without performing a thorough research, this paper seeks to highlight a part of the fact that the State and Local Administrative Units, under the umbrella of the phrase "public interest", have extended and tend to extend the exorbitant legal regime also concerning the goods part

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of the private domain thereof, the interests of natural persons and private law legal entities being thus damged. Obviously, the phrase "public interest" automatically refers to the public domain, and research in the public domain and the private domain, by reference to the concepts of public property and private property, occupies and has occupied a special place within the topics that raise constant conflicts between civil law and administrative law attorneys.

A well-known civil law attorney[1] shows in one of his papers that only the State and Local Administrative Units have a domain, have a private domain and a public domain that complements the concept of patrimony. Starting from the origins of the concept "domain", a specialist in the matter of the Roman private law[2] shows that in the Romans' view, law had two basic divisions: public law and private law.

Ulpian, a jusconsult of the second century, showed the criterion of distinction between private and public law. "Publicum ius ese quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem". Public law is the one that concerns the organization of the Roman state and the private one concerns individuals' interests.

Following the same idea a well-known specialist in the matter of Roman private law[3] showed that there were two types of Roman property: State ownership over public slaves ("servi publici ") and ownership of conquered land ("ager publicus") and individual ownership of the citizens called private property or quiritara property. In the classical age, three other forms of private property emerge: Provincial property, Pretorian property, and Peregrine property. In the post-classical age there was only one form of property - the "dominium" by the disappearance of peregrine and provincial property and the merging of other forms of property.

Finally, another respected author in the matter of administrative law[4] showed that the concept of domain thus originates in the Latin word "dominiu" which meant mastery, property while "dominus" meant owner

[1] Eugen Chelaru, *General Theory of Civil Law* (Bucharest: CH Beck, 2014), 1181
[2] Teodor Sambrian, *Roman Private Law* (Craiova: University of Craiova Reprography, 1993), 24
[3] Sambrian, *Roman Private Law*, 88
[4] Dana Apostol Tofan , *Administrative Law, 2nd Volume, 2nd Edition* (Bucharest: Lumina Lex, 2006), 128

In the administrative doctrine it has been unanimously accepted that an exorbitant legal regime derogating from the common law is applied to the goods in the public domain and the reason justifying the need for specific regulations derogating from the common law in the matter of these goods is represented by the idea of public interest, of general interest that the Administration has the mission to accomplish[1].

The elements that have highlighted this exorbitant legal regime concerned several theories, namely public service theory, public use theory, general interest theory, and the ownership theory.

Whether we are talking about those enforcing administrative law, or those enforcing civil law, the controversy between the public domain and the private domain, which of the two domains is the rule and which is the exception, existed and still exists today. This is all the more so since the civilian authors, who developed the theory of ownership law, have believed that the Administration has a right of ownership over the goods in the public domain.

Obviously, from this perspective, the three legal characters of the goods in the public domain of the state, namely the inalienability, indefeasibility and the intangible character appear. In relation to the public domain, the private domain of the state or of the Local Administrative Units is the rule[2], the formerly quoted author believed, given that the ownership of goods belonging to it is exercised by public, central or local authorities.

But the same author acknowledges the fact that it is no less true that the principle of inalienability has a relative character as the governors may order at any moment the decommissioning of a good in the public domain and its inclusion in the private domain, if it is judged to be to the government's best interest.

In conclusion, according to this point of view[3] the idea of public domaniality does not concern only the public property goods, but also some private property goods that for certain reasons are under the guardianship and protection of the state or of the Local Administrative Units.

Moreover, in considering and defending the exorbitant derogatory legal regime there were adopted legal regulations and a specific

[1] Tofan, *Administrative Law,* 130
[2] Tofan, *Administrative Law,* 134
[3] Tofan, *Administrative Law,*166

legislation, such as Law 554/2004 with subsequent amendments and completions, special legislation containing derogatory legal provisions, the rule according to which the principle of contractual freedom is subordinated the principle of public interest priority being expressly regulated.

In the opinion of another known civil law attorney[1] it is mentioned the existence of an exorbitant law, that this exorbitant law is administrative law, administrative law that is not an end in itself, but rather an instrument in the service of the citizen, required to observe the fundamental human rights and freedoms so that it is subordinated to the interests of individuals which cannot be sacrificed under the pretext of safeguarding the "public interest" or of ambiguous and uncontrollable state reasons.

Starting from the idea of exorbitant law, as the branch of law in the Romanian law system, the same author considers that starting from the idea of a whole, to the idea of part, the relevant exorbitant rights of the public administration are in fact two[2]: the right to unilaterally terminate the contract and the right to unilaterally amend the contract.

Another respected author in the matter of administrative law[3] showed that, from the point of view of the legal regime of private property goods, it is generally the one regulated by the common law, unless otherwise provided by law, and the acquisition or loss of ownership of such property is basically made by the means regulated by civil law, which means that these goods are no longer inalienable, imprescriptible and intangible.

But this author outlines his opinion[4] which we share, according to which the legal regime of common law is applicable only if the law does not provide otherwise, a case in which the legislator in certain situations imposed, however, the protection of the private property of the state and that of Local Administrative Units, even if this protection is not performed with the same force as in the case of the goods belonging to the public domain of the State.

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[1]Marian Nicolae, *Civil Law, General Theory, 1st Volume, Theory of Civil Law* (Bucharest: Solomon, 2017), 117

[2] Nicolae, *Civil Law*, 123

[3] Mircea Preda, *Administrative Law, General Part, 3rd Edition* (Bucharest: LuminaLex, 2006), 225

[4] Preda, *Administrative Law*, 226

Proof of excessive, exorbitant or discretionary protection is also highlighted in the procedure of selling goods from the private domain of the State or Local Administrative Units. Although, immediately after the events of December 1989, a there was, as shown in the summary, firstly a permissive legislation both on the exercise of certain rights of individuals on the private property of the State and of Local Administrative Units, as well as on the rights granted to individuals to sell goods from the private domain, the legislation has subsequently become very restrictive in this matter, and can be considered exorbitant even discretionary in favor of the State and Local Administrative Units.

GEO no. 110/2005 is the most eloquent example. This legislative instrument regulating the procedure of sale-purchase of medical premises in the private domain of the State and Local Administrative Units, legislative instrument with permissive legislation regarding the way of purchasing the medical goods and premises, was declared totally unconstitutional.

Surprisingly, the exception of unconstitutionality of the provisions of this legislative instrument was raised by two Local administrative units, respectively LAU Bogdanesti, Bacau County and LAU Solont, Bacau County, entities that claimed that the provisions of art. 1, art. 4 and art. 8 of this Ordinance were provisions that infringe on the provisions of the Constitution, by this law establishing the obligation to inventory and publish for sale of the premises owned by the State and by ATU, the obligation to "do" established, in the sense of automatically transmitting the ownership right .

The decisions of the Constitutional Court pronounced on 9th October 9 2007 with numbers 870 and 871, which declared the entire legislative instrument GEO 110/2005 as unconstitutional, with a single separate opinion of the judge Aspazia Cojocaru, showed that GEO 110/2005, as it was amended and adopted by Law 236/2006, did not affect art. 44 par. 1 Thesis I, Art. 44 par. 1 and 3 and art. 34 of the Romanian Constitution. This is because these entities have claimed that this legislative instrument establishes an automatic obligation of ownership transfer, that the right of private ownership of the Local administrative units is infringed, the right to dispose of these subjects of law is removed, including by setting a maximum sale price .

This separate Opinion we share shows that, in reality, art. 44 par. 1 of the Constitution was not infringed in any way whatsoever, because

the Local administrative units acting as sellers and the medical staff as the purchasers could only lead to the conclusion that this sale-purchase operation triggered the procurance of a price which brought revenues to the local budget. Also, according to art. 11 of this ordinance, it was clearly established that these purchased medical places could only be used for medical activities, observing the constitutional principle contained in article 34 of the Constitution regarding the right to health protection and since the legislative instrument was adopted for reasons of sanitary and medical policy, referring to premises that have this destination and are unused or used for any purpose other than the medical one.

However, although it has been alleged that the sale of these medical premises aimed at guaranteeing a complex right, the roght to health protection, the above-mentioned constitutional text establishes the State's obligation of taking measures to provide hygiene and public health, which implies the creation of conditions which will ensure the provision of medical services in terms of providing the necessary material base; in reality, there were many situations in which the new legislation adopted has led to contrary results, violation of this complex right concerning health protection. This is because some of these premises were inadequate for the medical activity and the irrevocable offer for sale led to the imposition of an excessive sale price without the possibility of challenging it. Thus, the decision to sell these medical premises in relation to the new legislation adopted in the case, namely GEO 68/2008, highlighted the exorbitant, discretionary and deregatory right of the State and the Local Administrative Units to impose all the conditions for the conclusion of the sale-purchase contract on these medical premises, the medical staff aiming to purchase these medical premises being confronted with a fait accompli, namely the sale-purchase contract in its final form, without the possibility of an objection or a negotiation.

Thus, in relation to the provisions of art. 7 of this legislative instrument, the selling price of the medical premises and the land was established firstly by drawing up an evaluation report which would determine the value of the medical premises and the corresponding land at the market price for the respective buildings, based on the market indicators and the the agreed evaluation criteria.

It is worth mentioning that this paragraph includea also the phrase of direct negotiation, which should be made at the moment of the sale, after performing the evaluation report and after this evaluation report would take into consideration the evaluation criteria accepted by mutual agreement.

In reality, the assessment criteria referred to under art. 7. par. 3 have never been accepted by the subjects involved in the procedure established by this legislative instrument, as the Authorized Independent Valuer was paid by the Administration, the Administration being the only one to provide the indications in which the evaluation would be carried out, the evaluation report being communicated to the applicant only upon his/ her request and without the possibility of objection.

This is all the more so as, prior to the decision to sell for these medical premises, technical expertise was carried out by MDRAP (Ministry of Regional Development and Public Administration) specialists, experts who concluded that the condition of the buildings in which these medical premises operate is so severe that it is no longer possible a consolidation or repair thereof, the only solution being their decommissioning and demolition.

Regarding the phrase "market indicators" as stipulated in the contents of art. 7. par 3 and 4, we consider that it is a phrase which demonstrates the exorbitant, discretionary character in determining the selling price of these medical premises, being a phrase lacking in predictability, given that the market value as defined by the evaluation report is the estimated amount for which an asset or liability could be traded at the date of the valuation between a determined buyer in an unbiased transaction after appropriate marketing, and in which the parties acted in full awareness, cautiously and unconditionally. The market valuation concept involves a negotiated price on the open and competitive market where the participants are acting freely.

Ultimately, the reference in the legislative instrument to the evaluation criteria mutually agreed upon would have led to the conclusion that either the physician can achieve effective negotiation or obtain technical assistance in conducting such a procedure, provided that any criterion evaluation can be considered or can be ignored in terms of cases or interest. In reality, the evaluation criteria have never been mutually agreed upon, the Administration indicating on the occasion of

the so-called negotiation that these evaluation criteria were unilaterally imposed.

Therefore, if in the previous legislation there was a legal range in the sense of determining the price per square meter, art. 8 of the GEO 110/2005 setting a selling price between 70 euro/ square meter for the 0 degrees localities, such as Bucharest and a price of 15 euro/ square meter for fifth ranked localities, the new legislation masks the maximum price under the word "direct negotiation", a direct negotiation that can only be achieved on the range caused by an arbitrarily and discretionally increased selling price that can not be less than the sale price in the valuation report.

As another known civil law author shows[1] the binding nature of the offer in the contract conclusion mechanism is a burning issue in the bidding mechanism and, from the point of view of the binding nature of the offer, it can be the irrevocable offer and the revocable offer.

In concrete terms, the content of a minutes concluded on the occasion of the procedure of sale through direct negotiation involving such medical premises certifies these circumstances, namely that there has never been a direct negotiation in the conditions in which the price offer was irrevocable, the negotiation procedure having a formal character.

Thus, in particular, the selling commission proposed that the selling price of the medical premises (without the costs of carrying out the cadastral, flat- and evaluation-related measurements) should increase by 10%, exceeding the value established by the evaluation report, that is the total value of 38 150 euro has been reached.

The applicant suggests the price of 33 200 euro. The Commission disagrees and proposes the price of 37 500 euro. The applicant proposes the price of 33 400 euro. The Commission proposes the price of 37 000 euro. The applicant proposes the price of 33 600 euro. The Commission proposes the price of 36 500 euro. The applicant proposes the price of 33 700 euro. The Commission proposes the price of 35,500 euros. The applicant proposes the price of 34 600 euro. The Commission proposes

[1] Flavius Baias, *Obligations.* (Bucharest: Brochure Conferences on the New Civil Code - publication co-financed by Switzerland through the Swiss-Romanian Cooperation Program for Reducing Economic and Social Disparities within the Enlarged European Union, 2015), 67-70

the price of 35 000 euro. The applicant proposes the price of 34,700 euros. The Commission proposes EUR 34 800 price. The applicant proposes the price of 34,750 euros, price at which it is adjudicated. The amount of 1 633,29 Lei is added to this price, representing the expenses incurred for carrying out the cadastral, flat- and evaluation-related measurements.

Therefore, as shown above in the Commission's proposal to sell the medical premises by an increase of 10%, the value in the evaluation report leads to the conclusion that since the 10% increase was 38150 euro, the value set through the valuation report was 34,335 Euro.

Negotiation, in a first instance, was made on this range between the price set by the evaluation report of 34 335 Euro and the price increased by 10% of 38 150 Euro. The Commission's decision to adjudicate for a price of 34 750 Euro, i.e. a difference of 415 Euro above the valuation report, demonstrates the formal nature of this negotiation procedure, in reality being a price imposed by the Commission, through this offer of irrevocable adjudication.

Secondly, the provisions of art. 7. par. 1 which refer to the fact that the value stipulated under par. 3 represents the price that could be obtained if any stakeholder could buy the premises in question certifies that although the intention of the legislator was to accelerate the process of ambulatory medical care reform, the physician who is the current ownerof the medical premises had only a preemption right at a price equal to any person interested in buying that premises.

## CONCLUSIONS

The legislative framework adopted after 2005 on the sale of certain goods in the private domain of the State and of the Local Administrative Units can be characterized as a legislative framework which is exorbitant, discretionary and derogatory from the legal regime of common law.

Although, according to the provisions of the Romanian Constitution, private property is equally guaranteed and protected by law, irrespective of the holder, the applicable legal regime was not and is not the common law legal regime, the possibility of applying the common law legal regime being "unless otherwise provided by law".

In the matter mentioned above, we obviously discuss about a legislative framework in which the State and the Local Administrative Units have a dominant, decisive position, sincer under the umbrella of the term "direct negotiation", they release an irrevocable offer of a price that cannot be challenged, the natural and legal entities involved in this procedure, in particular the medical staff having a form of organization, whether individual or corporative, being directly injured.

## BIBLIOGRAPHY

**Books**

1. Apostol Tofan, Dana. *Administrative Law, 2nd Volume , 2nd Edition*. Bucharest: Lumina Lex, 2006.
2. Chelaru, Eugen. *The General Theory of Civil Law*. Bucharest: C.H. Beck, 2014.
3. Chelaru, Eugen. *Class on Civil Law, Main Real Rights*. Bucharest: All Beck, 2000.
4. Chelaru, Eugen. *Civil Law - Main Real Rights, 2nd Edition.* Bucharest: C.H. Beck, 2006.
5. Nicolae, Marian. *Civil Law – General Theory, Volume 1*. Bucharest: Solomon, 2017.
6. Nicolae, Marian. *Unification of the Right of Civil and Commercial Obligations*. Bucharest: Universul Juridic, 2015.
7. Sambrian, Teodor. *Roman Private Law*. Craiova: University of Reprography Craiova, 1993.
8. Preda, Mircea. *Administrative Law, General Part, 3rd Edition*.Bucharest: Lumina Lex, 2006.

**Article in a print journal**

1. Baias, Flavius. „Obligations". *Brochure Conferences on the Current Civil Code - National Institute of Magistracy* (2015):67-70.

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# THE EUROPEAN UNION - PAST AND FUTURE

**Anton-Florin BOȚA**[1]

***Abstract:***

*Complex geo-political construction, with profound ramifications in all spheres of social life in this region, European integration is a spectacular phenomenon of socio-political construction, whose architecture has been completed not all at once, but over time, in steps and stages, becoming nowadays the most advanced form of regional integration in a determined geographic space of our world. Like any emblematic edifice, the current European construction, called the symbolic Union, faces a series of challenges, difficulties, perhaps with a system crisis, partly generating a skepticism about its evolution.*

*In the following, we will try to outline some ideas about the past, but especially about the future of the European Union.*

***Key words****: European integration; geo-political construction; evolution unity; Europe; idea; democracy; interest*

## 1. THE DISTANT PAST

Europe has received its statute as "the old continent", naturally and in accordance with a continuous evolution in different areas, such as policy, justice, economy, socio-cultural area etc. Generating and storing the greatest values of humanity, Europe proved to be an elitist continent, from this geographical area starting over 2500 years ago, the idea of regional unity. During a project developed between 2007 and 2012[2], we have called this idea "the European idea", with the meaning of an attempt to establish a European construction around the idea of unity.

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Specifically, the idea of European unity is, as we shall see up next, one with a rich past. By enjoying the dimensions of a larger state[1] - almost 10 million square meters – our continent has represented an area fit for this idea. Even if Herodotus, 500 years B.C stated that "no one knows about Europe...neither from where its name originates, nor who could be its author"[2], but a single thing remains as certain: Hesiod states for the first time the name of Europe, in his work "Teogonia", and the Greek legends assign this name, either to one of the 3000 oceanidas, nymphs of the sea, daughters of Ocean and Thetis, or to the princess of Tyr, daughter of King Agenor. For both cases the legend states that the beautiful girl – Europe – is being kidnapped by Zeus, disguised as a bull, to whom she will give three sons, thus establishing the Cretan dynasty[3].

The imagine of Europe 2500 years ago was comparable to that of Greece, a peninsula by the sea, divided by basins and fields, with a diverse population, which combined the Apollonian spirit (rational, balanced, religious, having a cult of the law, of justice, connected to the land, specific to human stability), with the Dionysian spirit (spontaneous, unsubordinated, rebel, but creative, specific to a rebel individual, with accent on trades, colonizing and even piratical)[4]. This is a true diversity, in the Hellenic spirit.

As opposed to Sparta, Athens will choose an evolution towards a democratic regime, Cleisthenes being the one who, at the end of the 6th century B.C will reorganize the city, by transforming it, according to the Athenian Constitution, a public space based on deme – residential areas for citizens, separated in 10 tribes of all Attica (the coastal area, the interior and the city). By the organization and functioning of this democratic system, it is practically insured that a citizen may, for one day, be the head of the Council (Boule) who prepared the laws voted by the People's Assembly (ecclesia). Also, a college formed by 10 magistrates supervised the city, and 10 generals insured the military ruling. Not least, to allow less rich persons to attend the Boule, the city provided an indemnity of presence (mistophoria). Thus, the Athenian

[1] Comparable as surface with India or China, three times smaller than Africa, two times smaller than Asia

[2] Herodot, *Histories, 1st Volume* (Bucharest: Scientific Press, 1961), 327; translated by Felicia Vant-Stef

[3] Minos of Crete, Rhadamanthus of the Cyclades and Sarpedon of Lucia

[4] Viorel Faur, *Istoria integrarii europene*, course held at the Faculty of Law, University of Oradea, 2002

democracy is based on the equal will of the people (isonomy)[1]. During the time of Pericles, Athens will become the "educator" of Ancient Greece, the time during 443-429 for as long as Pericles will be elected each year as general, shall mark the consolidation of the Greek democracy and the prosperity of the city. The Acropolis is rebuilt and dressed in marble, the Odeon is built, the wall of Theseion wall (near the Agora), the Parthenon etc. Thus, Athens becomes the most opened city of the Greek world, by reuniting the elite of world thinkers: Sophocles – the parent of tragic poems; Herodotus – the parent of history; Phidias – architect and sculptor; Protagoras – the Sophist; Anaxagoras – the philosopher[2] etc.

The crisis of the city shall manifest starting with 404 B.C, when Sophocles is sentenced to death, accused of corrupting youth. Even if the 4th century B.C continues to enjoy the services of the philosophic schools in which Plato and Aristotle were active, as well as from the services of brilliant sculptors, such as Praxiteles or Lysippus, as effect of the war between the cities (the Peloponnesian war, 431-404 B.C), Greece shall fall in decay, under all its aspects.

The rise of another power, up north from Greece, in the Balkans, namely in Macedonia, starting with 359 B.C., by the incoro-nation of Philip the 2nd and after that of his son, Alexander the Great (336-306 B.C), the Greek world changes its centre from the state-cities, independent, towards the Orient. In the same time another thing happens, namely the world evolves from the citadel to kingdoms and from democracy, the power of the people[3], to aristocracy, monarchy and tyranny[4].

One can easily note the fact that during the period of maximum unity, in its constructive period, Greece has chosen the federalization. The existence of a common religion (all Greeks from state-cities worshiped the same gods) has proven to be the liaison to unite them, by having a common spiritual patrimony, an identical destiny and then, a similar political organization. The establishment of the Delian League by which the state-cities have aimed the conclusion of conflicts and their

[1] Horia C. Matei, *O istorie a lumii antice* (Bucharest: Albatros, 1984), 210-214
[2] Matei, *O istorie a lumii antice*, 216
[3] Demos – the power of the people or its representatives, the general interest of the people overrides the individual interest.
[4] Matei, *O istorie a lumii antice*, 225

solution by using the arbitrage[1], is a major achievement regarding the idea of regional unity and its consolidation. A practical aspect of those times, in the meaning of the unity taken and developed by the modern ages, is represented by the organization of the Olympic games, during which all kind of hostilities were suspended, all barriers were cancelled, the athletes meeting in a peaceful competition. This is the proof that over 2000 years ago, the people aiming to achieve integration in their geographical area, considered the natural aspect of integration, by aiming a cultural integration, through sports, which generated effects.

Mainly, ancient Greece represents the genesis, the seed from which Europe was born. Nevertheless for the Greeks the term of Europe was not a political concept, by having a simple geographical meaning (at least, this is what results from Herodotus' and Hesiod's works, who state that the Earth is divided into three: Europe, Asia and Libya), it is without a doubt that ancient Greeks have created the political concept of Europe.

The Greek school, in fact the Athenian democracy, was based on the notion of equality, the Athenians having the obligation to comply with the laws and to subject to them. Also, they have defined the notion of citizen, establishing legislation for his protection, the foreigners, metics, women and slaves being excluded. The principle of citizenship is seen also in the Roman Empire and in the European Union, being one of the fundamental elements of the unity. Therefore, the unity is an organized form, represented by the city (polis), distinguished from the group (genos). The city has among its attributes the citizenship and also it represents the defined framework of democracy and its performance. The genos is the enlarged family, found under the authority of the chief (of tribe, who for the Romans is called "pater familias"), and does not represent the citizenship. The Greeks have also defined the "polis" as being the state-city delimited by its location and the civic body, by granting it: the ecclesia – the people's assembly, the Agora – the public square, the Boule – the Council, the permanent assembly, the Heliaia – the people's tribunal etc.

During the period in which Athens ruled Greece, in Italy a new state-city started forming: the city of Rome.

[1] Like the League of Nations (the Society of Nations) created on June 28, 1919, or the Kellog-Briand Pact signed on August 27, 1928, the Delos Confederation did not at last achieve its purpose, proof that the human spirit in certain sensitive matters , it changes very hard (or even refuses to change).

Around 753 B.C it seems that Romulus was already the first king of Rome. Starting from the 7th century B.C and until the 6th century B.C, Roma was ruled by kings. Initially, a small village within a confederation of peoples – the Latin League – Rome shall know an urban development during the Etruscan kings (Tarquin the Elder, Tarquinius Superbus – Tarquin the Proud, Servius Tullius). The evolution from royalty to republic is simultaneous with the Athenian one, in 509 B.C. Gradually, the relation of Rome with the other Latin cities evolves towards a hegemony more and more obvious of Rome, confirmed in 338 B.C by the dissolution of the Latin League[1]. This is the moment in which the Roman law replaces the Latin law used by the other cities. Around 272 B.C, Italy falls under the tutelage of Rome. There are created the conditions for the birth of the "Republica", with the transformation of Rome from a simple state-city of Latinum, into a dominant Italian city, thus there are created a series of institutions: the assemblies of the Roman citizens (the Centuriate Assemblies, in which the citizens are divided into centuries, according to 5 categories of fortune and the Tribal Assemblies, in which are classified 35 tribes, depending on the criteria of residence). The voting system favours in all cases the rich persons. Also, the Assemblies share the right to elect the magistrates and the legislative power. The magistrates are classified into two categories: superior magistrates (praetors, councilors, censor) elected by the Centuriate Assemblies and the inferior magistrates (quaestors and aediles) elected by the Tribal Assemblies. The plebs may elect only their representatives, tribunes and aediles, together with the Council of the Plebs (formed by the plebs from certain tribes). The Senate has 300 members, recruited by the censor among former superior magistrates and has the obligation to preserve the traditions, in the same time performing the control over the financial and foreign politics issues. By the organization and functioning of the institutions, the state-city becomes the framework for political expression[2].

Starting with the 3rd century B.C, a series of conquests will lead to the territorial expansion of the city. With all its expansion throughout Italy, Rome preserves a system close to the management of a state-city. After defeating the Carthage (from Northern Africa), moving after in

[1] Jean Carpentier and Francois Lebrun, *Histoire de l'Europe* (Bucharest: Humanitas, 1997), 62-64
[2] Carpentier and Lebrun, *Histoire de l'Europe*, 64

Sicily and northern Spain, but also in the Balearic Islands, Sardinia and Corsica, which Rome annexes – are created the premises of transforming the state-city into an empire. In the beginning, a Mediterranean empire, then, after conquering the Hispanic territory – where is created the Italica – its army for conquering the western Mediterranean territories[1], the empire becomes universal. Other territories are being targeted, such as the Iberian Peninsula, the Balearic Islands, Southern Gaul and Macedonia (around 146 B.C), Rome becoming in 200 years the dominant of Central Europe and to possess wide territories in Asia Minor and Northern Africa.

The crisis of the city emerges in the 1st century B.C, the territorial expansion bad influence for the Italian society and economy. Life changes deeply under all its aspects (cultural – new cults and gods are created, urban, the poverty of the population etc.). Also, a deep political crisis[2], starting from Gaius Gracchus up to Julius Cesar and Augustus, shall bring into debate the idea about a power entrusted to a single person. The idea shall be concretized by Caesar, who between 49-44 B.C aims to strengthen his personal power, by his appointment as dictator for life. This idea is temporary postponed, by his assassination (on the Ides of March, 44 B.C), but shall become real in 27 B.C when Octavianus, the adoptive son of Marcus Antonius, is appointed by the Senate as "Augustus"[3].

In 31 B.C the Roman world had not reached its peak, but the first emperor, Augustus (31 B.C – 14 A.D) manages to strengthen the borders. In 43 A.D during the Emperor Claudius, Britannia is conquered, the new province being added to the empire, thus concluding the prior attempts of Hadrian and Caesar (the Gallic Wars, 58-52 B.C).

In Eastern Europe, in order to optimize the communications between the western empire (the Gallic and Hispanic provinces, conquered during the Republic, but integrated within the Roman area during the Empire) and the East, Rome shall continue its conquests, by creating new provinces: Dalmatia, Pannonia, Moesia – annex to the Thrancian kingdom (46 A.D) which is also turned into a province. At the end of the 1st century A.D, at the Eastern borders of the Empire there was

[1] After the defeat of Hannibal in Northern Africa, at Zama in 202 B.C
[2] Yves Roman – *Imparati si senatori. Istoria politica a Imperiului Roman Secolul 1-4* (Bucharest: Saeculum I.O, 2007), 234
[3] Carpentier and Lebrun, *Histoire de l'Europe*, 74

only one threat: Dacia, lead by Decebalus. Of Thrancian origin, the Dacians have established a kingdom in the times of Caesar, the Dacian King, Burebista, based on the important gold richness of the kingdom, manages to strengthen it, to build cities and fortifications, to empower the army, which shall be also continued by Decebalus, the result being the transformation of Dacia into a powerful state, which represented a threat for Rome. In order to possess the wealth of Dacia and to secure the eastern borders of the empire, Trajan initiates between 101 and 106 A.D two campaigns, resulting in Dacia's transformation into a Roman province. This final campaign concludes the establishment of the Empire, which shall suffer – at the end of the 1st century A.D and throughout the 2nd century A.D – small modifications, of administrative nature (the division into two of the provinces of Pannonia, Moesia and Dacia).

The imperial power and the security of the empire are based on the army, on terrestrial troops (the legions formed by citizens and the auxiliary troops, formed by the natives of the conquered populations) and the navy (stationed in the harbours of Italy, Misenus and Ravenna)[1]. The defensive system (referred to by the Latin term "limes") refers to the network of public roads and fortifications – ditches, palisades, walls, fortresses – and spreads practically throughout the empire. In Britannia, the Emperor Hadrian builds, around 122 B.C, a wall of 128 km, with ditches, towers and fortifications, starting from the estuary of river Tyne and spreads up to the Solway Firth, completed by Antonius, using a system less resistant, of wood and earth, which at the end of the 2nd century A.D shall be abandoned.

The 2nd century A.D presents a divided Europe: a Europe of the state-cities – the Mediterranean Europe – subjected to Rome and a Europe of the peoples, in which the migration was dominant, especially among the Germanic tribes. For the first two centuries A.D, Rome provides for the southern half of Europe a political organization, a way of life and a culture, especially based on Greek elements, representing powerful unifying elements and which, do not hamper the manifestation of the regional identity, nor reject the renewal forces. For four centuries, as a unified empire, Europe shall know a unique period, in which the forms of Greek-Roman civilization gradually conquer all provinces, without endangering the features of the regional components. Again, a beautiful unified diversity.

[1] Carpentier and Lebrun, *Histoire de l'Europe*, 76

Greeks defined the empire as "a federation of state-cities". In the European context of the Roman provinces, the base for the political, social and religious organization of citizens was represented by the city. They used to say before that Greece has represented "the genesis of the primordial seed" of which Europe was born. By continuing in the same meaning, one can state that the Roman Empire represents the "origin" of Europe. Of remarkable importance is the "Pax Romana", under the shelter secured by the fortified borders ("limes") protected by the army, the European provinces being able to develop in peace. Stated by Octavianus, the "Pax Romana" represented a free world, federal, uniting under its law, the civilized world[1]. The roman principle was unitary and centralizing. Rome represented the symbol of order and force. The Roman citizenship was a special statute, foreigners being seen as enemies, having a clear delimitation between free men and slaves, between barbarians (who have remained as foreigners) and pilgrims (members of the provinces, belonging from the defeated peoples). By the territory on which it acts, establishing a single body, found under a single command, practically the "Pax Romana" represents the "original unity". This is why one could state that the origin of the unity dates back from the Roman Empire. Moreover, the Roman state has applied an agile policy of political assimilation, by offering the Roman citizenship to those who, by their services and loyalty were considered worthy of this quality, which expressed nobility. In 212 A.D, the Emperor Caracalla shall sign the decree by which all free men throughout the empire shall be assimilated to the category of Roman citizens[2]. This is the first example of a single citizenship in Europe. These are the times in which the city (urbis) and the world (orbis) represented an ensemble, by forming the picture of a universal order. After a few centuries, a large number of persons were citizens, Romans, citizens of the same geographical area, but in the same time citizens of the civilized world. It is the peak of the Roman Empire, of the Roman idea, of the European idea of those times. Found in its best period, the Empire shall enrich its wealth with a new element – expression of the perfection of its order. This element is represented by the Christianity, whose fundamental contribution is the principle that all human beings have a single God, so they should enjoy the same rights and norms, according to their merit.

[1] Faur, *Istoria integrarii europene*
[2] Carpentier and Lebrun, *Histoire de l'Europe*, 85

This construction shall represent for Europe a model, by influencing its history and evolution, by supplying for the universal civilization its culture, a large part of the criteria for the political organization, being in the same time a key element in spreading the Christianity. For the achievement of this construction, an important role was held by the Roman cities ("the states") which enjoyed a well organized administration, intelligent and centralized, the decay of the empire being reflected in the decay of the state-cities[1].

The Roman world, as it was built and evolved, shall provide for the medieval Europe, not only a geographical area, but also an ensemble of values such as: its language (Latin has been the official language of the Western Europe until the end of the middle Ages), its impressive culture, the science of law, the idea of a universal empire.

The transformations which marked the Roman Europe have not lead to the disappearance of the local particularities, the traditional forms of the indigenous environment, persisting and developing. In numerous areas, the cults were preserved, the local organization, the regional specificities, thus proving the force of the customs. To a good extent, the Romanization has allowed the awareness of the belonging to a community, whose dynamism may be stated as the provincial system[2].

Starting with the second half of the 2nd century, the Empire faces major crisis, accentuated in the 3rd and 4th centuries A.D, its decay being rushed by its division, in 395 A.D at the death of the Emperor Theodosius: the Eastern Roman Empire (Constantinople), lead by Arcadius and the Western Roman Empire (Mediolanum-Milano or Ravenna) lead by Honorius. In August 410 A.D, Rome is conquered and devastated by the Visigoths lead by Alaric, the Western Empire continuing to survive, under the tutelage of the Germanic people. A Roman unified Europe is replaced by a Europe dominated by the Germanic world. This is the Western Europe, unlike the Oriental Europe, in which the structures are maintained and evolve in the Byzantine Empire.

This is the end of the longest genesis and definition of the European idea. It is the time in which the European idea has registered numerous solutions and mediation points for future generations of thinkers and politicians who shall study it, either to enrich it under the

[1] Faur, *Istoria integrarii europene*
[2] Carpentier and Lebrun, *Histoire de l'Europe*, 90

aspect of its theoretical content, or to effectively apply it, attracted by the mirage of a unifying European construction.

One thing must be emphasized, moreover not being contested by any person: the principle of the European unity, characteristic for those times, does not have a physical or mechanical nature, but has the spiritual nature, the European tradition being the Christianity.

The integration achieved in Ancient Greece, but especially in the Roman Empire proves a surprising vision of those times. The integration was developed during a large period of time – over 400 years – first of all because it has been accepted by the populations subjected to it, effect of the fact that the integrant phenomenon was largely based on cultural elements, on the compliance with the local traditions, the local identity and not least, on the compliance with the human element – the main actor, irreplaceable in the process of a real and long-term regional construction. These very elements seem insufficient developed in the consolidation and development of the current European construction – the European Union.

For these reasons, the author has opted to emphasize the periods of Ancient Greece and the Roman Empire, as inspiration for certain trends for the current European construction.

## 2. THE LESS DISTANT PAST

The subsequent historical periods, starting with the middle Ages and until modern times, have also been preoccupied by the European idea. These preoccupations were numerous in a theoretical area, several authors – rationalists, expressing their ideas in their works, thus gathering a large bibliographical material. It is not the purpose of the author to develop this subject, representing the subject of a different paper.

Beside the theoreticians of the "European idea", there were historical personalities who have attempted to build "a European unity", among who we can mention the attempts of Charlemagne – Carolus Magnus (768-814 A.D) to restore the empire, continued by his son, Louis the Pious (814-840), the attempt of Otto the Great, founder of the Holy Roman Empire, which shall exist until its destruction by Napoleon in 1806, the attempts of Charles V and Napoleon Bonaparte to provide a universal dimension to their empires etc. All these actions (any many

more) were doomed to fail, being lead by nations aspiring to hegemony, imposing by constraint, an arbitral unity[1].

## 3.THE CURRENT TIMES

We are referring to a less distant present and nowadays.

a) *The less distant present* is emphasized by the first official step in the direction of the achievement of the current European construction, namely the Briand Plan or the "Memorandum on the Organization of a System of Federal European Union", presented on the 1st May 1930. This action opens the way towards the current European construction – the European Union – by establishing an intergovernmental international organization. After the WWII, the initiatives aiming the European integration follow two currents, the federalist one and the functional one and is specifically manifested by the establishment of intergovernmental international institutions (classic inter-states organizations), in a first phase (Council of Europe – 1946, Organization for Security and Cooperation in Europe – 1948), for a second phase to comprise the super-state international organizations, so-called integration organizations (European Coal and Steel Community [ECSC] – 1951, Economic European Comunity [EEC] and European Atomic Energy Community [EAEC or Euratom] – 1957, by the Rome Treaty). The Treaty of Rome shall be updated in 1965 in Paris, when the "ensemble of the European Community" is created, which shall become the European Union after signing the Maastricht Treaty in 1991, entered into force in 1994. The Maastricht Treaty insures the evolution from the economic community to a political unity.

The historical facts have confirmed that Europe has been the field of the hottest battles between two systems: the system of the social capital characterized by free competition, the mechanism of the market based on request and offer, real democracy etc – and the system of the popular power, characterized by an excessive centralism, specific to the communist totality. This aspect emphasizes the current state of facts of the European Union.

b) *Nowadays* – by taking into consideration the recent Brexit, but also the recent situations occurring in other Member States (Poland,

[1] René Rémond, preface for Jean Carpentier and Francois Lebrun, *Histoire de l'Europe* (Paris, 1990-1992)

Hungary) in their relation to Brussels, would be illogical not to accept the idea that the Union could face a crisis. For sure, there are certain difficulties. If we accept the idea of a crisis, is it a crisis of system, a crisis of the state-city or prior to a global crisis, not imputable to the national system, but affecting the world states (and not just the EU Member States)?

The objective reality forces us to ascertain several real facts:

- Starting from the struggle between the two systems, above mentioned, one could easy note that in ex-communist states – members of the Union – numerous in the current composition of 27 members – a larger number of citizens are nostalgic about the communist times. An important part of the citizens, due to their education – finished during those times – by more and more numerous because of the failures of their governments;
- On this ground, Russia expanded its appetite to achieve the statute held by the former Soviet Union. In fact, we consider that Russia has remained the same as of Peter the Great, based on a policy of expansion. In this context – explicable and inconclusive for a great power – Russia may achieve a forced integration, of the Eastern Europe to Asia. We are not stating that it is doing so just to prove that it has the possibility. One can observe in Russia an integrative system, which could include the states (or third parties), unlike the European Union, in which the states are integrated by their sovereign will.
- Due to the global crisis and mainly to its financial-economic element, with a cyclic evolution affecting mankind and the entire Europe, the number of Euro-sceptical grows constantly. In Great Britain, as we have seen, it had the largest growth, but they are present also in other states – some with a democratic tradition, such as France, Germany, Spain and Belgium – others with a "young" democracy, such as Poland, Hungary, Bulgaria and Romania etc., the Baltic states, where the phenomenon is fuelled by the national governance with flaw, the spread of corruption etc.

In all these states, the governments are in the position of facing the discontent expressed by the voices claiming that the removal of the current European architecture, and maybe the fear that the "state-city" be transformed into a "kingdom" or an "empire", thus waiving the original democracy.

- Every people aiming progress and well-being feel the need of a national policy and a national interest. These prolonged crises could generate an unwanted competition, between the national good and communitarian good. If we see as example Poland, it is quite suggestive the facts that this state, by more recent actions, expresses the discontent regarding the fact that from the European Constitution is missing the statement regarding the Christian tradition of Europe. Should the Polish created a relation between this absence and the European policy encouraging migration from areas with other religious beliefs towards Europe? It is a meditating question.

Reverting to the initial subject (the unwanted competition between the national well-being and the communitarian well-being, in the context of the current crisis), we note the fact that at a state-individual level, the ideology of the rational well-being is an easier achievement than the achievement of the communitarian well-being. This is the Russian advantage in front of the European Union. Therefore, Russia – which is an individual state – claiming to be the coordinator of the regional integration within its geographical area and which – if necessary, integrate by force (similar to other world powers) – finds its supporters among the neighbouring populations, not having the culture of true democracy, unlike the European Union, which is a conglomerate of states with different cultures (united in diversity) and in which, the achievement of the common welfare is a more complex and hard to achieve objective.

## 4.WHAT IS TO BE DONE? THE FUTURE OF THE EUROPEAN UNION

At least for the above mentioned reasons, we believe that in order to continue its ascendance and to fulfil the political integration and the political construction, it is time for the European Union to point towards the development of a new action: a national-European interest, specific to each Member State, shaped and defined precisely, in which the national interest of that state to be represented in the global concept of common-Union interest.

Reality has proven that the European integration has had as starting point the economic integration (ECSC, EEC, Euratom), in accordance with the beliefs and specific actions of its founders.

Practically, the states of the Western Europe have considered that overcoming the post-WWII situation and maintaining future peace could be achievable by a gradual economic integration and political closeness. From a historical perspective, things were moving in this direction, with the mention that the phenomenon of integration, otherwise complex, also studied by the Club of Rome, has assumed (beside the economic integration) the development of other elements: the functional, institutional, social and cultural integration. Only by achieving all these forms of integration, the political integration could be operated. Among these forms, the cultural integration (whose essence refers to the creation and promotion of a common cultural policy, the communitarian coordination and financing of important programs) seems the less evolved and developed, reason for which we argue in the favour of paying more attention to this fact. The changes occurred from the initiation of the European construction and until current times, determine us to believe that the cultural differences are the sensitive point of the current European edifice, and that are hard to avoid, moreover as are expressed in negotiations. This is why the European leaders must take into consideration a minimal set of values regarding future actions aiming the European edifice, such as:

- The political integration process for the European states shall continue, by considering each cultural aspect. We note that the European integration shall conclude by federalization, but regardless of its form, the integration must be accepted by the population, otherwise it is not valid;
- The implementation of a new common policy – the national-European interest – in which the national interest of each Member State shall be well defined and stated and framed within the common, communitarian interest, within a common ideology;
- A constructive, pacifying dialogue would be welcomed, with the main actor with integrating potential from the Euro-Asian area, Russia. The great win of the European diplomacy would be that Russia become a constant and stabile partner in the process of integration and not competitor (or worse, enemy);
- The maintenance of good collaboration in all areas, both with the traditional partners (US, NATO), as well as with the non EU Member States, a smart foreign policy, shaped in accordance with the preferences of all Member States;

- The orientation towards the development of an even larger scale of what the theoreticians name "the forms of integration", by paying special attention to the development of the concept of "cultural integration".

## CONCLUSIONS

We have expressed a few ideas which do not claim to be absolute truths, hope to send a message encouraging meditation.

## BIBLIOGRAPHY

### Books

1. Bideaux, Robert, and Richard Taylor. *European Integration and Disintegration.* New York: Rentleadge, 1996.
2. Bota, Anton-Florin. *European Union's History, Culture and Citizenship*. University of Pitesti, 2008 and 2013.
3. Carpentier, Jean, and Francois Lebrun, *Histoire de l'Europe*. Bucharest: Humanitas, 1997.
4. Dobrescu, Emilian. *Integrarea economica. 2nd Edition*. Bucharest: All Beck, 2001.
5. Faur, Viorel. *Istoria integrarii europene. Legal course*. Oradea: Faculty of Law - University of Oradea, 2002.
6. Herodotus. *Histories*. 1st Volume. Translation by Felicia Vant-Stef. Bucharest: Scientific Press, 1961.
7. Marga, Andrei. *Filosofia unificarii europene*. Cluj-Napoca: European Studies Association Press, 1997.
8. Matei, Horia C. *O istorie a lumii antice.* Bucharest: Albatros, 1984.
9. Roman, Yves. *Imparati si senatori. Istoria politica a Imperiului Roman Secolul 1-4*. Bucharest : Saeculum I.O, 2007.

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# THE PRELIMINARY RULING OF THE COURT OF JUSTICE

**Justyna MICHALSKA**[1]

***Abstract:***

*The question referred for a preliminary ruling concerns the interpretation of provisions of EU law which apply in a specific case before a court of a Member State. The aim of the preliminary ruling is to eliminate inconsistencies between the consequences of Member State law and European law. In accordance with the principle of the primacy of EU law, the national court, in the event of non-compliance of EU law with national law, applies the laws of the EU.*

***Key words:*** *the EU law,; the principle of the primacy of EU law; the court of a Member State; the preliminary ruling of the Court of Justice*

## INTRODUCTION

The legal basis for the preliminary ruling procedure is art. 267 of the Treaty on the Functioning of the European Union, which provides:

„The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

a) the interpretation of the Treaties ,
b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union ;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no

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judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay ".

Until the Treaty of Lisbon came into force, several types of preliminary ruling procedure existed under the EU system of legal protection. The basic procedure was included in art. 234 of the Treaty establishing the European Community. Special procedures were provided regarding the Area of Freedom, Security and Justice. Article 68 of the TEC modified the procedure set out in art. 234 TEC within Title IV TEC - Visas, asylum, migration and other policies related to the free flow of people. Art. 35 TEU modify the application of the EC Treaty, regarding the procedures applied in the field of police and judicial cooperation in criminal matters, which was then the third pillar of the European Union.

The Treaty of Lisbon introduced a uniform procedure for a preliminary ruling procedure, which was defined in art. 267 TFEU. On its basis, the Tribunal was equipped with full jurisdiction as part of the Freedom, Security and Justice Area. However, a five-year transitional period has been introduced for police and judicial cooperation in criminal matters, where the derogations provided for in Article 35 TEU will continue to apply until that time.

In addition, the procedure for the questions referred for a preliminary ruling is also provided for in agreements concluded between the Member States of the European Union[1].

Additionally, a detailed regulation regarding the procedure of the preliminary reference questions is contained in the Statute of the Court of Justice of the European Union in art. 23 - 24, as well as the Rules of the Court of Justice in Title III. The Court of Justice of the European Union itself has issued an Information Note, which concerns the submission by courts of Member States of requests for a preliminary ruling, although the Note has no binding force is undoubtedly an important instruction for national courts. In this document, on the basis of

[1] I.a. First protocol to the Rome Convention on the law applicable to contractual obligations of 1989.

the previous jurisprudence of the Court of Justice, the conditions to be met by the question referred should be taken into account[1].

EU law is most often used by the courts of the Member States, because it becomes part of the legal systems of these countries. This right can be invoked by national courts both indirectly and directly. It is the responsibility of the courts of the Member States to ensure the efficiency and effectiveness of EU law. The system of legal protection authorities within the European Union includes not only EU courts, but also national courts. National courts operate on the basis of the principle of procedural autonomy, so they are not hierarchically subject to the Court of Justice of the European Union. Such rules of operation of the EU legal system, as well as its application in a decentralized manner, may result in discrepancies in the interpretation of EU law in specific Member States. Bearing in mind the possibility of a different interpretation of the law in art. 19 of the Treaty on European Union, the Court of Justice has been given an important role in upholding the rule of law in the interpretation and application of the Treaties.

The Court of Justice's fulfillment of this task is made possible through cooperation between the courts of the Member States and the Court of Justice in the context of the questions referred for a preliminary ruling. This mechanism allows the Court to control the activities of Member States, not just EU institutions and bodies. The main assumption of such a structure is to enable the units to exercise the rights granted to them under the EU system in the most effective way in the field of national legal orders[2].

The case law of the Court of Justice often emphasizes that the question referred for a preliminary ruling under Article 267 TFEU is an important instrument for the cooperation of national courts with the Tribunal. Under this procedure, the Tribunal provides national courts with instructions on the interpretation of EU law that are necessary to resolve disputes before them.

By providing answers to a question referred by a court of a Member State, the Court of Justice shaped the basic principles regarding

[1] I. Skomerska- Muchowska, *Pytania prejudycjalne sądów krajowych*, [in:] *System ochrony prawnej w Unii Europejskiej*, (Warszawa: A. Wyrozumska, 2010): 304-305.
[2] M. Wąsek-Wiaderek, *Funkcja instytucji pytań prejudycjalnych, Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, (Warszawa: M. Wąsek-Wiaderek, E. Wojtaszek- Mik, 2007): 19-20.

the effect of EU law in the legal systems in force in the Member States, including primarily the direct and indirect effect of EU standards or the primacy of EU law over national law. Thus, the function of the questions referred for a preliminary ruling not only affects the coherence of the EU legal system, but also significantly affects the development of the entire European Union legal system[1].

Questions are brought before the Court of Justice of the European Union in the context of proceedings pending before the national court. Although the legal basis to submit a preliminary ruling is contained in EU law - the Treaty on the functioning of the European Union, the problem with EU law is based on the principles set out in national procedural rules. The national provisions also regulate the nature and effects of the decision to refer the question to the Court of Justice. The request for a preliminary ruling is of a procedural nature. The decision to refer to the Court of Justice itself can take any form that is regulated by the national legal order.

As part of the national legal system, each state settles the issue of the enforceability of a decision to refer a question for a preliminary ruling. Proceedings before the Court of Justice are not discontinued in the event of an appeal against a decision relating to a preliminary question. However, the decision of the national court of higher instance, which annuls the decision on the question referred for a preliminary ruling, effectively blocks the issuing of the decision on the question referred[2].

The possibility for the courts of higher instance to change the provisions for requesting a preliminary ruling may definitely limit the right of the national courts to refer questions for a preliminary ruling to the Court of Justice. This is possible if the court of higher instance issuing the order may cause that such a request becomes ineffective and the court seeking a preliminary ruling resumes the suspended main proceedings.

In the Court's case-law, it was settled that the right of a national court to ask a question for a preliminary ruling can not be undermined because it applies the provisions of national law on the right to challenge a decision to refer a question to the Court for a preliminary ruling and

[1] I. Skomerska- Muchowska, *Pytania prejudycjalne sądów krajowych*, 306.
[2]S. Biernat, *Współpraca sądów państw członkowskich z ETS w ramach procedury pytań prejudycjalnych*, [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, (Warszawa: J. Barcz, 2006): I-391.

allows the appellate court to change that decision, annul it, and order the court which has made the request for a preliminary ruling to resume the suspended national proceedings. Therefore, the Court of Justice should, for the sake of clarity and legal certainty, treat the order of referral as binding and should be effective until it is withdrawn or amended by the court which issued it, because only this court can decide about its withdrawal or change"[1]. The assumption formulated in this way allows for simultaneous consideration of the procedural autonomy applicable to the legal systems of the Member States, while ensuring the effective use of national courts for the right to request a preliminary ruling.

It should be borne in mind that with the question for a preliminary ruling, the main case is not referred to the Court, because it is not a court of higher instance in relation to national courts and these courts do not form a hierarchical system with the Tribunal[2].

## ENTITIES AUTHORISED TO REFER A PRELIMINARY RULING

Based on article 267 TFEU, the courts of the Member States have the right to refer questions for a preliminary ruling to the Court of Justice of the European Union. However, the Treaty itself does not formulate the concept of court. This definition should be sought in the jurisprudence of the Court of Justice, which is inconsistent in this regard and is sometimes contradictory. There is no doubt, however, that "court" is the term of EU law and its interpretation should be made in accordance with the autonomous interpretation of the Tribunal. It assesses its competence to answer a question for a preliminary ruling from the point of view of an entity authorized to do so, so the Tribunal itself decides which entity falls within the scope of the term "national court"[3]. Viewed from the perspective of the Court's case-law so far, it can be concluded that many entities can be authorized as a court, which in fact do not have such status in the national system. When making an analysis in this

[1]Cyt. za I. Skomerska- Muchowska, *Pytania prejudycjalne sądów krajowych*, [in:] *System ochrony prawnej w Unii Europejskiej*, (Warszawa: A. Wyrozumska, 2010): V-308.
[2] Ibidem.
[3]M. Taborowski, *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe*, (Warszawa, 2012): 33.

respect, the Tribunal is usually guided by several criteria that do not have to be fulfilled jointly: the creation of a given body on the basis of the law, its entitlement to adjudicate in the dispute procedure, adjudication on the basis of law and an independent nature[1]. The Tribunal, in determining the subject's jurisdiction to refer a question for a preliminary ruling, is guided by its position, as well as by the functions added and performed by that body[2].

One of the most important indications in this regard, which are referred by the Court, were contained in the judgment in Case C-96/04 Standesamt Stadt Niebüll, according to which „in order to determine whether the referring body is a court (...), which is an internal matter of the community legal order, the Tribunal is guided by the whole circumstances of the case, in particular the legal basis of the existence of the body, its permanent or temporary character, the obligatory nature of its jurisdiction, adversarial proceedings, the application by the authority of the law and its independence"[3].

## SCOPE OF THE PRELIMINARY RULINGS

Based on Article. 267 TFEU, national courts may ask questions for a preliminary ruling regarding the interpretation of European Union law. It should be emphasized that national courts have the right, and in some cases they are even obliged to submit a question for a preliminary ruling. The courts are obliged to submit a preliminary ruling, from which the decision can not be appealed. Significant relaxation of this obligation took place on the basis of the ruling of the Court of Justice in case 283/81 CILFIT and others against Minister della Sanitá[4]. The CILFIT formula was then defined, which is:„ A court whose decisions are not subject to

[1] R. Ostrihansky, *Współpraca sądów krajowych z Trybunałem Sprawiedliwości*, [in:] *Prawo instytucjonalne Unii Europejskiej*, (Warszawa: M. M. Kenig- Witkowska, 2006): 355.

[2] M. Taborowski, *Konsekwencje naruszenia*, 33.

[3] Ruling of 27 April 2006 in the case C-96/04 *Standesamt Stadt Niebüll*; see inter alia rulings from: 17 September 1997 in the case C-54/96 *Dorsch Consult*; from 21 March 2000 in joined cases from od C-110/98 to C-147/98 *Gabalfrisa i in.*; from 14 June 2001 in the case C-178/99 *Salzmann*, and from 15 January 2002 in the case C-182/00 *Lutz i in*.

[4] Ruling of 6 October 1982 in the case C-283/81 *Srl CILFIT i Lanificio di Gavardo SpA v. Ministero della Sanità.*

an appeal under domestic law is obliged - if a question about Community law arises before it - to fulfill its obligation to submit a question, unless he has stated that the question raised is not relevant to the case or that a particular provision of Community law has already been the subject of the interpretation of the Court, or that the correct application of Community law is so obvious that it leaves no room for any reasonable doubt; the existence of such an eventuality must be assessed in the light of the characteristics of Community law and the specific difficulties of its interpretation and the danger of divergence in case-law within the Community".

The above decision of the Tribunal has become the basis for determining situations in which the last instance court is not obliged to refer the question for a preliminary ruling to the Court of Justice. Such cases occur when:

- a decision on the interpretation of EU law is not necessary to rule on the matter;;
- the decisions previously issued by the Court have already referred to the legal issues to which the question relates, irrespective of the type of procedure leading to these decisions, also where the matters concerned are not completely identical;
- the application of EU law is so obvious that it does not raise any doubts.

Having regard to the foregoing, it can be concluded that the referring court is entitled to refer the question to the Court of Justice if it states that obtaining the answer to that question is necessary for the resolution of the dispute before it[1]. It is for the national court to decide on which judgments can not be appealed under domestic law, to ask the Court for a preliminary ruling. However, if the Court has previously ruled on such a matter in a similar case and it has already been clarified by it, the national court is relieved of that obligation[2].

[1]See Information note on the submission of requests for preliminary rulings by national courts, 2011/C 160/01, OJ UE C from 28 May 2011, § 11.

[2]J. Skrzydło, „Doktryna acte éclairé w orzecznictwie Trybunału Wspólnoty Europejskiej i sądów krajów członkowskich Unii Europejskiej", *Studia Prawno-Europejskie*), t. 2 (1997): 143 and on.

## APPLYING FOR A PREJUDENTIAL QUESTION AND EFFECTS OF PREJUDENTIAL DECISIONS

The specific form of the ruling on the basis of which a national court should turn to the Court of Justice is not provided for in the Treaty. Above all, it must be remembered that this document will be the basis for proceedings before the Court of Justice, so the Court must have the necessary data to allow the necessary response from the national court. It is worth emphasizing that the request for a preliminary ruling is the only document conveyed to the entities entitled to submit observations to the Court, in particular to Member States and institutions, and translated into other languages[1]. The application should be written in a simple, clear and precise manner and should not contain unnecessary data[2] due to the fact that it must be readable by the Tribunal and other entities that take part in the proceedings.

The ruling of the Court of Justice in the context of the preliminary ruling procedure is binding on the national court, which has referred the question to the court for a preliminary ruling. The ruling is also binding for the higher courts that deal with the case as a result of appeals. Thus, it can be said that this means that in a given case the court of a Member State is obliged to take into account the interpretation of the norm of EU law indicated by the Tribunal, and in the case of a question regarding the invalidity of an EU law, the national court has to circumvent these provisions.

The decision given in the preliminary ruling procedure, both concerning interpretation and validity, has binding force from its announcement. As a rule, they cause the effect of *ex tunc*[3]. However, in special cases, the Tribunal may limit the effects of its decisions in time. Such an eventuality is possible in case of a decision *ex tunc* caused

[1]Information note on the submission of requests for preliminary rulings by national courts, 2011/C 160/01, OJ UE C from 28 May 2011, § 20.

[2]Information note on the submission of requests for preliminary rulings by national courts, 2011/C 160/01, OJ UE C from 28 May 2011, § 21.

[3]D. Miąsik, *Skutki prawne orzeczenia wstępnego Europejskiego Trybunału Sprawiedliwości z perspektywy efektywności prawa wspólnotowego*, [in:] *Prawne problemy członkostwa Polski w Unii Europejskiej*, (Lublin: L. Leszczyński, 2005): 50 and on.; I. Skomerska- Muchowska, *Pytania prejudycjalne sądów krajowych*, [in:] *System ochrony prawnej w Unii Europejskiej*, (Warszawa: A. Wyrozumska, 2010): V-359.

serious effects or other adverse financial consequences for the entities that apply EU law in good faith.

## CONCLUSION

The assumption for which the preliminary rulings were introduced was to avoid discrepancies in the interpretation and different application in the Member States of the same EU provisions, which could have arisen from the tradition or legal culture of the Member States. Discrepancies in the application of EU law could also result from different constitutional solutions in the relationship between the internal and external law.

Because the European Union is based on the idea of integration, where EU law is established by the Treaty or as part of non-state legislative procedures, then it is incorporated into national legal orders. The subjects of this right are not only the Member States but also their citizens. Thus, national courts are obliged to apply EU law which is not an internal law and still has autonomous features. The question referred for a preliminary ruling concerns the interpretation of EU law provisions applicable in a specific case. The essence of the question referred is to ensure a uniform interpretation and application of EU law in all the Member States, because in accordance with the principle of the primacy of EU law, the national court applies Union law in the event of a conflict between Union law and national law.

## BIBLIOGRAPHY

### Books

1. Biernat, S.. *Współpraca sądów państw członkowskich z ETS w ramach procedury pytań prejudycjalnych*, [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, Warszawa: J. Barcz, 2006
2. Miąsik, D. *Skutki prawne orzeczenia wstępnego Europejskiego Trybunału Sprawiedliwości z perspektywy efektywności prawa wspólnotowego*, [in:] *Prawne problemy członkostwa Polski w Unii Europejskiej*, Lublin: L. Leszczyński, 2005.
3. Ostrihansky, R.. *Współpraca sądów krajowych z Trybunałem Sprawiedliwości*, [in:] *Prawo instytucjonalne Unii Europejskiej*, Warszawa: M. M. Kenig- Witkowska, 2006.

4. Skomerska-Muchowska, I.. *Pytania prejudycjalne sądów krajowych*, [in:] *System ochrony prawnej w Unii Europejskiej*, Warszawa. A. Wyrozumska, 2010.
5. Taborowski, M.. *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe*, Warszawa, 2012.
6. Wąsek-Wiaderek, M... *Funkcja instytucji pytań prejudycjalnych*, [in:] *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, Warszawa: M. Wąsek- Wiaderek, E. Wojtaszek- Mik.,2007

**Articles in a print journal**

1. Skrzydło, J.. „Doktryna acte éclairé w orzecznictwie Trybunału Wspólnoty Europejskiej i sądów krajów członkowskich Unii Europejskiej", *Studia Prawno- Europejskie*, no 2 (1997)

**Legislation**

1. First protocol to the Rome Convention on the law applicable to contractual obligations of 1989.
2. Information note on the submission of requests for preliminary rulings by national courts, 2011/C 160/01, OJ UE C from 28 May 2011.
3. Ruling of 27 April 2006 in the case C-96/04 *Standesamt Stadt Niebüll*; see inter alia rulings from: 17 September 1997 in the case C-54/96 *Dorsch Consult*; from 21 March 2000 in joined cases from od C-110/98 to C-147/98 *Gabalfrisa i in.*; from 14 June 2001 in the case C-178/99 *Salzmann*, and from 15 January 2002 in the case C-182/00 *Lutz i in*.
4. Ruling of 6 October 1982 in the case C-283/81 *Srl CILFIT i Lanificio di Gavardo SpA v. Ministero della Sanità.*

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# THE RIGHT OF A POLISH CITIZEN TO EU CONSULAR PROTECTION

**Ewa ŻOŁNIERCZYK**[1]

***Abstract:***

*This article is about the issue of EU consular protection over a Polish citizen during a stay abroad. This problem is now regulated by art. 20 and 23 of the Treaty on the Functioning of the EU. According to art. 23 of the Treaty "every citizen of the Union benefits on the territory of a third country where the Member State of which he is a national, he has no representation, no diplomatic and consular protection of each of the other Member States under the same conditions as nationals of that State. Member States shall adopt the necessary provisions and enter into the international negotiations required to ensure this protection". The care offered by consulates usually includes help in cases of death, assistance in cases of serious accident or illness, assistance in the event of arrest or detention, assistance to victims of violence or assistance in returning to the country to citizens deprived of financial resources. The exercise of consular protection over the citizens of the sending State is the core of consular functions, hence, it is so important to provide it even in a situation where the sending State does not have a consular representation in a given country. The topic raised in the article concerns an important problem of the implementation not only of art. 23 of the Treaty on the functioning of the EU, but also art. 36 of the Constitution of the Republic of Poland. Currently, the catalog of activities undertaken within the framework of broadly understood consular protection is still growing. Over the years, with the increase in the wealth of societies, citizens are increasingly traveling, and travels are not limited only to countries neighboring their country of origin, but they are heading in the directions of the most distant and exotic corners of the world. Consuls are expected to intervene in all the problems faced by citizens staying outside the country. The legal provisions applicable in the host country have a large impact on the scope of the consul's tasks, international regulations, regulations resulting from bilateral and multilateral agreements, but also realities and conditions, culture, geographic locations of the consul's state of operation.*

***Key words:*** *The EU consular protection; the Polish citizen; the EU law; the Constitution of the Republic of Poland*

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The subject of EU consular protection is rarely discussed. It appears mainly as an additional topic when addressing the issue of citizenship of the European Union, while it remains very important especially from a practical point of view. Currently, the issue of Community diplomatic and consular protection is regulated by art. 23 of the Treaty on the Functioning of the European Union, according to which „Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection. The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection."[1]. The provision indicates that the citizens of the European Union are entitled to the right of protection, and therefore it is necessary to refer to the content of art. 20 of the TFEU to clarify the concept of 'EU citizenship'.

Every person holding the nationality of a Member State shall be a citizen of the Union. The citizenship is additional to national citizenship and does not replace it. A prerequisite for exercising the rights correlated with EU citizenship is to prove national citizenship (national of a Member State). In principle, it will not be possible to establish a node of EU citizenship without a previously established national citizenship. From the point of view of citizenship of the Union the internal regulations of the Member States, determining the conditions for the acquisition and loss of national citizenship, are of decisive importance[2]. That is a consequence of the relationship or co-shaping of European citizenship by the rules of the two legal systems: national and EU. On the one hand, the provisions of the TFEU relate to European citizenship, on the other hand citizenship can not exist without national citizenship[3]. EU citizenship is therefore accidental in nature against the national one. It is

[1] Treaty on the functioning of the European Union from 2004, No. 90, item 864/2, hereinafter referred to as TFEU.
[2]E. Żołnierczyk, *Sytuacja obywatela polskiego w sferze administracji spraw zagranicznych* (Wrocław, 2010, typescript) 141.
[3] As above.

important that recognition as a citizen of a Member State automatically and unconditionally leads to a Union citizenship (European Union law does not provide for any separate - in relation to national procedures of the Member States or a special EU procedure for granting EU citizenship). In this approach, it can be concluded that it is indisputable on the basis of which principles and in what mode the acquisition of national citizenship took place, it is only important to determine whether such actual acquisition has taken place, and if so, automatically acquires EU citizenship. The question of whether or not a person resides in or outside of the Union is irrelevant. This finding is relevant to determine whether an individual may benefit from the EU consular protection. Apart from the sphere of considerations, other rights have been left to citizens of the Union, in particular the right to diplomatic protection, the right to move freely, because these go beyond the subject taken in this text.

As indicated by EU law citizens are entitled to consular protection, therefore, to people who are citizens of one of the Member States[1]. Community protection has been introduced as an alternative to national diplomatic and consular protection for citizens residing temporarily or permanently in one of the third countries. It seems correct to accept that the role of community protection is to fulfill the role of national care in situations when the latter can not be actually performed for various reasons[2]. The regulation contained in art. 23 TFEU is so vague that it is difficult to answer the question on what principles the community protection is granted. The term "protection" is also questioned, not consular and diplomatic care as having a much broader scope. As M. Muszyński rightly points out, the term "protection" refers only to a fragment of what is traditionally understood by the term "care"[3].

[1] A different position is presented by M. Muszyński, who emphasizes that the subjective scope of art. 20 TFEU also covers legal entities established in one of the Member States. According to the author, the accepted interpretation remains indisputable, especially in the context of the recognition of diplomatic and consular protection for these entities in international law, *Opieka dyplomatyczna i konsularna w prawie wspólnotowym*, „Kwartalnik Prawa Publicznego" 3 (2002): 149.

[2] C. Mik, *Wkład Unii Europejskiej w rozwój prawa międzynarodowego publicznego (zarys problematyki),* [in:] C. Mik (ed.), *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji sześćdziesiątej rocznicy urodzin Profesora Janusza Gilasa*, (Toruń 1997), 323 and on.

[3] M. Muszyński, *Opieka dyplomatyczna,* 151.

From the content of art. 23 TFEU we can only derive the conditions for granting protection, ie protection is granted on the same principles as protection granted to other citizens of a given Member State and is granted only under conditions where the state whose citizenship the person in need has, has no representation in the state of residence of the citizen. Article 23 does not settle(even if, for example), which situations can cause intervention on the part of another Member State, what should be done in a situation where, for example the scope of national healthcare is narrower than the scope of care provided "as a substitute" by another Member State. It seems that EU citizens can benefit from consular protection in any situation that requires intervention.

The determination of the lack of representation of a Member State in the country of residence may raise doubts. In particular, a discussion should be made as to whether the institution of the honorary consul should be treated as a lack or as the existence of a representative office[1]. As a rule, the scope of the function of the honorary consul in relation to the professional consul is limited, which does not defend the thesis that the honorary consul is not a representative of the sending state. The author of the considerations is of the opinion that determining the scope of competencies of the honorary consul should be based on the internal regulations of individual Member States, specifying which functions on behalf of the sending State can be performed by the honorary consul in the host country. It should be acknowledged that the fact that a Member State has a representative office in the form of an honorary consul in a third country should eliminate the possibility of applying for Community consular protection, since art. 23 of the TFEU, there is clearly a condition that if there is no representation in the country of residence of the citizen, the presence of an honorary consul can not be recognized as such.

It is worth paying attention to the fact that art. 23 TFEU introduced the principle according to which „Every citizen of the Union

[1] The Honorary Consul is a consular officer of the sending State in the host country. Unlike professional consuls, he does not receive any remuneration for his work. As a rule, the honorary consul can perform all the same functions as the professional consul, although sometimes he is entrusted with a narrower scope of duties. In countries where the sending state is not represented by diplomatic missions or by a professional consul, the honorary consul is usually treated as an "official representative" of the state and invited to state ceremonies as such. Honorary consuls are usually citizens of the host country.

shall, (...), be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State". The quoted text of art. 23 TFEU does not imply that a citizen has a claim to grant him protection, it only refers to the citizen's use of protection under the same conditions on which assistance is provided to other citizens of a Member State. The question should be asked what happens when a given Member State is not obliged to provide protection to its own citizen in a given situation. Will it not be obliged to protect the citizen of another Member State in this case? It seems that it will not have to provide such protection, since art. 23 TFEU speaks only of providing protection under the same conditions as the protection granted to its own citizens, and since protection for its own citizens is not factually provided, it can not be demanded by citizens of other Member States. The situation should be considered only hypothetically, because it is difficult to imagine a situation that the state would not provide protection for its own citizen during a stay abroad (regardless of the nature of the stay). Most often, countries regulate the issue of diplomatic and consular protection in their basic laws[1]. In Poland, the issue of consular protection is regulated by art. 36 of the Constitution of the Republic of Poland[2], according to which "a Polish citizen has the right to protection from the Republic of Poland during a stay abroad". Every state has the right to provide care to its own citizens and, in principle, this right is undisputed and unquestionable from the point of view of international legal regulations. The issue of protection provided by the Polish state for the benefit of its own citizens was specified in the Act of June 25, 2015 - Consular Law[3]. Article 20 of the Consular law shows the citizen's right to consular protection in the event of a serious accident or serious illness, arrest or imprisonment, as well as in the event of an act of violence against a Pole in the event of death or the necessity of an abrupt return to the country or state of residence by a citizen deprived of funds.

[1]In Poland, the issue of care is regulated by art. 36 of the Constitution of the Republic of Poland, according to which "during a stay abroad a Polish citizen has the right to receive protection from the Republic of Poland". The right of the state to provide protection to its citizens is undisputed and unquestionable by both the internal laws of the states and international law, additionally, see E. Żołnierczyk, op. cit., p. 178 and on.
[2] Journal of Laws from 1997, No 78, item. 483.
[3] Journal of Laws from 2017 item. 1545 as amended, the act replaced the Act of 13 February 1984, on the functions of consuls of the Republic of Poland (Journal of Laws from2015, item 389).

Assistance is provided only to the extent necessary and with the application of measures necessary to protect the essential rights and interests of the Polish citizen. A question arises whether it is justified that that a citizen of a Member State in the situation described in art. 23 TFEU has the right to consular protection under the same rules (and also in analogous situations) like a Polish citizen? Article 23 of the TFEU refers to the right to protection, and the right to care derives from the Constitution of the Republic of Poland. It seems that it would be right to accept that a citizen of a Member State will have the right to care referred to in Article 36 of the Constitution, when it finds itself in the situation described in art. 23 TFEU, since the Polish legislator uses the concept of care rather than a narrow concept of protection. It is worth noting that on the Polish side of the Ministry of Foreign Affairs the term "care" is used in relation to community care, but it does not protect, as it results from art. 23 TFE[1].

It should be noted that the nature of protection as referred to in art. 20 TEC, is not the same. The Treaty requires all Member States to ensure that all EU citizens the same protection they provide to their nationals. There are as many different protection systems as there are in the Member States. These systems can substantially differ from each other in terms of scope and power of legal protection (eg. in most Member States it is not expected to appeal against a decision to refuse protection)[2].

It should be stressed that community consular and diplomatic protection is carried out on the territory of a third country and in accordance with the international law regulations on the mutual relations between the host and sending states. In fact, a third country should give consent to the provision of care. The right to protection is a civil right, which should be guaranteed by the Member States, but its enforceability depends on the will of a third country that could take steps to block the possibility of protection. According to art. 8 of the Vienna Convention on Consular Relations, it is possible for the host State to object to the

[1]http://www.msz.gov.pl/pl/informacje_konsularne/polak_za_granica/w_razie_klopotow/prawo_obywatela_ue_do_opieki_konsularnej, [date of download: 30.04.2018].
[2] Ibidem, p. 180.

exercise of consular functions for the benefit of a third State[1]. The same is true of the Vienna Convention on Diplomatic Relations, which underlines the dominant decision-making position of a third country[2]. According to art. 46 conventions on diplomatic relations: „*A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals*". Currently, the only requirements for mobilizing protection on the territory of a third country are prior notification and no objection from the host country.

The introduction of the institution of community diplomatic and consular protection is the fruit of the cooperation of the Member States in the framework of the Common Foreign and Security Policy. At the same time, the Community knowledge in this area is still negligible, basically just to the regulation of art. 23 TFEU, and the need to strengthen the Community diplomatic and consular protection of the institution grows almost from year to year.

Article 23 TFEU acquires significant importance in connection with the observed increase in the year-on-year travel of citizens - not only Polish but other EU Member States to third countries as well. It is not uncommon for Europeans to decide to live in one of these countries and then the issue of protecting them becomes all the more important. The need for continuous development of diplomatic and consular protection within the framework of effective cooperation between Member States should be emphasized. In today's era, particular emphasis should be placed on information activities, developing citizens' awareness that this form of protection exists, that it is the right of every citizen of the European Union. Already in 2007, the Green Paper on diplomatic and consular protection of EU citizens in third countries[3] stressed the need to systematically develop a system of information on the right to diplomatic and consular protection by distributing brochures,

[1] M. Muszyński, *Konwencja wiedeńska o stosunkach konsularnych. Komentarz*, (Bielsko Biała 2003): 43. The norm in art 8 allows you to perform consular functions in the receiving state for the benefit of a third country.
[2] *Ibidem, p.* 127. Additionally, see C. Mik, *Wkład Unii Europejskiej w rozwój prawa międzynarodowego publicznego (zarys problematyki)*, [in:] Mik C. (ed.), *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji sześćdziesiątej rocznicy urodzin Profesora Janusza Gilasa* (Toruń,1997): 323.
[3] OJ EU 2007/C 30/04.

informing on the Europa website and intranet sites of Commission delegations in third countries , posting at airports, in ports, at stations and in all other relevant places, and creating special citizen IT services. The Green Paper also emphasizes that if a Member State does not have an embassy or consulate in a third country that its citizen goes to, that citizen must have access to information about embassies or consulates of other Member States in that country. In order to implement this postulate, the Green Paper also proposed publishing and updating contact details of embassies and consulates of the Member States represented in each third country. It would be reasonable to post the content of art. 23 TFEU in passports, which would increase the implementation of the principle to inform citizens about their rights.

The Polish Ministry of Foreign Affairs regularly publishes various warnings about threats that may occur in particular regions of the world on its website, as well as in the form of a message in the mass media. The MFA warns against travel and makes recommendations. It would be desirable to harmonize the message and recommendations for travelers - EU citizens in all Member States, because observations on the type of risk, refraining from specific behaviors and so on, may vary in different EU countries depending on the level of knowledge about the country of citizens' travel. Moreover, the referral from the website of the Polish Ministry of Foreign Affairs to the website of the European Commission in the scope of community consular protection should be assessed negatively, as the reference is made to the English version of the website, and this can be a significant obstacle for Polish citizens in determining what such care consists of and in which situations a citizen is entitled to it.

Introduction in art. 23 TFEU of Community diplomatic and consular protection is the beginning of harmonization work on providing citizens of the European Union with common diplomatic and consular protection. Member States should strive to create a completely new institutional network, where all the imperfections of current EU diplomatic and consular protection could be eliminated. The importance of the development of European diplomatic and consular protection is nowadays fundamental. It must be a real right, enjoyed on an equal basis by all citizens of the Union. Therefore, it is important to conduct actions that exclude currently existing irregularities and inequalities in the

treatment and protection of citizens resulting from the discretionary powers of consuls[1].

The adoption of common uniform patterns of conduct by Member States would certainly exclude inequalities resulting from art. 23 TFEU regarding the provision to a citizen of the Union, when there is no representation of the sending State in a third country, the care of any other Member State under the same conditions as nationals of that State. In practice, as has already been noticed, inequalities may arise, resulting from various forms of protection that are formulated in the internal regulations of the Member States. This is not about entering the field of internal legislation, but about creating a common, uniform course of action in the event of the need to exercise the right to the Community diplomatic and consular protection.

Community diplomatic and consular protection is a right which can only be exercised by an individual holding citizenship of the Union. Against this background, in practice, there is a doubt about what is happening in the need to provide protection to the family members of a Union citizen. According to art. 23 TFEU only the protection of an EU citizen is brought out, not members of his family who do not hold EU citizenship. In this respect, it seems necessary to take measures that could eliminate the difficulties in using diplomatic and consular protection by family members of an EU citizen.

The community diplomatic and consular protection is an important element of Union citizenship. As an institution without a long lineage, however, it requires constant changes to improve and eliminate the existing ones. It is worth to take an effort, because in practice it is of great importance, often greater than other rights resulting from the EU citizenship bond. The practical meaning of art. 23 TFEU should be stressed. The relatively large number of Member States still does not have representation in many third countries, and, according to K. Kowalik-Bańczyk, only three Member States are currently represented in all Member States[2]. Actions should be taken as a result of which the right

[1] E. Żołnierczyk, op. cit., p. 183.
[2] D. Mąsik, N. Półtorak, A. Wróbel (red.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz, Tom I, art. 1-89, availabe on:* https://sip.lex.pl/#/commentary/587327097/124537/miasik-dawid-red-poltorak-nina-red-wrobel-andrzej-red-traktat-o-funkcjonowaniu-unii-europejskiej...?cm=URELATIONS, [date of download: 27.04.2018].

to community diplomatic and consular protection would become a factual right and not an illusory one.

## BIBLIOGRAPHY

**Books**

1. Mik, C... *Wkład Unii Europejskiej w rozwój prawa międzynarodowego publicznego (zarys problematyki)*, [in:] C. Mik (ed.), *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji sześćdziesiątej rocznicy urodzin Profesora Janusza Gilasa*, Toruń, 1997
2. Muszyński, M.. *Konwencja wiedeńska o stosunkach konsularnych. Komentarz*, Bielsko Biała, 2003.

**Journal in a print journal**

1. Muszyński, M.. „Opieka dyplomatyczna i konsularna w prawie wspólnotowym", *Kwartalnik Prawa Publicznego*, no. 3 (2002).
2. Żołnierczyk E... *Sytuacja obywatela polskiego w sferze administracji spraw zagranicznych*, Wrocław, 2010

**Legislation**

1. Journal of Laws from 2017 item. 1545 as amended, the act replaced the Act of 13 February 1984, on the functions of consuls of the Republic of Poland (Journal of Laws from2015, item 389).
2. Treaty on the functioning of the European Union from 2004, No. 90, item 864/2.

**Websites**

1. http://www.msz.gov.pl/pl/informacje_konsularne/polak_za_granica/w_razie_klopotow/prawo_obywatela_ue_do_opieki_konsularnej.
2. Mąsik, D. And Półtorak N. And Wróbel A. (red.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz, Tom I, art. 1-89,available* https://sip.lex.pl/#/commentary/587327097/124537/miasik-dawid-red-poltorak-nina-red-wrobel-andrzej-red-traktat-o-funkcjonowaniu-unii-europejskiej...?cm=URELATIONS

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# THE ROLE AND SCOPE OF POWERS OF THE CONSTUTIONAL TRIBUNAL IN POLAND

**Anna RYTEL-WARZOCHA**[1]

***Abstract:***

*Constitutional judiciary plays an important role in contemporary constitutional orders based on the principles of democracy, the rule of law and the division of powers, regardless of institutional solutions adopted in individual states. Due to the high authority of these bodies, resulting primarily from their highly qualified composition, constitutional courts not only fulfill their basic function of reviewing the constitutionality and legality of law, but also receive a number of specific competences that go beyond this function. The analysis presented in the article focuses on the role and the scope of competences of the Polish Constitutional Tribunal with regard to the abstract and concrete constitutional review, as well as other competences not directly related to the review of law.*

***Key words:*** *Constitutional Tribunal; constitutional review; constitutional complaint; discupetes over authority; legal questions*

## INTRODUCTION

Constitutional judiciary plays an important role in contemporary states based on respect the principles of democracy, the rule of law and the division of powers, regardless of institutional solutions adopted in individual states. Due to the high authority of these bodies, resulting primarily from their highly qualified composition, constitutional courts not only fulfill their basic function of reviewing the constitutionality and legality of law, but also receive a number of specific competences that go beyond this function.

Constitutional judiciary did not exist in Poland before the II World War. It was neither introduced to the Constitution of March 1921[2]

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[2] Constitution of the Republic of Poland of 17 March 1921, Official Journal of Laws „Dziennik Ustaw" 1921, No 44, item 267.

based on principles modeled on the system of the Third French Republic nor the Constitution of April 1935[1] which provided for the review of statutory law by common and administrative courts. After the II World War, the Soviet model of the unity of all state power was also not conducive to the introduction of an external authority, independent and difficult to be politically subordinated, which could control the legislative power. Despite the fact that the necessity to establish judicial review was expressed in the Polish doctrine of constitutional law, the possibility for that came with the beginning of the 1980-ties when the restless social moods and the activities of the Solidarity movement pushed Poland towards democratic reforms. The Constitutional Tribunal was established in Poland on the 26 March 1982[2] during the period of martial law. However, the constitutional provisions on the Constitutional Tribunal were ineffective until 1985 when the appropriate statutory regulations were issued. The Act on the Constitutional Tribunal was adopted on 29 April 1985[3] after long disputes as to its specific form. At the beginning of 1986 the composition of the court was established and the first judgement was issued on 28 May 1986. The main weakness of the then regulation was that the judgements of the Constitutional Tribunal were not final as the parliament could overrule the Tribunal's decisions by a resolution adopted with a two-thirds majority vote. Such limitation was rooted in the constitutional principle of the unity of power and the principle of the superior position of the Parliament, according to which the acts of the Parliament - the highest representative body - could not be controlled by any other non-parliamentary authority[4]. The Constitutional Tribunal's judgements were not final untill 1999.

[1] Constitution of the Republic of Poland of 23 April 1935, Official Journal of Laws „Dziennik Ustaw" 1935, No 30, item 227.
[2] Law of 26 March 1982 on the amendment of the Constitution of the People's Republic of Poland, Official Journal of Laws „Dziennik Ustaw" 1982, No 11, item 83.
[3] Law of 29 April 1985 on the Constitutional Tribunal, Official Journal of Laws „Dziennik Ustaw" 1985, No 22, item 98.
[4] Wiesław Kraluk, „Trybunał Konstytucyjny," in *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, ed. Andrzej Szmyt (Warszawa: C.H. Beck, 2010), 622.

# CONSTITUTIONAL POSITION OF THE CONSTITUTIONAL TRIBUNAL

The current legal regulation concerning the Constitutional Tribunal is provided in the Constitution of the Republic of Poland of 1997[1] and two statutes – the Act of 20 November 2016 on the organization of the Constitutional Tribunal and the mode of proceedings before the Constitutional Tribunal[2] and the adopted on the same day the Act of 30 November 2016 on the status of the judges of the Constitutional Tribunal[3]. However, it is worth mentioning that the first law on the Constitutional Tribunal under the new Constitution was adopted in August 1997 so the same year as the Constitution and it was in force for 18 years not raising significant constitutional or political problems, although it was amended eight times. The problems appeared in 2015 when the new law on the Constitutional Tribunal was adopted on 25 June 2015[4]. It did not radically change the existing structure of the Tribunal and was mainly supposed to improve the functioning of the Tribunal. The only controversial provision was art. 137 which provided that the candidates for new judges of the Tribunal who were to be nominated in place of all judges whose term of office was passing in 2015 could be proposed in the condensed time frame of 30 days from the entry of the law into force. This allowed the previous ruling party to choose five new judges including two for places that were to be vacant in December 2015 so after the parliamentary elections. The previous parliament took advantage of such possibility and chose five new judges to the Constitutional Tribunal on 8 October 2018 at its last seating. This provoked the dispute between the previous and the current ruling parties

[1] Constitution of the Republic of Poland of 2 April 1997, Official Journal of Laws „Dziennik Ustaw" 1997, No 78, item 483, with later amendments.
[2] Law of 30 Noveber 2016 on the organisation of the Constitutional Tribunal and the mode of proceedings before the Constitutional Tribunal, Official Journal of Laws „Dziennik Ustaw" 2016, item 2027.
[3] Law of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal, Official Journal of Laws "Dziennik Ustaw" 2016, item 2073.
[4] Law of 25 June 2015 on the Constitutional Tribunal, Official Journal of Laws „Dziennik Ustaw" 2015, item 1064, with later amendments.

which resulted in the constitutional crises that last until now[1]. The law of 2015 was replaced by the new law on the Constitutional Tribunal of 22 July 2016, however, in November 2016 two new laws above mentioned were adopted by the parliament which repealed previous acts.

The Constitution of 1997 has changed and significantly strengthened the legal position of the Constitutional Tribunal in Poland. Art. 173 of the Constitution has clearly settled that Tribunals together with courts constitute a separate power independent of other authorities. It is also stressed that the judges of the Constitutional Tribunal are independent in the exercise of their office and subject only to the Constitution (art. 195 par. 1). According to the Constitution, the Tribunal's rulings are passed by the majority of votes (art. 190 par. 5), they are universally binding and final, and shall be immediately published in the official journal of laws, in which the questioned normative act has been published (art. 190 par. 1 and 2). The Tribunal's judgement on the incompatibility of a normative act on the basis of which a legally effective judicial judgment, a final administrative decision or a settlement on other matters was issued with the Constitution, an international agreement or a statute, is the basis for the resumption of the proceedings, quashing the decision or other settlement in a manner specified by the appropriate provisions (art. 190 par. 4 of the Constitution).

According to art. 194 of the Constitution, the Constitutional Tribunal is composed of 15 judges chosen individually by the Sejm for a term of office of nine years from amongst "persons distinguished by their knowledge of law". The statutory provisions specify that in order to became a judge of the Constitutional Tribunal it is required to be qualified to hold the post of a judge of the highest courts in Poland – the Supreme Court or the Supreme Administrative Court. The status of a judge is primarily defined by the principle of independence: according to art. 195 p. 1 of the Constitution, the judges "in the exercise of their office, shall be independent and subject only to the Constitution". No person may be chosen for more than one term of office, so the re-election of a constitutional judge is not permitted (p. 1). The President and the Vice-President of the Tribunal are appointed by the President of the

[1] See more: Anna Rytel-Warzocha, Andrzej Szmyt, "The new law of 2016 on the Constitutional Tribunal in Poland," *Annales Universitatis Apulensis. Series Jurisprudentia* no 19 (2016): 263-290.

Republic from among candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal (p. 2). The judges of the Constitutional Tribunal are granted an immunity so they cannot be criminally liable or deprived liberty without the consent of the General Assembly. Constitutional judges cannot hold public offices (*incompatibilitas*) as well as undertake political activity, they cannot belong to political parties or trade unions and they shall not perform public activities incompatible with the principle of the independence of the courts and judges (art. 195 p. 3 of the Constitution).

The Constitution of the Republic of Poland has clearly defined the scope of the Constitutional Tribunal's jurisdiction. The competences of the Tribunal have been expressly granted to this body in the Constitution and cannot be extended or limited by statutory provisions. All the Constitutional Tribunal's tasks can be divided in two groups – the first one strictly connected with the constitutional review of normative acts and the second one including additional competences granted to the Constitutional Tribunal because of its high recognition and respect. The second group of the Constitutional Tribunal's competences which do not relate to constitutional review of norms includes adjudicating on the conformity to the Constitution of the purposes or activities of political parties (art. 188 p. 4), settling of disputes over authority (art. 189) and determining whether or not there exists an impediment to the exercise of the office by the President of the Republic (art. 131 par. 1).

## ABSTRACT CONSTITUTIONAL REVIEW OF LAW

The primary function of the Constitutional Tribunal is the review of hierarchical conformity of legal norms. In Poland, the typical "European model" of constitutional review developed by Hans Kelsen[1] has been implemented. The basic feature of this model is the centralisation of the review so only the Constitutional Tribunal in Poland is empowered to conduct constitutional review. Additionally, according to Kelsen, constitutional review should be abstract. In Poland the Constitutional Tribunal examines the constitutionality of legal norms which are in force no matter they have been applied in practice or not.

[1] See more : Victor Ferreres Comella, "The European model of constitutional review of legislation: Toward decentralization ?," *I.CON, Oxford University Press and New York University School of Law*, Vol. 2, 3(2004): 461-491.

Nevertheless, the abstract review is the basic but not the exclusive way of reviewing law as there are also two cases of concrete review provided by law. The third feature is the general effect (*erga omnes*) of the judgment stating that the law under review is unconstitutional. The Constitutional Tribunal's judgements are universally binding and are effective on the date of their publication in the official journal of laws. It means that unconstitutional provisions lose their binding force at that moment unless the Tribunal specifies another date in its judgement. According to art. 190 p. 3, the Constitutional Tribunal may specify another day for the end of the binding force of a normative act but such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. If a judgement has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned after seeking the opinion of the Council of Ministers. The fourth feature of the Kelsen's model is that the constitutional review shall be conducted *a posteriory*. In Poland constitutional review as a rule concerns legal acts which have been already in force, however, there is also *a priori* constitutional review of a preventive preliminary nature provided which can be initiated at the request of the President of the Republic of Poland before signing the act or ratifying an international agreement. The last feature of the "European model of constitutional review" concerns the scope of competences of the constitutional court that should be clearly specified by law (in contrast to the "American model" in which all legal acts or administrative decisions that are to be applied in a certain court case can be reviewed by a court).

According to art. 188 of the Constitution, in the mode of an abstract review the Constitutional Tribunal adjudicate on the conformity of statutes and international agreements to the Constitution, the conformity of statutes to ratified international agreements which ratification required prior consent granted by a statute and the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes.

In proceedings before the Constitutional Tribunal there is a "rule of complaint" applied which means that the Tribunal cannot initiate proceedings on its own initiative. The scope of entities entitled to initiate the constitutional review before the Constitutional Tribunal is strictly defined by the Constitution.

The applications to the Constitutional Tribunal regardless what matters the questioned act concerns can be submitted by the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights. The second group of entities entitled to initiate the proceedings includes the constitutive organs of units of local government, the national organs of trade unions as well as the national authorities of employers' organisations and occupational organizations, churches and religious organizations which may make such application if the normative act relates to matters relevant to the scope of their activity. Constitutional provisions also grant such right to the National Council of the Judiciary, however, in this case the scope of application is limited to normative acts which relate to the independence of courts and judges.

The review of norms can be both conducted *a posteriori* and *a priori*. The *a posteriori* review, which refers to legal acts already enacted which are in force or in the period of *vacatio legis*, is the basic one while the preventive review takes place rather exceptionally. According to art. 122, the President of the Republic shall sign a bill within 21 days of its submission. However, the President may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President cannot refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution. If, however, the non-conformity to the Constitution relates to particular provisions of the bill, and the Tribunal has not judged that they are inseparably connected with the whole bill, then, the President after seeking the opinion of the Marshal of the Sejm shall sign the bill with the omission of those provisions considered as being in non-conformity to the Constitution or shall return the bill to the Sejm for the purpose of removing the non-conformity. Additionally, art. 133 provides the President with a similar right in regard to international treaties, stating that the President of the Republic before ratifying an international agreement my refer it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution.

Apart from the above cases of abstract constitutional review, the review conducted by the Polish Constitutional Tribunal can be also

concrete (specific) when it is initiated in connection with a particular case of the application of legal norms in a court or administrative proceedings as it is in case of a constitutional complaints and legal questions.

## CONSTITUTIONAL COMPLAINT

The proposals to provide people with a possibility to refer the Constitutional Tribunal in a direct way were presented in the doctrine of law from the 1980-ties when the Tribunal was established, however, it was introduced for the first time to the Polish constitutional system only in 1997. Constitutional complaint is regulated in art. 79 of the Constitution which provides that everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgement on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution. The only exception concerns the right to asylum and the right to be granted the status of a refugee violation of which cannot be subject to constitutional complaints. As it appears from the above, the constitutional complaint in Poland can be directed against a normative act and it cannot question the constitutionality of individual decisions.

The formal requirements to be fulfilled in order to submit a constitutional complaint are specified in the law on the Constitutional Tribunal. The decision passed by a court or an organ of public administration which cause the infringement of the rights of the complainant must be final in a sense that all the available legal means of appeal had been exhausted. The complaint must be submitted within three months from delivering to the complainant the legally valid decision, the final decision or other final judgment. The complaint must also be drawn up by an advocate or a legal advisor.

It is also important to draw attention to the effects of the Tribunal's decision issued as a consequence of reviewing a constitutional complaint. First of all, the unconstitutional provisions of law lose their binding force with an *erga omnes* effect. However, the decision of the court or administrative organ referred to in a constitutional complaint is not automatically annulled. In order to do it the complainant needs to request the appropriate organ to revise his case due to the recognition of

the legal basis of the decision as unconstitutional. It is worth pointing out that not only the complainant but all the persons to whom the questioned provision had been applied can request to have their cases revised. To secure his or her interests the complainant can request the Tribunal to issue a preliminary decision to suspend or to stop the enforcement of the judgment in the case to which the complaint refers.

## QUESTIONS OF LAW

The second case of the "concrete" constitutional review before Polish Constitutional Tribunal is specified in art. 193 of the Constitution which provides for submitting "legal questions". Any court in Poland may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, a ratified international agreement or a statute, if the answer to such question of law will determine an issue currently before the court. Despite discussions in this regard that took place in the 1990-ies, it became commonly accepted that courts in Poland cannot independently assess the constitutionality of legal norms to be applied in pending proceedings and on this basis refuse to apply such norms. Instead, in case of any doubts as to the constitutionality of legal norms, common courts, administrative courts as well as the Supreme Court have the right (and obligation) to refer a question of law to the Constitutional Tribunal. The benches adjudicating in particular case shall suspend the proceedings and turn directly to the Constitutional Tribunal, without the need of intermediacy of the president of the court or any other body.

## REVIEW OF THE PURPOSES AND ACTIVITIES OF POLITICAL PARTIES

One of the constitutional principles provided for in the Constitution of 1997 is the principle of political pluralism. According to art. 11, the Republic of Poland shall ensure freedom for the creation and functioning of political parties, which shall be founded on the principle of voluntariness and upon the equality of Polish citizens. However, there are also certain limitations of that freedom imposed by art. 13 which provides that political parties and other organizations whose programme is based upon totalitarian methods and the modes of activity of nazism,

fascism and communism, as well those whose programme or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited. Constitutional regulation of the Constitutional Tribunal's competence to adjudicate on the conformity to the Constitution of the purposes or activities of political parties is limited to art. 188 p. 4 which only mentions this competence. The more detailed regulation in this regard is included in the Law of 2016 on the organisation and the mode of procedure of the Constitutional Tribunal and the Law of 1997 on political parties[1].

The proceedings before the Constitutional Tribunal in regard to political parties can be conducted in two mode – *a priory* and *a posteriory*. The first one can take place at the stage of registering political parties in the register maintained by the District Court in Warsaw. According to art. 14 of the law on political parties, if concerns arise as to the compliance with the Constitution of the purposes and rules of operation of a political party set out in its statute or in its programme, the Court shall suspend the proceedings and refer to the Constitutional Tribunal with a request to examine the compliance of the political party's purposes with the Constitution. If the Constitutional Tribunal delivers a judgement finding the political party's purposes to be non-compliant with the Constitution, the Court shall refuse to enter the party in the register. The decision is final as there is no appeal against it. In regard to *a posteriory* review, the law on political parties in art. 42 repeats the Constitutional provision stating that the examination of cases for ascertainment of non-compliance of the purposes and activities of political parties with the constitution shall fall within the competences of the Constitutional Tribunal. The proceedings can be initiated by entities mentioned in art. 191 p. 1 p. 1 of the Constitution: he President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 deputies, 30 senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights. The basic model of review is the above mentioned art. 11 and art. 13 of the Constitution, however, it is

[1] Law of 27 June 1997 on political parties, Official Journal of Laws "Dziennik Ustaw" 1997, No 98, item 604.

also possible to question the conformity of the party's activities with other constitutional provisions. For example in 2010 the Constitutional Tribunal examined the conformity of the activities of the political party "Samoobrona RP" to art. 104 p. 1 of the Constitution which provides that "deputies shall be representatives of the Nation. They shall not be bound by any instructions of the electorate"[1]. If the Constitutional Tribunal delivers a judgement finding a political party's purposes or activities to be non-compliant with the Constitution, the District Court in Warsaw should immediately issue a decision to strike the party from the register[2].

## SETTLEMENT OF DISPUTES OVER AUTORITY

The Constitutional Tribunal's competence to settle disputes over authority concerns disputes between central constitutional State organs. The statutory provisions[3] precise that the Tribunal shall settle disputes over power in one of two cases. Firstly, in a situation in which at least two central constitutional state authorities consider themselves competent to determine the same matter or have delivered a determination with regard to that matter (positive powers dispute). Secondly, when at least two central constitutional state authorities consider themselves to lack competence to solve a particular matter (negative powers dispute).

[1] The judgement of the Constitutional Tribunal of 24 November 2010, Case No. Pp 1/08.

[2] On the competence of the Constitutional Tribunal to adjudicate on political parties see more: Marcin Krzemiński, „Kontrola konstytucyjności celów i działalności partii politycznych w Polsce," in *Konstytucja i sądowe gwarancje jej ochrony. Księga jubileuszowa Profesora Pawła Sarneckiego,* (Kraków, 2004), 99 and next.; Mirosław Granat, „Problem badania konstytucyjności partii politycznych w Europie Środowej i Wschodniej," in *Prawne aspekty funkcjonowania partii politycznych w państwach Europy Środkowej i Wschodniej,* ed. Aldona Domańska, Krzysztof Skotnicki (Łódź: 2003); Piotr Uziębło, "Kilka uwag o badaniu przez Trybunał Konstytucyjny zgodności z Konstytucją celów i partii politycznych*,"* in *Trzecia władza. Sądy i trybunały w Polsce. Materiały Jubileuszowego L Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego, Gdynia, 24-26 kwietnia 2008 roku*, ed. Andrzej Szmyt (Gdańsk, 2008); Anna Rytel-Warzocha, "Kompetencje Trybunału Konstytucyjnego związane z kontrolą konstytucyjności celów i działalności partii politycznych," in Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej, ed. Zbigniew Witkowski, Jiři Jirásek, Krzysztof Skotnicki, Maciej Serowaniec, (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2017), 311-333.

[3] Art. 85 of the Law of 2016 on the organisation of the Constitutional Tribunal and the mode of proceedings before the Constitutional Tribunal.

According to the Constitution, the dispute may refer to "constitutional" organs so the authorities expressly mentioned in the text of the Constitution, and "central" organs so those which scope of activity covers the entire territory of the state. Therefore, the Constitutional Tribunal does not settle disputes between state and local authorities. The right to initiate the proceedings in regard to disputes over authority has been granted to the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court and the President of the Supreme Chamber of Control. It may be assumed that they may also act of behalf of other constitutional organs of State (art. 192 of the Constitution). For example, in 2009 the Constitutional Tribunal considered the dispute between the President of the Republic and the Council of Ministers as to which of them should represent Poland during a meeting of the European Council of the European Union. The Tribunal decided that the President can take part in the meeting, however, this is the Prime Minister that has the priority and agreeing the official position of Poland on matters discussed during the meeting is a responsibility of the Council of Ministers.

## DECIDING ON THE EXISTENCE OF AN IMPEDIMENT TO THE EXERCISE OF THE OFFICE BY THE PRESIDENT OF THE REPUBLIC

The last of the "additional" competences of the Constitutional Tribunal concerns deciding on the existence of an impediment to the exercise of the office by the President of the Republic of Poland and to assign the Marshal of the Sejm with the temporary performance of the duties of the President of the Republic of Poland. According to art. 131 of the Constitution, if the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President. However, if the President is not in a position to inform the Marshal of his or her incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office of the President. If the Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President

for a period of no longer than three months. If the Marshal of the Sejm is unable to discharge the duties of the President, such duties shall be discharged by the Marshal of the Senate. The Tribunal shall consider the application submitted by the Marshal immediately but no later than within 24 hours form the submission of the application. The decision of the Constitutional Tribunal ceases to have effect if, before the lapse of the time-limit specified therein, the President of the Republic of Poland notifies the Marshal of the Sejm and the Tribunal about his or her capacity to exercise the office or if one of following circumstances appears: the death of the President, the President's resignation form office, a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his or her health by two-thirds of the statutory number of members or dismissal of the President from office by a judgement of the Tribunal of State. Where – after the lapse of the time-limit for which the Tribunal assigned the Marshal of the Sejm with the temporary performance of presidential duties – the circumstances which temporarily make it impossible for the President of the Republic of Poland to exercise the office have not ceased to exist, the Marshal of the Sejm may again, for the last time, refer to the Tribunal with an application to determine whether or not there exist an impediment to the exercise of the office by the said President and to assign the Marshal of the Sejm with the temporary performance of the duties of the President of the Republic of Poland.

## CONCLUSIONS

The basic function of constitutional judiciary, regardless of the control formula adopted in a state (centralized or decentralized), is the vertical control of binding law, and hence the examination of the conformity of legal acts with acts of higher legal force, including, first of all, compliance of laws with the Constitution. Nevertheless, in European countries, which largely adopted a centralized model of constitutional judicature, constitutional courts which, in principle, enjoy very high authority (above all due to the highly qualified composition of judges) also have a number of competences not directly related to the constitutional review of law. In this respect, the competence of constitutional courts to adjudicate electoral matters and matters related to the institution of direct democracy (in particular, to carry out an audit of

the subject matter and procedures for holding a referendum), or adjudication on the constitutional liability of persons holding the highest positions in the state.

As pointed above the current Constitution of the Republic of Poland of 1997 provides for three "additional" competences not connected with the constitutional review of legal norms – solving disputes over authority between central constitutional state bodies, deciding on the temporary impediment to the exercise of the office by the President of the Republic and deciding on the compliance of the purposes and activities of political parties to the Constitution. Nevertheless, there is a debate in the doctrine of law as to the scope of jurisdiction of the Constitutional Tribunal. For example, among the proposals the entrusting the Constitutional Tribunal with the power to adjudicate on the constitutional liability (instead of the Tribunal of State that in such case would be liquidated) or with the competence to conduct preliminary review of the constitutionality and admissibility of the matters subject to referendum questions are considered. Nevertheless, all changes in this regard would require the adoption of relevant constitutional amendment.

## BIBLIOGRAPHY

### Articles in a print journal

1. Comella, Victor Ferreres. "The European model of constitutional review of legislation: Toward decentralization ?." *I.CON, Oxford University Press and New York University School of Law*, Vol. 2, No 3 (2004).
2. Granat, Mirosław. „Problem badania konstytucyjności partii politycznych w Europie Środowej i Wschodniej." *Prawne aspekty funkcjonowania partii politycznych w państwach Europy Środkowej i Wschodniej.* Łódź: Aldona Domańska, Krzysztof Skotnicki (2003)
3. Kraluk, Wiesław. „Trybunał Konstytucyjny." *Leksykon prawa konstytucyjnego. 100 podstawowych pojęć*, ed. Andrzej Szmyt. (2010).
4. Krzemiński, Marcin. „Kontrola konstytucyjności celów i działalności partii politycznych w Polsce." *Konstytucja i sądowe gwarancje jej ochrony. Księga jubileuszowa Profesora Pawła Sarneckiego,* Kraków (2004)

5. Rytel-Warzocha, Anna.. "Kompetencje Trybunału Konstytucyjnego związane z kontrolą konstytucyjności celów i działalności partii politycznych" *Współczesne problemy sądownictwa w Republice Czeskiej i w Rzeczypospolitej Polskiej,* ed. Zbigniew Witkowski, Jiři Jirásek, Krzysztof Skotnicki, Maciej Serowaniec. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, (2017)
6. Rytel-Warzocha, Anna and Szmyt, Andrzej. "The new law of 2016 on the Constitutional Tribunal in Poland." *Annales Universitatis Apulensis. Series Jurisprudentia.* no 19 (2016)
7. Uziębło, Piotr. "Kilka uwag o badaniu przez Trybunał Konstytucyjny zgodności z Konstytucją celów i partii politycznych*," Trzecia władza. Sądy i trybunały w Polsce. Materiały Jubileuszowego L Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego, Gdynia, 24-26 kwietnia 2008 roku*, ed. Andrzej Szmyt, Gdańsk ( 2008).

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# RULE OF LAW AND POLITICS: TOWARDS A NECESSARY LIMITATION

**Marius VĂCĂRELU**[1]

***Abstract:***

*If we want to analyse the rule of law, we always find some tendencies of politicians to restrict the full contain of this very important concept. This is not a surprise: in fact, the history of Constitution – understood as a document for trust and society's organisation – is represented in almost all cases by the fight between people and politicians, with the main purpose of the first ones to limit the second group power. The last „evolutions" in politics of Romania (and to some other countries too) makes mandatory a debate about the rule of law and politicians relation and which are the possible and necessary limits of this. Our text will try to present some ideas on this topic, wishing to have a good reception of them from the readers.*

***Key words:*** *Rule of law; limitation; politics; justice; social trust; morality; Constitution.*

## INTRODUCTION

Recent years have witnessed a multiplication of initiatives promoting the rule of law and constitutionalism (mainly in Romania, the Constitution become one of the most usual word in public speech of every social active person[2]). Both are understood, by many if not most, as necessary to create and sustain a just political order.

A state governed by the rule of law describes a state where both private and public powers are removed from the administration of justice and are regulated by law. The rule of law serves the public good of the community as a whole. It is a system where laws rule and not men. The law determines what is necessary in a society to prevent domination and oppression and to promote the common good. As people seek justice through law, the rule of law comes at first from men itself, because men

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[2] We can consider that the appeal to the Constitutional Court of Romania become sometimes an abuse, expressed by a change of the real dimension of legal norms into a political instrument.

obey rules they believe to be just and arise against ones they consider unjust. The value of the rule of law lies in the fact that it prevents arbitrary judgments, secures justice, and prevents tyranny and oppression. It limits the power of those who have authority. The government must first control the people and then it must be obliged to control itself. It must therefore be stable and constitutional and it can therefore be implied that some states are not ready to implement the rule of law, because the governments cannot be trusted. One of the most important step towards the rule of law is when judges are independent of executive and legislative powers. Constant attention to the combination of powers in a state is required, because only in this way can laws be created for the common good. Law must be separated from arbitrary power[1].

**1.** When you talk about rule of law and politicians, we should think to relation between needs of people, instruments for fulfilling those needs, ethics of politics and, more important, the limits of politics as a practice.

The last part of the equation must be explained in a larger way. The last decades brought a real expansion of the political studies and also a great opening of politicians to be in everything involved.

As Jan W. van Deth noted, "since the scope of government activities and responsibilities has been expanded too in the last few decades, the *domain* of political participation grew considerable. The combined increase in both the repertoire and the domain of political participation implies that these activities affect virtually all aspects of social life in advanced societies ... Political participation is about participating in politics. If we have a clear idea about the nature and the defining aspects of politics as the *object* or as the *arena* for participation, we might obtain a useful demarcation between political and non-political activities. A general discussion about the characteristic aspect of the concept politics, however, brings us even further away from a clearer understanding of political participation. Usually, politics is defined in terms of state and government activities or functions. The most practical approach, then, seems to be to have a closer look at government or state

[1] Mortimer Sellers, *What Is the Rule of Law and Why Is It So Important?*, in Flora Goudappel, Ernst Hirsch Ballin, *Democracy and Rule of Law in the European Union*, (Berlin Heidelberg: Springer-Verlag, 2016), 3.

activities, since political participation is loosely defined as citizens' attempts to influence those activities[1].

Even a cursory look at the development of democratic societies in the last decades shows a remarkable extension of government activities and involvement, and **for many people the distinction between political and non-political activities or areas completely disappeared** (our underline, M.V.). The abandonment of the traditional laissez-faire doctrine of rising industrial capitalism in many countries followed the traumatic experiences of the Great Depression of the 1930s and the post-war economic chaos in the late 1940s. Although the dissimilarities between different countries and distinct points in time have always been evident, the developments led to a considerable strengthening of the position of central government agencies in social-economic and cultural life"[2].

**2.** If politicians want to regulate every field of social domain, according with the royal rights of state and economic developments of the XXth century, it appears a problem between the legal power of representatives to society regulate and their skill on domain of regulation. It means that politicians has a general competence to regulate every domain of national (social, economic, cultural etc.) life, but for a good regulation it is necessary to have enough skills to understand the domain and – mainly – its main contemporary provocations.

In this trend, we must underline the disposition of article 121, paragraph 2 of the Romanian Constitution, who proclaim: "The Local Councils and Mayors shall act as autonomous administrative authorities and **solve** (our underline, M.V.) public affairs in communes and towns, in accordance with the law".

To solve is not just "manage", but also "obtaining a positive result". In a complex contemporary world, to solve is not a question of "simple management", but a complete form of analyse, prognosis, making strategic plans and fulfilling a long-time strategy. For all this contain of the word "solve" a politicians must be (and not should) an expert on public administration sphere and public policies too; for this he needs

[1] Jan W. van Deth, *Studying political participation: towards a theory of everything?*, paper presented at the Workshop "*Electronic Democracy: Mobilisation, Organisation and Participation via new ICTs*", Grenoble, 6 – 11 April 2001, 9.
[2] Ibidem.

studies and results proved before politics' engagement. In the same time, he must understand that his activity results could and must be measured with quantitative items. As a consequence: politics become more economic and measurable, but less a "vision for future" and a sea of words".

For sure, for such a different vision of politics it will be a lot of critics. Firstly, politicians will be afraid and will reject strongly the idea of quantitative measure of their activity; in the same time, some scientist will argue that politics is mostly a question of instruments and diligence, but less a question of results. We cannot agree with this, especially now, when the natural resources are less in every country. Economising resources become mandatory and for this goal we can settle clear standards and quantitative items to measure politicians and public administration activity.

**3.** These quantitative instruments mean in the same time a real limitation of politician liberty. For centuries, the liberty in politics – even in a Machiavellian sense – was considered as a standard characteristic, *ab initio* too. But liberty for politicians is not always related to morality, ethics and great values of humanity. Much more; the rule of law dimension means an *a priori* a limit of politician's liberty.

The conflict between rule of law and politician's liberty is settled by citizens who vote and pay the taxes. In the last decades paradigm of participation to politics by every citizen, is a normal pretention from the citizen's side to receive a good behaviour from politicians and a good level of life too. For this, citizens ask not only moral behaviour in an abstract way, but also a moral behaviour from facts. As example, a plagiarism made a politicians must be very fast follower by a resign from every public position; a debate on this topic is not only a violation of abstract moral rules, but also equal position of citizen in state's principle violation.

For the ordinary citizen, it is extremely important that the exercise of political power is subjected to law. It is decidedly not a good thing when the government can do as it pleases at whim as in a dictatorship. It is important that their own behaviour and that of their fellow citizens is subject to law, because the law facilitates a stable and predictable environment which is conducive for everything from personal security of individuals and their liberty to safe business transactions.

A politician should not be in favour of being free to do as he or she pleases, but be content to be entirely bound and constrained by law. A politician should strive for a system where the exercise of authority is done according to law. As far as the exercise of political power is concerned, politicians, whatever their position in the political system, should never allow officials, let alone themselves, to operate outside the law, either by exercising a power they are not entitled to employ, or by using it in a way that violates the law[1].

Rule of law is understand by every citizen in almost the same way: it means that every person follow the rules, no matter his position; this way of behavior means that not state regulations are respected, but also moral standards. Is not possible to have a rule of law state/society with a low level of morality and ethics.

The moral criteria is quite strict and without flexible paradigm. Morality and ethics refer to what is right or wrong, good or bad, and thus concern values and norms about which people feel strongly because they involve serious community interests.

Ethics, in general, concern (reflection on) the moral values and norms that matter, while integrity concerns the ethics of the governance process and refers to the quality of acting in accordance with relevant moral values, norms, and rules. On this situation, we should observe that society has its own moral and its own moral requests; to ignore them can be very dangerous, because the speed of protest sharing is higher related to moral topics.

**4.** The rule of law is an important and widespread constitutional ideal. The phrase 'rule of law' can be found in more than a hundred of the world's constitutions, often either in the preamble or in one of the first articles which defines the nature of the state. The rule of law is praised and proclaimed, if not always upheld in practice, even in states that do not meet the minimum criteria for a functioning democracy (as example, during the communist rule in Eastern Europe, some protest had one of their slogan: "Respect your own Constitution").

To have a correct function of the rule of law, it is necessary to moderate the power of politicians. Moderating their power means to stop the danger of dictatorship and despotism. Political moderation is

[1] The Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Rule of Law. A guide for politicians*, (Lund: 2012), 8.

understood as the antithesis of despotism. Despotic government is absolute, unlimited, unchecked, unbalanced and arbitrary, but a moderated government is characterised by the fact that power is constrained, checked, balanced and limited, by other competing centers of power.

Moderation is a result of a special kind of national legal system: a legal system that serves the common good of society as a whole. Only in this case, without any discrimination we have the rule of law: because the laws rule and not a person; we have liberty – because the law prevents oppression – and we live in a "res publica" space (understood as a politics dedicated to serve citizens, and not to act against them. Every person understood these characteristics from instinct; in the same time, politicians know that this framework limits their power and liberty of acting.

If everyone knows – by instinct or from school system – the needs for the rule of law, why so many states are not considered as "successful states"? In the index of failed states[1] one of the items is measuring the political trust of citizens in their government, and the rule of law violation strongly affect the trust of citizens. We can observe from the index[2]: "Though the State Legitimacy indicator does not necessarily make a judgment on democratic governance, it does consider the integrity of elections where they take place (such as flawed or boycotted elections), the nature of political transitions, and where there is an absence of democratic elections, the degree to which the government is representative of the population of which it governs. The Indicator takes into account openness of government, specifically the openness of ruling elites to transparency, accountability and political representation, or conversely the levels of corruption, profiteering, and marginalizing, persecuting, or otherwise excluding opposition groups".

In the next page "The Human Rights and Rule of Law Indicator considers the relationship between the state and its population insofar as fundamental human rights are protected and freedoms are observed and respected. The Indicator looks at whether there is widespread abuse of legal, political and social rights, including those of individuals, groups and institutions (e.g. harassment of the press, politicization of the

[1]https://reliefweb.int/sites/reliefweb.int/files/resources/951171705-Fragile-States-Index-Annual-Report-2017.pdf, consulted on 04.05.2018.
[2] Page 30.

judiciary, internal use of military for political ends, repression of political opponents)".

In the same paradigm, Acemoglu and Robinson observed the differences between the North of Mexico and the South of United States: "Slim has made his money in the Mexican economy in large part thanks to his political connections. When he has ventured into the United States, he has not been successful. In 1999 his Grupo Curso bought the computer retailer CompUSA. At the time, CompUSA had given a franchise to a firm called COC Services to sell its merchandise in Mexico. Slim immediately violated this contract with the intention of setting up his own chain of stores, without any competition from COC. But COC sued CompUSA in a Dallas court. There are no *amparos*[1] in Dallas, so Slim lost, and was fined $454 million. The lawyer for COC, Mark Werner, noted afterward that "the message of this verdict is that in this global economy, firms have to respect the rules of the United States if they want to come here." When Slim was subject to the institutions of the United States, his usual tactics for making money didn't work"[2].

Politicians do not like the rule of law, for sure not all dimension of the concept. In such a case, moderation is a need and for that we need not only the legal instruments, but also a real enforce of morality. Too many examples of corruption in the last years offered a bad image of politics – despite its official intentions – but not to the rule of law. We can consider that it is a continuous conflict between the basics of politics and rule of law principles, and the winner is the rule of law. In such a paradigm, the winner will impose his standards, and we must accept that a rule of law country (with good position in every index of states) is a success story; but states where politicians are intangible are not. Law and by extension the power of legality offers an effective benefit for people; in such a conflict, politics must be limited in its internal and external powers.

[1] A legal instrument "to argue that a particular law does not apply to you. The idea of the *amparo* dates back to the Mexican constitution of 1857 and was originally intended as a safeguard of individual rights and freedoms. In the hands of Telmex and other Mexican monopolies, however, it has become a formidable tool for cementing monopoly power. Rather than protecting people's rights, the *amparo* provides a loophole in equality before the law". Daron Acemoglu, James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, (London: Profile Books Ltd., 2012), 40.
[2] Ibidem.

## CONCLUSION

It is the political institutions of a nation that determine the ability of citizens to control politicians and influence how they behave. This in turn determines whether politicians are agents of the citizens, albeit imperfect, or are able to abuse the power entrusted to them, or that they have usurped, to amass their own fortunes and to pursue their own agendas, ones detrimental to those of the citizens. Political institutions include but are not limited to written constitutions and to whether the society is a democracy. They include the power and capacity of the state to regulate and govern society. It is also necessary to consider more broadly the factors that determine how political power is distributed in society, particularly the ability of different groups to act collectively to pursue their objectives or to stop other people from pursuing theirs.

As we can see, in this equation, the politics is loosing, but the law and the morality is winning. Can we accept a world where just politicians decide and citizens just support their decisions? For sure, we cannot agree; in such task, a limitation of politics brings more benefit for society. The way of limitation is made is not the same everywhere, and it not a perfect receipt for every country; but good practices are not s isolated and we must learn from everyone of them.

## BIBLIOGRAPHY

### Books

1. Acemoglu, Daron and Robinson, James A.. *Why Nations Fail: The Origins of Power, Prosperity and Poverty*. London: Profile Books Ltd., 2012;
2. Goudappel, Flora and Ballin, Ernst Hirsch (editors). *Democracy and Rule of Law in the European Union*. Berlin Heidelberg: Springer-Verlag, 2016;
3. W. van Deth, Jan. *Studying political participation: towards a theory of everything*?. Grenoble, 2011;
4. The Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Rule of Law. A guide for politicians*. Lund, 2012;

**Websites**

1. Fragile States Index, Annual Report 2017, at https://reliefweb.int/sites/reliefweb.int/files/resources/951171705-Fragile-States-Index-Annual-Report-2017.pdf, consulted on 04.05.2018.

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# COORDINATION OF SOCIAL SECURITY SYSTEMS IN THE EU. PURSUIT OF ACTIVITIES IN TWO OR MORE MEMBER STATES

**Piotr KAPUSTA**[1]

***Abstract:***

*The freedoms of the internal market affect the activity of individuals in the sphere of employment, which increasingly provide work in various Member States. The aim of the legal systems should be to normalize and simplify their legal situation in the sphere of social security in the European Union. One of the areas coordinated by social security systems in the EU is to work in two or more Member States. This study presents and analyzes the legal basis for determining the applicable legislation when working in two or more Member States.*

***Key words:*** *Coordination of social security systems; European Union; Pursuit of activities in two or more Member States; salaries employee; economic activity*

## INTRODUCTION

Coordination of social security systems aims at simplifying the definition of the legislation applicable to social security. The increasing mobility of employees and persons conducting business activity causes their legal situation to be as complicated as the insured. The use of the general principle of lex loci laboris is insufficient. Temporary (periodic) work in another country - with the adoption of only the principle according to which the law of the state of the workplace is supposed to be appropriate, is ineffective. Additional difficulties arise when working simultaneously in two or more Member States. In such cases, it would be impossible even to use the principle of *lex loci laboris.*

Two basic ways of regulation are known to coordinate social security systems - either on the basis of international agreements or set

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by rules defined by EU law. The method of regulation adopted in the EU, implemented by means of ordinances, allows for defining uniform standards in the area of coordination of social security systems in all EU Member States. The use of acts of the rank of ordinances also means that in each Member State they may constitute a basis for issuing a ruling (direct effect and direct application of EU regulations).

This study aims primarily at identifying the legal basis for determining the applicable legislation when working in two or more Member States. At the same time, the level of generality of the wording used by the Union legislator means that it will also be necessary to clarify the terms defining the criteria for determining the appropriate legislation. To do this, one should use such research methods that would fulfill the postulate of adequacy, that is, lead to the achievement of the intended results. In the field of the analysis of normative texts, it is necessary to have a whole range of legal methods that are used in the analysis conducted in the dissertation. First of all, they include the method of exegesis of the legal text. It is also accompanied by a linguistic analysis of the legal text. Of course, it was necessary to refer to legal hermeneutics as a method of explaining the text. The use of these methods is reflected in the adopted method of exploring the texts of all legal acts. This forced him to use the lexical method.

## A. PERFORMING HIRED WORK IN TWO OR MORE MEMBER STATES

### *Legal basis for determining the applicable legislation when working in two or more Member States*

The legal basis for the coordination of social security systems is first set out in the provisions of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereinafter: Regulation 883 or the Basic Regulation). In addition, the principles for the coordination of social security systems in the EU are set out in Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereinafter 987 or implementing regulation).

Further analysis in respect of the performance of work in two or more Member States by employees will be carried out in relation to the content of Article 13 para. 1 of the basic regulation. This provision states in point (a) that a person who normally performs an employed activity in two or more Member States is subject to the legislation of the Member State of residence if he pursues a substantial part of the work in that Member State or if he is employed by different undertakings or by different employers who have their registered office or place of business in different Member States. A second standard is also provided indicating that a person who normally performs an activity as an employed person in two or more Member States is subject to the legislation of the Member State in which the place of business or employers employing him is situated, if he does not carry out a significant part of his/her work in the Member State in which he is resides.

***Normal employment in two or more Member States***

The provisions of the basic regulation do not explain the meaning of the term "normal employment in two or more Member States". This is only done in art. 14 para. 5 of the implementing regulation, according to which the person who 'normally pursues contract work in two or more Member States', in particular means a person who, while still working in one Member State, simultaneously performs separate activities in one or more other Member States, regardless of the duration or nature of that separate work. A person may also be considered as a person who continuously performs several types of work alternately, with the exception of a marginal job, in two or more Member States, irrespective of the frequency of such a change or of its regular nature.

The explanation given in the implementing regulation thus provides two options for "the normal performance of hired work in two or more Member States" within the meaning of the basic Regulation. The first option indicates the simultaneous separate work in another Member State. In the absence of any further guidance, it should be assumed that separate work undertaken in another Member State can be performed not only for the benefit of the new entrant but also for the existing one. Much greater interpretive difficulties arise when determining the content of the concept of "separate work". If this is work provided to another entity, then the separateness is obvious. In the case of working for the same entity in another Member State, the question of the existence of the

distinctiveness of this work remains unexplained. It should be assumed that separate work will undoubtedly be the performance of a different kind of work, i.e. other activities next to those which the employee has previously performed. But what about the same type of work done in different Member States? One should opt for a position according to which it can also be the same type of work. Explanation contained in art. 14 para. 5 letter a of the executive regulation indicates that the separate work undertaken is of an ancillary nature along with the work still being carried out. Such a situation will take place regardless of the duration or nature of the separate work.

The second form of "normal work in two or more Member States" requires several alternatives to be carried out. Thus, the generic identity of work done in different Member States is excluded. In contrast to the previously presented situation, in the case of alternating several types of work, basic and separate work are not distinguished. This is because the work is generically different and still carried out for change. The solution adopted is independent of the frequency of such a change or its regular nature. In the explanation of art. 14 para. 5 letter b of the executive regulation results in one more condition - marginal works are not taken into account. Although the marginal work is excluded from the scope of application of the provisions on the coordination of social security systems, no explanations or indicators that constitute a reference point in defining the nature of work are included in the generally applicable provisions of law. The fact of permanently performing a job does not exclude that it may be marginal. The assessment should be determined by the criterion of economic profit and time, which is devoted to its performance. "It is recommended as a guideline to consider a marginal job of activity that occupies less than 5%. regular working time or represents less than 5% of the employee's total remuneration. The nature of the work performed, eg work of an ancillary nature, deprived of independence, performed at home or in the service of the main job, may also serve as an indicator of marginal work"[1].

[1] „Praktyczny poradnik. Ustawodawstwo mające zastosowanie w Unii Europejskiej (UE), Europejskim Obszarze Gospodarczym (EOG) i Szwajcarii" Komisja Administracyjna ds. Koordynacji Systemów Zabezpieczenia Społecznego, Bruksela 2013, s. 30.

***Performing a substantial part of the work in the Member State of residence***

The basic rule for determining the applicable legislation when working in two or more Member States provides that a person who normally performs an employed activity in two or more Member States is subject to the legislation of the Member State in which he or she resides if he / she performs a significant part of the work in this Member State (Article 13 (1) (a) of Regulation 883). Determining the legislation of the competent Member State of residence requires in this situation to determine the country of residence of the employed person in advance. This should happen on the basis of the statement in art. 1 in the letter of the ordinance, according to which the term "residence" means the place where a person usually resides. Where there is a discrepancy of opinion between the institutions of two or more Member States with regard to the place of residence of the person to whom the basic ordinance applies, those institutions shall establish a center of interest of the person concerned based on a common understanding on the basis of a general assessment of all available information on relevant circumstances, which may include, the appropriate the duration and continuity of stay in the territory of the Member States concerned and the person's situation, including: the nature and specificity of the work to be performed, in particular the place where the work is normally carried out, its permanent nature and the duration of each job contract; his/her family situation and family ties; conducting any non-profit activities; in the case of university students - the source of their income; his/her housing situation, especially information whether this situation is permanent; the Member State in which the person is considered to be resident for tax purposes. If taking into account of individual criteria on the basis of the abovementioned circumstances does not lead to an agreement by the institutions concerned, the intention of the person as resulting from these circumstances and, in particular, the reasons which led him to move shall be considered decisive to establish his/her actual place of residence.

„A significant proportion of wage labor' carried out in a Member State means a quantitatively significant amount of hired work carried out in that Member State, which may not necessarily be the largest part of this work. In the implementing regulation, in order to determine whether a significant part of the work is done in a given Member State, the

following indicative criteria should be included in the case of hired work-working time or remuneration. As part of the overall assessment, the fulfillment of the above criteria in a proportion of less than 25% of these criteria indicates that a significant part of the work is not carried out in a given Member State. Admittedly, from art. 14 para. 8 of the implementing regulation, there are no other criteria for examining the "significant part of hired labor" condition, the competent authority of the Member State is entitled to take into account other circumstances. The criterion of working time or remuneration is essential and can not be disregarded in determining the applicable legislation. The relevant legislation can not be determined solely on the basis of the circumstances existing at the date of the decision. The body is required to forecast the situation that may occur (that is probable) in the next 12 months.

***Not performing a significant part of work in the country of residence***

If a person who normally works as an employed person in two or more Member States does not carry out a substantial part of the work in the Member State of residence, the basic regulation provides four possible solutions. First of all, it is indicated that the legislation of the Member State in which the company or employer's place of business is located will be relevant if the person is employed by one company or one employer. The connection with the social security system, in connection with remaining in employment with only one entity, takes place by using the liaison of the employing office.

If the applicable law can not be determined in the above manner, and if there is a substantial part of work not being performed in the State of residence, the person pursuing an activity as an employed person in two or more Member States shall be subject to the legislation of the Member State in which the place of business or employers is situated; so in which he/she is employed by at least two enterprises or at least two employers whose registered office or place of business is located in only one Member State. In this case, the non-performance of a substantial part of the work in the Member State of residence results in the determination of the legislation of the competent State in which the headquarters of all those employing the entities are located. The amount of work performed in individual countries and residence does not directly affect the

determination of the relevant legislation, because previously as criteria combining an employed person with a given legal system were rejected.

If it is not possible to determine the applicable legislation on the basis of the two definitions set out above, a person not performing a significant part of work in the Member State of residence shall be subject to the legislation of the Member State in which he has his registered office or place of business or an employer other than the Member State of residence if he is employed by two or more enterprises or two or more employers whose head office or place of business is in two Member States, one of which is the Member State of residence. In this way, if the employers have headquarters in different Member States, when one of these countries is the country of residence of that person, then the legislation of that country will be the right one.

If the relevant legislation can not be determined on the basis of the three conditions set out above, a person pursuing an activity as an employed person in two or more Member States who does not perform the majority of the work of the Member States of his place of residence is subject to the legislation of the Member State in which he is domiciled; if the person is employed by two or more enterprises or two or more employers, and at least two of these enterprises or two of these employers are established or resident in different Member States other than the Member State of residence. This is the case of the multiplicity of Member States which are linked to the insurance situation of the employed person and the country of residence of such an employee and the country of residence of the entities employing it is not the same.

## B. CONDUCTING BUSSINESS IN TWO OR MORE MEMBER STATES

### *Legal basis for determining the applicable legislation when working in two or more Member States*

Further analysis with regard to the conduct of activities in two or more Member States will be carried out in relation to the content of article 13 para. 2 of the basic regulation. This provision states in point (a) that a person who normally pursues self-employment in two or more Member States is subject to the legislation of the Member State in which he or she resides if he / she carries out a substantial part of the work in that Member State. If the determination of the applicable legislation can

not be made on the basis of the abovementioned standard, then it will be the legislation of the Member State where the person's interests are located if that person is not resident in one of the Member States in which he carries out a significant part of his work.

***Normal self-employment in two or more Member States***

The statement by an authority of a Member State that in the circumstances it is dealing with normal self-employed activities in two or more Member States makes it possible to separate such facts from temporary work on the territory of another Member State, which is regulated by article 12 para. 2 of the basic regulation. The term "person who normally performs self-employment in two or more Member States" means, in particular, a person who simultaneously or alternately carries out one or more separate types of work on his own, irrespective of the nature of the work, in two or more Member States. 'It is therefore a person who at the same time in several Member States undertakes a large number of independent services for different clients as part of his business activity and does not operate in several Member States in successive periods'[1].

The requirement of simultaneous economic activity in two Member States referred to in article 14 para. 6 of the implementing regulation shall be reduced according to its linguistic importance to simultaneous work as part of its economic activities in two or more Member States. However, the wording "doing business for change" may raise doubts about interpretation. Having regard to the judgment of the Polish Supreme Court, it should be stated that the interpretation of this concept must take place narrowly, without extending the application of the provision of art. 13 para. 2 of the basic regulation for alternating work in two or more Member States, but for a longer period of time. In such a case, the classification of the facts should take place on the basis of art. 12 para. 2 of the basic regulation. "Therefore, it should be assumed that the changes are so short that it would be difficult or futile to provide insurance to a person moving in a given country or that it is not possible to confirm the situation referred to in art. 12 para. 2 of regulation 883/2004 "[2].

[1] Polish Supreme Court ruling from 2 March 2010, II UK 233/09.
[2] K. Ślebzak, *Koordynacja systemów zabezpieczenia społecznego (*Warszawa, 2012), 247.

***Performing a substantial part of the work in the Member State of residence***

As in the case of hired employees, deciphering the terms used in the basic regulation is possible through the use of indications from the implementing regulation. Since the concept of place of residence and criteria for its determination are explained in part A of this study, this part of the analysis will not be repeated. In order to determine the meaning of 'a significant part of the work' carried out in the context of an economic activity, it should be pointed out that it is a quantitatively significant part of self-employed work done in a Member State, which may not be the largest part of this work. In the case of self-employment, the following indicative criteria should be taken into account: turnover, working time, number of services provided or income. As for employed persons, as part of the overall assessment, compliance with the above criteria in a proportion of less than 25% of these criteria indicates that a significant part of the work is not carried out in a given Member State.

It follows from the above that the conditions for establishing a significant part of the activity are analogous to the provisions referring to the determination of a significant part of the work of hired employees. The catalog of explicitly indicated criteria is wider. At the same time, it was adjusted to the economic nature of running the business, in particular by referring to the issue of turnover and income. If a competent authority of a Member State carries out a substantial part of the work by a person doing business in the country where he resides, this should result in the issuance of a certified A1 form, in which the legislation of that country is defined as appropriate.

***Not performing business or a substantial part of it in the Member State of residence***

If a person who normally works as self-employed in two or more Member States, does not reside in one of the Member States in which he carries out a substantial part of his work, he is subject to the legislation of the Member State in which his/her center of interest is. The provision of art. 13 para. 2 letter b of the Regulation is, in principle, clear and does not require explanation, apart from the necessity to establish the meaning of the concept of "center of interest" as previously not occurring. The 'center of interest' for the activities of the self-employed person is determined by taking into account all aspects of his/her professional

activity, in particular the place where his/her permanent place of business is, usual nature or duration of the activity performed, the number of services provided and his/her intention resulting from all circumstances.

The selection of circumstances should be adapted to the situation of the given individual. The body is not limited by criteria, because using the term "and especially" not only is allowed, but even accepted it is necessary to refer to other aspects of the business. Hence, it is necessary to include all aspects of the person's activities. As in the case of salaried employees, the assessment should be made taking into account the situation that is likely to occur during the next 12 calendar months.

## C. OTHER CASES OF WORK IN TWO OR MORE MEMBER STATES

In addition to the above situations widely regulated by EU law, it was noticed that it is necessary to regulate facts that do not fall within the scope of only contract work or only business. The first case concerns persons who normally perform contract work and self-employment in different Member States. The person is then subject to the legislation of the Member State in which he / she carries out his paid employment. Conversely, if he or she carries out such work in two or more Member States, then the applicable legislation should be determined according to the rules applicable to persons who only work in two or more Member States.

The second special regulation refers to the situation of persons employed as a civil servant by one Member State and which carries out contract work and / or self-employment in one or more Member States. Such a person shall be subject to the legislation of the Member State to which the administration employing him is subject. This special regulation should be seen in the context of art. 1 of the basic regulation. It is not about any official employment situation. Conflict of rules of art. 13 para. 4 of the basic regulation will apply only when a person employed as a civil servant, i.e. under a public-law relationship, is covered by a social security system other than the general one.

## CONCLUSIONS

The complicated employment relations in the EU resulted in a broad extension of legislation in this area. This problem can be clearly seen by examining the example of a short issue regarding the performance of work in two or several Member States. At the same time, the adopted provisions use extremely general terms, the fulfillment of which requires the adoption of an implementing regulation for the basic regulation, which in the end does not remove all interpretation doubts. However, it should not be forgotten that the choice of a regulation as a form of regulation means that it should be applicable in all Member States - that is, in legal systems regulating the employment sphere and the area of social security in various ways. Therefore, the adopted method of regulation should be considered as correct and corresponding to the EU's needs.

Depending on the conditions of work performed by a given person, the authorities must separately assess the situation of hired employees and persons conducting business activity using different criteria. Although some of them are similar, the nature of employment requires their adjustment to the form of work. The Member States' authorities must, in doing so, fully determine all the circumstances relevant to the determination of the applicable legislation. This means that it is unacceptable to examine the actual state only using the criteria set out in the regulations as an example.

The determination of the applicable legislation under the provisions of regulations nr 883/2004 and 987/2009 gives rise to legal fictions requiring the treatment of persons covered by the A1 form to be validated for the purposes of legislation determined in accordance with the regulations as if they were pursuing each of their hired work or self-employment bill and as if they obtained all their income in the Member State concerned. This solution has a direct impact on the basis for the assessment of social security contributions. The competent authority in matters of social insurance must take into account the entire economic activity of the person for whom the applicable legislation has been established.

## BIBLIOGRAPHY

**Books**

1. „Praktyczny poradnik. Ustawodawstwo mające zastosowanie w Unii Europejskiej (UE), Europejskim Obszarze Gospodarczym (EOG) i Szwajcarii" Komisja Administracyjna ds. Koordynacji Systemów Zabezpieczenia Społecznego, Bruksela, 2013.
2. Ślebzak K. *Koordynacja systemów zabezpieczenia społecznego.* Warszawa, 2012.

**Case Law**

1. Polish Supreme Court ruling from 2 March 2010, II UK 233/09.

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# THE PARENTS RIGHT TO CONTROL THE CHILD'S RELATIONSHIPS

**Andreea DRĂGHICI [1]**
**Daniela IANCU[2]**

***Abstract:***

*In the context of the increasing recognition and promotion of children's rights and freedoms, the action margin of parents is increasingly limited, leaving the child with decision-making independence and action, with all the consequences of this fact. In their quality as titulars of parental authority, parents must intervene to ensure the proper purpose of their quality of legal custody of parental authority. The question arises as to the limitation between the exercise of rights and freedoms of the child and the restrictive parental interference that could prevent or correct a situation of potential danger to the child's life, physical or mental integrity. For a rigorous analysis, we will also refer to the French legislation in the matter.*

***Key words:*** *child; parent; parental authority; personal relationships; rights; freedoms.*

## INTRODUCTION

The content of the Parent's right to control the child's social relationships. The influence of the Parent supervisingobligation on the child's right to have personal relationships with certain persons.

In the French doctrine, it was shown that the parent's right to control the child relationships allowedparents to forbid or to impose limits to all child's relations with the third parties, no matter the relation type. Thus, it is about regulating visits that can be made to the child, supervising the correspondence the child receive or send, forbidding the relationships with certain persons. This right allows the parents to forbid

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to the adolescent child to live in concubinage or control his sentimental life[1].

By the way they are regulated and by the variety of rights and freedoms recognised to the child by the Law no. 272/2004[2]concerning the protection and the promotion of the child's rights, this beneficiates of an indisputable autonomy in the society and in the relationships with third parties.

That allows the child, undoubtedly, to voluntarily adopt a certain conduct in the relationships with them and to use all the necessary ways to have, maintain and develop the social relations that he wishes. The main way to achieve this right is circumscribed, as we already mentioned, in the Law no. 272/2004 which consecrate to the child the rights and the freedoms allowing him to manifest itself as a subject of law within the society.

As it results from the 17 paragr.1 from the Law 272/2004 the child has"the right to maintain personal relationships and direct contacts with his parents, relatives and, also, with other person for whom the child has developed attachments bonds".

We must mention that, considering their quality of parental authority titular, the parents have the duty to supervise the child in order that he grows and develop in a harmonious environment and corresponding to his needs which are in permanent development. It results, by the way that, concerning that legal duty, the parent has also the right to control this relationships of the minor other persons. So, the right of the child to have relationships with certain person would be limited, restricted through the intervention of any of the parents, justified by the parental authority content, as long as their supervising obligation is in accordance with the superior interest of the child. However, the justified and reasoned intervention of the parents mustn't be presumed in all situations being in the superior interest of the child, because there are also situations in which this intervention exceeds the legal limits, representing a true intrusion in the child's private life.

In other words, the limit between legitimate and unjustified is regulated, this time also, by the principle of the primordial protection of

[1]Guy Raymond, *Droit de l'enfance et de l'adolescence,* 5 edition, (France: LexisNexis, 2006), 173.
[2]Published in Official Journal no.159 from 5 march 2014.

the superior interest of the child, such it is stipulated in art. 6 of the Law no. 272/2004.

In our opinion, it is necessary to distinct between two important categories of social relationships: the social relationships of the child with those persons whom the law or the judicial court recognise the right to personal contact and the social relationships of the children with other persons who doesn't benefit from this prerogative. Considering this last perspective, we appreciate that, after a just analyse, the parent's right to control the child relationships with other persons must be flexible, otherwise the supervision duty resulting from the paternal authority content shouldn't find its purpose.

So, in accordance with art.493 from the Romania Civil Code "the parents has the right and duty of supervising the minor child". In the same logic is regulated, also, art.37 from the Law 272/2004 which establish the supervising obligation to the parents as a consequence of the fact that "the child has the right to be raised in conditions allowing his physical, mental, spiritual and social development".

What child supervision means?

As a right and a duty, conferred by the law, the child supervision has a considerable importance in qualifyingparents' performance regarding the child. It has to be permanently exercised, so that the child grows harmoniously both physically and mentally. As it was already mentioned, the supervision obligation suppose, on the one hand the child's guard, in the sense that he must be protected from certain situations that would endanger him and, on the other hand, the permanent information and conciliation of the child by the parent regarding all the risk situations to which it may be exposed[1].

In other words, the guard could can remove those circumstances that, by their nature, could expose the child to situations that would harm himself and other people.The supervision obligation, based on the parental authorityrepresents the basis for the parents'responsibility for the prejudicial act of their child that can be removed only if the parent proves that the prejudicial act of his child is due to another cause, independent of the exercise of the supervision obligation[2].

[1]Cristina Irimia în Fl. A. Baias, E. Chelaru, R. Constantinovici and I. Macovei (coord.) *Noul Cod civil*, (Bucharest: C.H Beck, 2012), 538.
[2]See Andreea Draghici, *Protecţia juridică a drepturilor copilului,* (Bucharest: Universul Juridic, 2013), 201-208.

# THE CHILD'S RIGHT TO MAINTAIN PERSONAL RELATIONSHIPS WITH PARENTS, RELATIVES OR WITH OTHER PERSON FOR WHOM THE CHILD HAS DEVELOPED ATTACHMENTS BONDS

The child's right to maintain personal relationships with parents, relatives or with other person for whom the child has developed attachments bonds is guaranteed by the Civil Code regulations and by the article 17 from the Law no. 272/2004. The law naturally establishes also the exception to the exercise of this right, namely the situation in which this does not correspond to the superior interest of the child. The legislator thought the recognition of this right as a normal consequence of the fact that, losing the quality of husband does not suppose the loss of the parent quality. In other words, the parent to whom the child was not entrusted will continue to exercise the parental rights recognized by the law (the right to supervise to the growth and education of the child and the right to guide his in all aspects). Also, it should be pointed out that the parentto whom the child was not entrusted is nor assimilated to the parent declined from the paternal rights. The law recognize him, considering his quality, a series of rights regarding the child, rights that are representing a guarantee of the respect of the constitutional right to a private life and to a family right.

In conclusion, the parent to whom the child was not entrusted has the right to keep personal relationships with the child and to supervise to the growth, education, teaching and professional training of the child. In the case this is prevented by the other parent in exercising this right, he or she has the possibility to appeal to the judicial court who will determine the concrete ways of the right exercise and which are mandatory for the parent to whom the child was entrusted.

According to article 18from the Law no. 272/2004, the exercise of the right to maintain personal relationships with the child could be realised in many ways: meetings of the child with the parent or with another person who has, according to law, the right to personal relationships with the child; visiting the child at his home; accommodation for a determined period by the parent or by another person to whom the child is habitually resident; the correspondence or another form of communication with the child; transmitting information to the child about the parent or about other persons who, according to the

law, have the right to maintain personal relations with the child; the transmission by the person to whom the child leaves of certain information concerning the child, including recent pictures, medical or scholar evaluations, to the parent or to other persons who have the right to maintain personal relationships with the child.

Establishing the concrete ways of the exercise of the right to maintain personal relationships with the child and of the visiting programme could be realised in good faith by both parents and only in the case they do not reach a compromise it can be subsidiary determined by the judicial court (art.17 paragr.4 from the Law no. 272/2004). We consider that, in order to avoid eventual misunderstandings between parents regarding the exercise of the right to have personal relationships, with the custody of the child after the divorce, the court should also decide on those concrete way of exercising this right, all the more so as, for the first time, the superior interest of the child is evaluated and, in additions, the children are and must be the main beneficiaries of the court decision. Un additional argument in rejecting a compromise between parents concerning the visiting programme could be also the fact that, getting a divorce, the relationships between the child parents are irremediably injured, agreeing to any common problem, even the child entrusting or setting up a visiting programme who will ensure the maintain of personal relationships with the child is hard to believe that will last in time. Thus, it worth considering the court decision pronounced by the Section for minors and family from Alba-Iulia which shows that the establishment of a visiting programme for the father, on the grounds that he did not have an aggressive attitude towards the child, only towards the child's mother, represents a misapplication of the legal provisions in this matter, as long as it was proved that keeping those relationships for the moment is not in the superior interest of the child[1]. Also, it was pointed out that the request of the parent to whom the child was not entrusted to establish the visiting hours, formulated in the same time with the divorce action, it is admissible and cannot be rejected simply because it was formulated prematurely[2].

To the right of the parent to whom the child was not entrusted to maintain personal relationships with the child it corresponds the

[1]C.A. Alba Iulia, Section for minors and family, Decision no.32 from 3 march 2006 unpublished.
[2]C.A. Alba Iulia, Section for minors and family, Decizia no.5 from 17 january 2006.

correlative obligation of the other parent to respect it, in order to reach its purpose. So, it was shown that „such a cooperative conduct is imposed by the circumstance that the mentioned rights represents, in reality, ways to fulfil the obligations that every parent has towards his child and which subsists as long as the parent in not declined from the paternal rights"[1]. The cooperative conduct must be manifested not only by the parent to whom the child was not entrusted, but also by the parent who has the permanent and effective exercise of the parental rights and duties and which may obstructed in their exercise. For instance, in the practice court it was shown that the definitive expatriation does not make impossible the maintaining of personal relationships with the parent to whom the child was not entrusted or with the members of the extended family. This is the reason why the holders of this right to maintain personal relationships cannot oppose moving out the country's borders and establishing the child's domicile there[2]. As far as we are concerned, we agree with the judicial practice that, establishing the child domicile abroad, does not interfere with the exercise of the right to maintain personal relationships with the child, for the simple reason that the distance would prevent the other parent to keep watch to the growth and education of the child. The personal relationships can be exercised in this situation by finding the ways permitting the participation to the child's growth and education in a most efficient way. In this situation, the intervention of the court is essential in order to concretely determine the specific ways for the exercise of this right, in our opinion the parent's agreement being excluded.

According to the judicial practice, the right of the parent to have personal relationships with the child cannot be limited, unless it was abusively exercised. If this circumstance it isn't proved, the concrete exercise of the parent's right mustn't be obstructed by the mandatory presence of the other parent, the communication between the parent and the child will naturally occur, without any restriction[3]. Therefore, only in special cases, when it is found that the exercise of this right by the parent

[1] Decision no.82 from 25.02.2003, published inO.J.nr.189/26.03.2003, in Curierul Judiciar no.4/2003.
[2] C.A. Section for minors and family, Decision no. 59 from 2 May 2006 unpublished, in D. Tiţian, *Cauzele cu minori în materie civilă şi penală. Practică judiciară, (*Bucharest: Hamangiu, 2006), 71.
[3]Civil section no. III, Decision nr.560/8.04.1994.

to whom the child was not entrusted is not in the best interest of the child, the court may forbid its visiting right. This right can be suppressed, for example, for serious reasons that are likely to deeply trouble the child (alcoholism, inappropriate behavior towards the child)[1].

In French doctrine, it is claimed that the parent titular of the right of visiting the child is also titular of a correspondence right, which involves, even it is not regulated by the law, on one hand, the right of the child to receive a correspondence from the parent who he was not entrusted with the child raising and caring and, on the other hand, the right of the parent to receive and send correspondence to the child. This rules are applied also for the telephonic conversations[2].

In French legislation, article 373-2 from the Civil Code regulates the principle in accordance which, in the situation of separate exercise of the parental authority, the parent who does not daily exercise this authority, must maintain personal relationship with the child.

In this purpose, any change of residence of one of the parents, when it modifies the ways of exercising the parental authority, must be the subject of a prior information in due time of the other parent (Civil Code, article 373-2).

It must, in fact, allow the parent, who would risk to be deprived of the relationship with his child, to ask to the judge responsible for family law cases a modification in the ways of exercising the parental authority[3].

The French legislation is extremely tough on one parent's refuse to allow the child to have personal relationships with the other parent. So, many offenses were regulated in order to sanction the parent who would thus deprive the other of his relationship with his child, namely: failure to inform about the change of residence (art.227-6 from Criminal Code); kidnapping the minor (art.227-9).

As for the relations with ascendants, parents cannot limit the child's relationship with his grandparents. However, the ban may intervene when the interest of the child asks for it. If there is no amicable agreement between the interested parties, the judicial authority will determine the grandparents' right to visit, who will, most often, be

[1]R. A. Garder, *Les enfants et le divorce,* (Paris: Éditions Le Hennin et Éditions Ramsaz, 1980), 244.
[2] Garder, *Les enfants et le divorce*, 244.
[33] Raymond, *Droit de l'enfance et de l'adolescence* , 174.

entitled to receive the child to them. The jurisprudence considers that this right granted to grandparents can be extended to great - grandparents.

Article 371- 4 from French Civil Code authorise the judicial authority to grant, in exceptional circumstances, a visiting right or correspondence right to other persons, parents or not. According to the French jurisprudence, the judges from the trial courts often appreciate the character of an exceptional situation: it may be the godparents, uncles, or aunts, persons who have previously obtained the child, the ascendant's partner, the divorced husband of the mother, the author of a false recognition, the former partner of the mother, author of an annulled recognition.

## THE PARENT'S RIGHT TO CONTROL THE SOCIAL RELATIONSHIPS OF THE CHILD WITH OTHER CATEGORIES OF PERSONS

Concerning the other categories of persons, other that we have already mentioned,such: friends from a school or extra-curricular entourage, representatives of formal or informal structures, etc.,we believe that, in accordance with the duties resulting from the content of parental authority, the parent can limit any social connection or relationship that could cause injuries of any kind to the child.Obviously, this limitation must be made after an objective information of the child from the parent, by presenting the concrete situation as a whole in relation with social values, moral and ethical, to which the legal representative refers. Even in this situation, the superior interest of the child must come first.

## CONCLUSION

In conclusion, the parent's right to control the child relationship is founded on the legal duty to raise and educate the child according with their own convictions. So, the child's right to have relationships with some persons can be limited, restricted as long as their supervision obligation is in accordance with the superior interest of the child. However, the justified and argued intervention of the parents must nor be presumed in all situations as beeing in the superior interest of the child because there are situations when this intervention exceeds the legal

limits and, in this case, can be classified as an intervenție depășește limitele legale putând fi calificată ca o adevărată interference with the child's private life. Obviosly, the coercitions applied by the parents refers only to the people on the child's group or entourage, meaning those relationships that are not founded on legal provision or a court decision. With the statement that the parent's intervention should take into account the child's best interest, we make it clear that this prerogative is limited to the personal relationships the child has to maintain with those with whom he has a blood relation or to whom he has developed attachment relationships.

## BIBLIOGRAPHY

### Books

1. Baias, Fl. A., Chelaru, E., Constantinovici R. and Macovei, I. *Noul Cod civil.* Bucharest: C.H Beck, 2012.
2. Draghici, A. *Protecţia juridică a drepturilor copilului.* Bucharest: Universul Juridic, 2013.
3. Garder, R. A. *Les enfants et le divorce.* Paris: Éditions Le Hennin et Éditions Ramsaz, 1980.
4. Raymond, Guy. *Droit de l'enfance et de l'adolescence,* 5 edition. France: LexisNexis, 2006.
5. Tiţian, D. *Cauzele cu minori în materie civilă şi penală. Practică judiciară.* Bucharest: Hamangiu, 2006.

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# LIABILITY FOR INSOLVENCY IN REGULATION OF LAW NO. 85/2014

**Dragoș-Mihail DAGHIE**[1]

***Abstract:***

*The new regulation of the insolvency procedure brought novelties in the field of professionals which failed in trading and has transposed the new challenges regarding the way in which the insolvency procedure is opened, conducted and closed.*

*As regards the opening of the insolvency procedure, some novelties may be noticed that affect the requisite conditions for the manifest insolvency, but also for the impending insolvency, regarding the content of the debtor's application initiating the proceedings, the threshold value and so on.*

*Moreover, Law no. 85/2014 introduces the obligation of running the procedure prior to opening the insolvency procedure, and this stage is intended to mitigate the risk for the claims which the debtor owes to the state budget.*

***Key words:*** *insolvency; debtor; creditor; liability*

## INTRODUCTION

In contemporary times, insolvency is an unquestionable reality, as many merchants/professionals are subject thereto either because they fail in business, or because they choose this method in an attempt of relief from debts accruing intentionally or as a consequence of bad management.

From this perspective, one may classify insolvency as premeditatedly fraudulent or insolvency due to economic circumstances, bad management, unforeseen situations, etc.

Insolvency, as a generic name, has been the subject of three regulations since 1989: Law no. 64/1995 regarding judicial reorganization and bankruptcy[2], Law no. 85/2006 regarding insolvency

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[2] This study considers the form of the law before being repealed.

proceedings[1] and Law no. 85/2014 regarding insolvency prevention and insolvency proceedings.

The new regulation of the insolvency procedure brought novelties in the field of professionals that failed in trading and has transposed the new challenges regarding the way in which the insolvency procedure is opened, conducted and closed.

Regarding the liability of management bodies, the new legislative act, starting from the prerequisites, which have already been set forth by Law No. 85/2006 and Law No. 64/1995, also introduces new elements, finishing certain aspects concerning this type of liabilities, which needed to be updated.

By its legal provisions, the new legislative act proposes modifications of the previous conditions required to trigger the liability of management bodies, which, nevertheless, could have been improved even more, considering their current form.

The insolvency proceedings have always meant, irrespective of their name, not only giving the debtor the possibility to redress its activity, but also a method for holding liable the person or persons who is/are guilty, under any form, for the occurrence, for causing or for any form of inducing this situation.

The company's management bodies are liable for the actions taken by the company through its participation in the commercial circuit.

## LIABILITY OF MANAGEMENT BODIES

The insolvency regulation currently lays great focus on the parties responsible for the initiation of the insolvency proceedings, the legislator attempting to cover the widest possible range of situations and active subjects triggering liability.

Traditionally, Law no. 31/1990 stipulates, under Art. 73 the impossibility to engage the directors' liability towards third parties for the company's obligation, showing that the directors' solidarity with the company exclusively concerns the reality of the payments made by shareholders, the actual existence of the paid dividends, the existence of the registers requested under the law and the correct maintenance thereof, the full compliance with the general assembly's resolutions and the strict

[1] This study considers the form of the law before being repealed.

fulfilment of the duties imposed under the law and the incorporation deed.

Moreover, Art. 72 of Law no. 31/1990 stipulates, in addition to this reasoning, that the directors shall only be held liable according to the provisions in the agency agreement concluded with the company and in compliance with the provisions under the companies' law.

Hence, during the normal course of business of the company, the directors may not be held directly liable by the company's third party creditors, but, instead, the liability is circumstantiated, via the company.

Furthermore, Art. 55(1) of Law no. 31/1990 also supports this theory. According to this article, in so far as third party relations are concerned, the company is bound by its management bodies' acts, even if these acts exceed the company's business scope.

Law No. 31/1990, under section 73, provides for only one situation when the company's creditors may take direct action against the directors, namely when the insolvency proceedings are initiated. Thus, there is only one method available for the creditors, to take action directly against the directors, in other situations than within the insolvency, the only action available to them being against the company.

Pursuant to section $73^1$ of Law No. 31/1990, the scope of the management bodies is enlarged, including the directors, managers, members of the supervisory council and of the management board, censors or financial auditors.

The possibility to trigger the liability of management bodies is currently regulated by section 169 of Law No. 85/2014, according to which, at the request of the receiver or liquidator, the syndic judge may order that part or all of the liabilities of the legal entity debtor, which is subject to the insolvency proceedings, without exceeding the prejudice caused by the act, be borne by the members of the management and/or supervisory bodies of the company, and by any other persons who triggered the debtor's insolvency, by one of the following acts: a) use of the legal entity's assets or credits in own interest or in another person's interest; b) production activities, trade or services supply carried out in personal interest, under the coverage of the legal entity; c) ordering, in personal interest, the continuation of an activity which obviously led the legal entity to the suspension of payments; d) keeping fictitious accounting records, hiding of certain accounting documents, or failure to keep the accounting records according to the law. In case of failure to

provide the accounting documents to the receiver or liquidator, both the fault, and the causality relationship between the act and the prejudice shall be presumed. Presumption is relative; e) embezzlement or hiding part of the legal entity's assets or fictitious increase of its liabilities; f) use of subversive means to procure funds for the legal entity, for the purpose of deferring the suspension of payments; g) during the month preceding the suspension of payments, preferential payments have been made or ordered to be made to one creditor, to the detriment of the other creditors; h) any wilful act which triggered the debtor's insolvency, established pursuant to the provisions of this title.

If the receiver or, as the case may be, the liquidator failed to point to the persons who are guilty for the debtor's insolvency and/or decided not to initiate the action provided under section 169(1) of Law No. 85/2014, such action may be initiated by the president of the creditors' committee, based on the creditors' assembly decision or, in the absence of the creditors' committee, by a creditor appointed by the creditors' assembly. In addition, this action may be initiated, under the same terms and conditions, by the creditor holding more than 50% of the value of the debts entered on the list of debts.

The syndic judge may be vested with the settlement of the action for liability of the members of the management bodies by the receiver, the liquidator, the president of the creditors' committee based on the creditors' assembly decision or, in the absence of the creditors' committee, by a creditor appointed by the creditors' assembly.

According to the previous legal provisions of the insolvency law, before the amendment of Law No. 85/2006 by Law No. 169/2010, the creditors, in order to hold liable the director causing their prejudice, needed the syndic judge's prior approval. The law on the insolvency proceedings conditioned the syndic judge's approval on the satisfaction of certain conditions:

- the receiver or the liquidator failed to point, in their report on the causes for insolvency, to the persons who are guilty for the insolvency of the legal entity debtor's assets;
- the receiver or the liquidator failed to lodge the action provided under paragraph (1), and the liability of the persons mentioned under paragraph (1) is subject to a limitation period.

In the case of the first condition, the report mentioned was that provided under section 59(1) of Law No. 85/2006, a report which is required to be prepared, under the simplified proceedings, within the term set out by the syndic judge, which may not exceed 60 days from the appointment of the insolvency practitioner, analysing the reasons and circumstances leading to the debtor's insolvency, stating the persons to whom the insolvency may be ascribable.

Further to the amendments introduced by Law No. 169/2010, syndic judge's authorization was no longer required, as it prevented free access to justice.

According to the doctrine[1], the legal nature of the directors' liability when the insolvency proceedings are initiated is considered, as a rule, to be of a civil tort nature or, more rarely, of a civil contractual nature. According to one opinion[2], the liability established by section 138 of Law No. 85/2006, currently section 169 of Law No. 85/2014, has a civil tort nature, because its triggering is conditional upon the satisfaction of the conditions provided by section 1357 *et seq.* of the Civil Code.

Certain conditions are required to be satisfied, in order for the management bodies' liability to be triggered. First of all, an illegal act has to be committed.

Illegal acts, which may be sanctioned by liability under the insolvency law, are listed under section 169(1)(a)-(h):

a) use of the legal entity's assets or credits in own interest or in another person's interest;
b) production activities, trade or services supply carried out in personal interest, under the coverage of the legal entity;
c) ordering, in personal interest, the continuation of an activity which obviously led the legal entity to the suspension of payments;

[1] Stanciu Cărpenaru, Vasile Nemeş and Mihai Hotcă, *Legea nr. 85/2006 privind procedura insolvenţei. Comentarii pe articole*, 2nd ed. (Bucharest: Hamangiu, 2008), 424.

[2] Gheorghe Piperea, *Insolvenţa: legea, regulile, realitatea* (Bucharest: Wolters Kluwer, 2008), 737. Also see Ioan Turcu, *Tratat de insolvenţă* (Bucharest: C.H. Beck, 2006), 523; Ioan Adam and Nicolae Savu, *Legea procedurii insolvenţei. Comentarii şi explicaţii* (Bucharest: C.H. Beck, 2006), 773 *et seq.*; Aurica Avram, *Procedura insolvenţei. Răspunderea membrilor organelor de conducere* (Bucharest: Hamangiu, 2007), 29 *et.seq.*

d) keeping fictitious accounting records, hiding of certain accounting documents, or failure to keep the accounting records according to the law. In case of failure to provide the accounting documents to the receiver or liquidator, both the fault, and the causality relationship between the act and the prejudice shall be presumed. The presumption is relative;
e) embezzlement or hiding part of the legal entity's assets or fictitious increase of its liabilities;
f) use of subversive means to procure funds for the legal entity, for the purpose of deferring the suspension of payments;
g) during the month preceding the suspension of payments, preferential payments have been made or ordered to be made to one creditor, to the detriment of the other creditors;
h) any wilful act which triggered the debtor's insolvency, established pursuant to the provisions of this title.

Another condition for triggering the liability of management bodies is the prejudice. The insolvency law provisions refer to the possibility that part or even all of the company's liabilities may be borne by the company's management and/or supervisory bodies, and by any other persons who triggered the debtor's insolvency, by their actions.

There has to be a causal relationship between the illegal act and the prejudice caused, pursuant to the civil liability rules, *i.e.* the resulting prejudice has to be the result of the illegal act committed by the company's management and/or supervisory bodies, or by any other persons who triggered the debtor's insolvency.

The guilt requirement, although the law does not expressly provide it, results from the wording of section 169(2) of Law No. 85/2006, which uses the phrase persons guilty for the insolvency.

Furthermore, please note that the liability of the company's management bodies is not unlimited, rather, it is subject to the common law rules, therefore the liabilities required to be covered must not exceed the prejudice caused by the illegal act.

Thus, the causality relationship determines the value of the liabilities to be covered, which is the measure for the extent of the prejudice.

The new regulation takes over the amended legal provisions of the previous law, which covered the legislative void where the initiation of the action for liability was conditional upon the syndic judge's approval, which, in its turn, was conditional upon the satisfaction of certain conditions.

Currently, if the receiver or, as the case may be, the liquidator failed to point to the persons who are guilty for the debtor's insolvency and/or decided not to initiate the action provided under section 169(1) of Law No. 85/2014, such action may be initiated by the president of the creditors' committee, based on the creditors' assembly decision or, in the absence of the creditors' committee, by a creditor appointed by the creditors' assembly. Moreover, this action may be initiated, under the same terms and conditions, by the creditor holding more than 50% of the value of the debts entered on the list of debts.

The previous regulation emphasized the rather unclear wording of section 138 of Law No. 85/2006, which referred exclusively to the situation when the report prepared pursuant to the provisions of section 59(1) pointed to the persons to whom the debtor's insolvency was ascribable, at the request of the receiver or liquidator, the syndic judge may order that part of the liabilities of the legal entity debtor who is subject to the insolvency proceedings be borne by the members of the company's management and/or supervisory bodies, and by any other person who triggered the debtor's insolvency, by one of the following acts:

a) use of the legal entity's assets or credits in own interest or in another person's interest;

b) trade carried out in personal interest, under the coverage of the legal entity;

c) ordering, in personal interest, the continuation of an activity which obviously led the legal entity to the suspension of payments;

d) keeping fictitious accounting records, hiding of certain accounting documents, or failure to keep the accounting records according to the law;

e) embezzlement or hiding part of the legal entity's assets or fictitious increase of its liabilities;

f) use of subversive means to procure funds for the legal entity, for the purpose of deferring the suspension of payments;

g) during the month preceding the suspension of payments, preferential payments have been made or ordered to be made to one creditor, to the detriment of the other creditors.

One may notice that, pursuant to the former regulation, this type of liability could only be triggered if the second report of the insolvency practitioner established that the insolvency would have been ascribable to the members of the management bodies, only at the request of the receiver or liquidator and, if the syndic judge approved such request, they could order that only part of the debtor's liabilities be borne by the guilty persons, provided that such liabilities were the consequence of any of the acts listed under letters a) - g) of section 138 of Law No. 85/2006.

Currently, the law expressly provides that all of the liabilities may be ordered to be borne, provided that there is a causality relationship between the acts and the entire prejudice.

Also pursuant to the former regulation, as an exception, the creditors' committee or the creditor holding more than half of the value of all liabilities could request the syndic judge to be authorized to initiate the action provided under paragraph (1), if the receiver or the liquidator failed to point, in its report on the causes for insolvency, to the persons who were guilty for the insolvency of the legal entity debtor's assets; if the receiver or liquidator failed to lodge the action set out under paragraph (1), the liability of the persons mentioned under paragraph (1) is subject to a limitation period[1].

Nevertheless, this exception was also very limited in terms of its applicability. Thus, only the creditors' committee or the creditor holding more than half of the value of all the liabilities could request the syndic judge's authorization to initiate the action for liability, and only if the receiver or liquidator failed to point, in their second report, to the persons who were guilty for the insolvency, or if the receiver or liquidator failed to lodge the action, which was subject to a limitation period.

Pursuant to these legal provisions, in the absence of a creditors' committee or if none of the creditors held more than half of the value of the liabilities, the guilty persons are exempt of liability, by legislative omission. Moreover, if the receiver or the liquidator established, in their

[1] Paragraph (3) of section 138 was amended by point 15 of section I of Law No. 277 of July 7, 2009, published in *The Official Gazette* 486 (2009), supplementing section I of Emergency Government Ordinance No. 173 of November 19, 2008, published in *The Official Gazette* 792 (2008), with point $20^1$.

second report, the absence of any persons guilty for the insolvency, neither the creditors, nor even the syndic judge, could reverse this presumption, strictly from the perspective of the examined legal provisions. Again, this equalled an amnesty for these guilty persons. Neither the limitation of the acts that could trigger the liability contributed to increased liability of the economic agents, but rather encouraged a fraudulent behaviour, with the complicity of the law.

Unfortunately, the current regulation maintains the condition regarding the exclusive initiation of the action by the creditor holding more than 50% of the value of the liabilities entered on the list of debts. One solution open to the idea of recovering any possible prejudice would have been to acknowledge the legitimate *locus standi* for any creditor whose receivables are entered on the list of debts.

## CONCLUSIONS

The new regulation of insolvency is an unquestionable progress as regards this sensitive area in the life of the merchant/professional. However, like any regulation, there are issues that can be improved following analysis of the practice in that matter, which can prove the effectiveness of certain legislative solutions.

We may infer, without drawing any final and irrevocable conclusions, that the current economic situation, affecting mainly the economic agents, presents a risk which is higher than usual, regarding suspect operations, questionable activities of the management bodies, carried out by these for various hidden or culpable purposes, aimed at causing prejudice for the company's creditors.

This intensification of the potential for fraudulent situations leads to an increased attention required to be paid by the participants in the insolvency proceedings, and not only, without, however, generalizing and extending the presumption of fraud to other operations, as well, since this may potentially unbalance and compromise the civil circuit, in the presence of a constant pressure and fear that the act performed by an entity of law is subject to cancellation, at any moment.

## BIBLIOGRAPHY

### Books

1. Adam, Ioan and Nicolae Savu. *Legea procedurii insolvenţei. Comentarii şi explicaţii*. Bucharest: C.H. Beck, 2006.
2. Avram, Aurica. *Procedura insolvenţei. Răspunderea membrilor organelor de conducere.* Bucharest: Hamangiu, 2007.
3. Cărpenaru, Stanciu, Vasile Nemeş and Mihai Hotcă. *Legea nr. 85/2006 privind procedura insolvenţei. Comentarii pe articole*, 2nd ed. Bucharest: Hamangiu, 2008.
4. Piperea, Gheorghe. *Insolvenţa: legea, regulile, realitatea*. Bucharest: Wolters Kluwer, 2008.
5. Turcu, Ioan. *Tratat de insolvenţă.* Bucharest: C.H. Beck, 2006.

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# ABOUT THE THEORY OF NATURAL RIGHTS, CULTURE AND THE FIRST ROMANIAN CODES

**Andreea RÎPEANU** [1]

***Abstract:***

*An important contribution to the development of juridical science was that of the patriotic lord and great scribe Dimitrie Cantemir, representative cultural personality of his era who, by his wide and multilateral activity, as well as by these advanced, laic and humanistic ideas, was one of the most important European science people. Referring to his works that include as well researches in the field of juridical sciences, we should outline the signification of his contribution by knowing the history of Romanian law, the scientific value of his theories and the manner of presenting it. Partisan of the ideas of the school of equity, supporter of the state of law, where the lord himself is subject to laws and justice, for the sake of the people, protector of law and justice towards the people and predecessor of illuminism, Dimitrie Cantemir considered necessary the evolution of people by culture, with a view to provide the social evolution and preparation of the conditions for the achievement of reforms with a view to improve the situation of peasants.*

***Key words****: State of law; natural rights; culture; Romanian code; juridical principles.*

## THE ROMANIAN LAW IN THE PERIOD OF IX-XVII CENTURIES

Evolution of thought and Romanian juridical science are closely related to the development of society. In this study, referring to the period prior to constituting law as science, we shall deal with the ideas and conception of some significant personalities of the time. We shall focus on their juridical, as well as political thinking, both expressed in documents and legislations, that had an important role in the development of Romanian juridical science.

The period of IX-XIV centuries is characterised by the assertion of Romanian people, as distinct personality from an ethnical perspective, with own political organisation and juridical norms. The ancient Romanian law,

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as Dimitrie Cantemir stated as well, was *ius non scriptum*, that is an unwritten law.

The existence of Romanian unwritten law, with a strong identity, was acknowledge as well by our neighbours, calling it in the official documents, drafted in Latin, *ius valachicum*.

In the Romanian chancelleries, the law is known as *The Custom of Ground* or *The Law of the Country*[1], with the same disposals for all Romanian countries.[2]

Therefore, the name of *Law of the Country* means at the same time its territorial, unitary nature, since it is the law of a country, of a territory inhabited by the same Romanian population.

*The Law of the Country is a Romanian creation*, generated by the lifestyle of ancestors, developed by Romanians under the conditions of organisation in collectivities and feudal political formations.[3]

In order to define the sphere of enforcement of the *Law of the country*, one shall rely on the assertions of Nicolae Bălcescu:

*The Law of the Country substituted as well the political constitution and of civil register and of criminal register. The Law of the Country is an inclusive law system, of a society politically organised in countries, including all norms of unwritten law that rule the organisation of states on local and central level, the juridical regime of property, the juridical status of individuals, the organisation of family, the successions, contracts, collective liability in criminal and tax field, repression of criminal acts and judging trials.*

These norms of law must be construed and enforced in conformity to the principles of equity, since in the Romanian conception[4], justice is equity.

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[1] The expression of *Law of the Country* presents the best the contents of Romanian juridical custom.

[2] Romanians have called these norms, *law*, having the signification of *unwritten norm*, signification explained by Nicolae Noica in *Romanian philosophical saying* (Bucharest: Scientific and Encyclopaedic, 1970), 174, coming from the Latin *re-ligio*, that is *inner law with faith and consciousness*, since *law* at Romanians means as well *religious faith*. Christian law influenced the moral contents of the consciosness of Romanians since their ethnogenesis. Therefore, when *nomocanons* (church laws) appeared, in the XV century, Romanians called them *God's laws* or the *Laws of God*.

[3] The juridical norms related to the organisation of principality and voivodeship represent the beginning of *public law* in the Romanian Countries.

[4] Based on the Romanian principle, according to which, the law system is conceived by Celsus as, *ars boni et aequi*, where *bonus* is the social wellbeing which refers to the protection of social values, and *aequi* is equity.

It must be considered that during all this period the Romanian feudal law had a strong religious nature, and also that unwritten law predominates comparatively to written law.

More bound forms of political-juridical thinking with laic character started to appear, both in Moldova and in the Romanian Country, towards the middle of XV century, when, promoting a policy of consolidation of feudal state and of a more focused centralisation, under the conditions of constituting a religious organisational unity, the lords leading the state, with the support and through Church, introduced written legislation, the same on the entire Romanian territory.

During the following period, that lasted until the end of the XVI century, when feudal immunities started to be limited, and lord force to consolidate, the feudal law includes juridical principles more and more systematised and crystallised.[1] Naturally, the juridical thought registers evolutions, as well the base of which cannot dispense with the legislative, unwritten or written background, certain in terms of contents and accurate as formulations.

In this respect, *the Precepts of Neagoe Basarab to his son Teodosie* (1519-1520) may be considered the first attempt of theorizing the policy of centralised feudal state. With a double character, laic and religious, the work contains elements of public law (receiving messengers, military organisation, rules concerning the organisation of war etc.), for the explanation of which the author declares himself partisan of the idea of authority of lord power for the substantiation of which he used the religious argument.

In the same XVI century, it is noticed a beginning of differentiation between canonic law and laic law, between church law and royal law, being focused distinctions, both practical and theoretical, between public and private law. On their turn, the by-laws of Saxon borough included own regulations.

These include *Statuta iurium municipalium saxorum* (1583), juridical masterpiece which, inspired from Roman and German law, was to satisfy the new desires of urban economy in full development from Saxon towns. The drafting of *bylaws* was preceded by a juridical activity rather intense, carried out by the humanists of the era, one of them being Johannes Honterus from Braşov. In this two juridical works, he supports

[1] From a doctrine perspective. Traian Ionaşcu and Mircea Duţu, *History of juridical sciences in Romania* (Bucharest: Academia Româna, 2014), 17.

the substitution of feudal law with a new Roman ruling, based on humanism, which may correspond to the needs of municipal bourgeoisie in formation.

Also, in the same period, some principles of natural law are also established. Thus, in Transylvania, in the *Tripartitum of* Ştefan Werböczi - 1517[1], code of laws appearing immediately after the peasant war headed by Gheorghe Doja[2], it is defined the notion of „people", including only the aristocrats, and the notion of „populace", assigned to non-aristocrats, to the peasants constituting the majority of Romanians. By this act, the Romanians are completely excluded from the political life of Transylvania. Distinction was made between law and customs, between church and laic law, between law, justice and jurisprudence, between public law and private law and even between natural law and positive law. By its contents, the *Tripartitum* occupies an intermediary place between written and customary law, being a codification of both forms of law in force in such era. *The code* has an introductory part, *prologus*, which includes a range of juridical principles and three parts widely corresponding to tripartite division of law in the law of individuals, goods and actions, division used by Romanian jurisconsults in the presentation of their juridical system. The third part deals with the law and local customs of Transylvania.

In the XVII century in the writings of great scribe aristocrats and mainly in the works of historians, elements of laic thought appeared theoretically substantiating the restriction of lord prerogatives and the increase of the role of great aristocrats, by consolidating the political power of manorial council, by control of state apparatus by the great aristocracy, through the organisation of military forces under the heading of great aristocrats, by their consolidation of feudal exploitation etc. It was simultaneously acknowledge, in a more restricted form, however, the role of Ottoman suzerainty, in the life of Romanian Countries. For instance, Grigore Ureche (1590-1647), partisan of aristocrat regime, supported the need of written laws with a view to restrict central power and secure the political power of great aristocracy, declaring himself however an

[1] The original title is *Tripartitum opus iuris consuetudinarii inlycti Regni Hungariae partiumque adnexarium.*

[2] He was a small Szekler nobleman from Transylvania, who led the peasant revolt against great Hungarian owners (magnates) of ground from 1514, which bears his name.

adversary of Ottoman power.[1] A similar conception we encounter at Miron Costin 1633-1691 and Ion Neculce 1672-1745 in Moldova, as well as at Constantin Cantacuzino 1650-1716 in the Romanian Country.

The feudal law of these times is characterised by beginnings of codifications, founding their expression in the juridical monuments of XVII century, firstly, in the codes of laws of Vasile Lupu, *Romanian book of learning* (1646) and Matei Basarab, *Rectification of law* (1652), both being an original arrangement of Roman – Byzantine law to the realities of Romanian life. Acknowledging as sources of law, the law and customs, the *Book* …. makes a difference between world law, *ius humanum* and God law, *ius divinum* and the law of human nature, *ius naturale*. The first concept corresponds to positive law, the second to the canonic law, whereas the third, to the idea of natural law. It makes an important step on the line of development of Romanian juridical thought, approaching, although only implicitly, issues of a classical juridical importance: principles of enforcement of laws, rights and obligations of individuals, patrimony, field of obligations, successions, institutions of criminal law etc.

The second law, *Rectification of law,* has the same contents as the *code of laws* of Vasile Lupu, to which it is added a part of canonic law from Byzantine law.

Feudal laws by excellence, these codes provided for the inequality of individuals in front of law in a pyramidal medieval society, focused on multiple vassalage relations, consolidating, simultaneously, a state heading when the lord aspired more and more obviously to the position of Byzantine autocratic.

## THE THEORY OF EQUITY, RELY THE ELABORATION OF CODES IN THE CENTURIES XVIII-XIX

The crisis of aristocratic regime determines the occurrence of new forms of government, of absolute monarchy, supported by lords such as Şerban Cantacuzino (1640-1688)[2] and Dimitrie Cantemir (1673-1723)[3].

[1] P.P. Panaitescu, *Annals of the Country of Moldavia*, 2nd edition (Bucharest: Academia, 1959).

[2] He was the lord of Romanian Country between 1678 and 1688.

[3] He was lord of Moldavia (March-April 1693; 1710-1711) and great scribe of Romanian humanism.

An important contribution to the development of juridical science in this period was that of the patriotic lord and great scribe Dimitrie Cantemir, representative cultural personality of his era who, by his wide and multilateral activity, as well as by these advanced, laic and humanistic ideas, was one of the most important European science people. Referring to his works that include as well researches in the field of juridical sciences[1], we should outline the signification of his contribution by knowing the history of Romanian law, the scientific value of his theories and the manner of presenting it[2]. Partisan of the ideas of the school of equity, supporter of the state of law, where the lord himself is subject to laws and justice, for the sake of the people, protector of law and justice towards the people and predecessor of illuminism, Dimitrie Cantemir considered necessary the evolution of people by culture, with a view to provide the social evolution and preparation of the conditions for the achievement of reforms with a view to improve the situation of peasants. Dimitrie Cantemir supported from a historical perspective the traditions of hereditary monarchy in the Romanian Countries, the subordination of aristocrats to central power and the independence of the country towards the Ottoman Power, proving that the tribute which the lords of Moldavia agreed to pay to Turks was only a sign of rendering, not a tribute of submission.[3] The absolute monarchy, *the lordship that dominates alone*, regarded by Dimitrie Cantemir in the form of European enlightened absolutism, was not however a monarchy of divine law, since, in his conception, the lord had to observe law and consider the *voice of vulgus* and the *whispers of herds*. Consequently, he conceived political history as a succession of monarchies, led by the laws of nature, with periods of ascension and regress.

These ideas were reflected in Romanian written law at the end of XVII century and the beginning of XIX century.[4]

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[1] Such as, *Description of Moldavia* (*Descriptio Moldaviae*), (Bucharest: Academia, 1973).

[2] Roman origin of ancient law; receiving the Romano-Byzantine law; hereditary nature of lordship and of succession to lord seat, supporting an enlightened monarchy relied on equity; origin of high dignities; suzerainty and position of Romanian Countries in international relations.

[3] Traian Ionaşcu and Mircea Duţu, *History of juridical science in Romania* (Bucharest: Romanian Academia, 2014), 20.

[4] *Register of laws* (1780) and *Code of Calimach* (1817).

Absolute monarchy, in the form of enlightened absolutism, was supported by the annalists of the time[1], in their works.

During the period of division of feudalism (end of XVIII century – first half of XIX century) primary were the norms of the *customs of ground*, the norms of feudal law, as well as the written norms. In parallel, it was developed the action of codification of law, being removed the regional and municipal particularities. There were however enforced as well the norms included in the *charters* and *lord establishments*, with respect to financial organisation, the organisation of courts, procedure of judgement[2], adoption[3], alienations of premises, gypsy servants[4] etc.

The rulings of Fanariot lords included juridical norms concerning the state organisation and social structure.[5] They included advanced measures, with respect to the organisation of administration, by introducing the waging of state officers and mainly with respect to tributes, with a view to remove the abuses concerning the determination and collection of it.[6]

*Register of laws* (1780) of Alexandru Ipsilanti, elaborated in Greek and Romanian, reflects some authoritarian ideas concerning the state heading, equally taken over from Byzantine law (*Basilicans*) and from the *customs of ground* and included in the scope of defence of the privileges of feudals and their power (consolidation of ownership) a range of improvements concerning the concerning the court organisation and judgement procedure.

*The civil code* of Moldavia (1817) of Scarlat Calimach, having as source of inspiration *the Austrian Civil Code* (1808) and maintaining some feudal traits, reflects the beginnings of division of feudalism and

[1] Ion Neculce and Mihail Cantacuzino.
[2] *Charter of Alexandru Ipsilanti* in the Romanian Country from 1775.
[3] *Charter of Alexandru Moruzi* in Moldovia from 1800.
[4] *Catholic charter* in Moldavia from 1785.
[5] *Establishments of* Constantin Mavrocordat from 1740 in the Romanian Country and 1743 in Moldavia.
[6] *Manual of laws* of Mihail Fotino (Photinopoulos), written in neo-Greek, in three different draftings (1765, 1766, 1777), it may be characterised as code of laws, treaty and legislative codification meant to be adopted as legislation in the Romanian Country. It included excerpts from *Basilicans* and from other Byzantine collections adapted to Romanian social realities. Meant to become an official *Code*, *the Manual from* 1766 was used in Romanian Country and Moldavia only as simple private collection of Byzantine law. In its drafting from the year 1777, where it is paid a special attention to the *customs of ground*, it served to the drafting of the *Register of laws*.

constitution of capitalist relations. It provides a wide juridical frame, which materialises the newest requirements of juridical and political thought.

*The Law of Caragea* (1818), having as source of inspiration the *custom of ground, Basilicans and Register of Law*, although it provided for the feudal relations and even the rests of servitude, it included as well few new disposals, due to some sporadic influences of the *Code of Napoleon* (1804).

A characteristic of bourgeoisie ideology was the modern concept of *illuminism* which, following the instauration of a *national state* and the creation of a *national society*, included all fields of social life. Therefore, *illuminism* represented a political-cultural formula corresponding to the needs of renewal of feudal state and of adjustment of it to the new economic development. *The new formula* intended to prevent the revolutionary subversions, that had taken place in England and France and to shape the medieval institutions in the spirit of the new social-economic requirements and bourgeois claims.

The only solution was the *enlightened absolutism*, meant to modernise, by reforms, *a state crushed by social contradictions*.[1] The enlightened absolutism claims new concepts and positions opposite to state and justice. The monarch exercises the prerogatives in virtue of equity (and not divine), based on a *contract* concluded with its people, to whom it has to provide *happiness*.

In its first form, illuminism developed in our country as a wide progressive movement, the beginning of which was noticed in the *Transylvanian School*, by its representatives: Samuil Micu (1745-1806), Gheorghe Șincai (1753-1816), Petru Maior (1761-1821) and Ion Budai-Deleanu (1760-1820). They criticised the feudal structure and the exploitation of peasants by aristocrats and bourgeois, supporting the need of acknowledgement of equal political rights for the Romanians from Transylvania. Their program claims, besides the elimination of bondage[2], equal rights for all inhabitants, political emancipation of Romanians, by acquiring the status of *constitutional nation*[3] and not *tolerated.* Such claims relied, both on equity, and the right of Romanians resulting from their number and proportion of duties incumbent upon them opposite to the state.

[1] Ionașcu and Duțu, *History*, 23.
[2] This was as well one of the objectives of reformist policy of Iosif II.
[3] State component.

On the same line, by *Supplex Libellus Valachorum* from 1791, Romanian bourgeois from Transylvania asked for being instated in full citizenship rights, equal rights with *constitutional nations*, proportional representation in the political life of the country. This report was grounded, both on historical arguments, proving the authority of Romanians opposite to all the other nations of the country and juridical (constitutional)[1] based on which one asked for proper rights in public life. We notice that these aren't *new rights* but a *reinstate in the prior status* (*restitutio in integrum*).

In this context, it must be outlined the contribution of the first Romanian author of juridical treaties, Vasile Vaida (1780-1835), who, in the three volumes approaching Transylvanian civil law and his history (1824-1826)[2], proved to be the partisan of the ideas of Latin school, by the historical-juridical arguments brought in favour of Roman origin and continuity of Romanians from Transylvania, as well as their claims and social and national rights.

In juridical plan, a first manifestation of illuminism takes place in the form of spreading the theory of equity, on which it shall rely the elaboration of codes in the centuries XVIII-XIX. It will influence as well the activity of the jurists of the time, such as: Petre Depasta, Greek annalist of Constantin Mavrocordat; Toma Cara, translator of the books of Armenopol from 1804 and author of the tree parts of *Pandects* (including the law of individuals); Andronache Donici, representative of the new rationalist-metaphysical thinking, of the centuries XVII-XVIII and author of the famous juridical manual, used as an authentic code of laws, until the adoption of the *Code* of Scarlat Calimach; Damaschin Bojinca, personality with a wide juridical culture; Christian Flechtenmacher[3], one of the main authors of the *Code* of Calimach.

An important thinker of such times, in the Romanian Country, was also Naum Râmniceanu (1764-1839) who, under the influence of the French Revolution and Illuminism, supported the annulment of privileges, equality of all citizens and their representation in the Public Assembly, by deputies, equal rights to learning, as well as the other *illuminated nations of Europe*.

[1] Romanians were the most numerous nation and with the highest number of duties.
[2] It was considered the *first treaty of civil law* drafted by a Romanian.
[3] He considers that the development of national culture is a decisive factor for social and political emancipation.

The illuminist conception entailed other important juridical demarches as well. Therefore, the report of the Moldavian middle bourgeoisie, from 1822, entitled *Carbonaro Constitution*[1] reflected the influence of the ideology of lights and of the ideas of Montesquieu, preoccupation to enforce equal rights for all categories of aristocrats, as well as the maintenance of feudal relations in agrarian economy. *The report* included almost accurate translations of the *French declaration of rights*[2]. As for state organisation, the conception of authors relied on the restriction of the lordship powers and acknowledgement of the law of Public Assembly, as representative body of aristocracy of all categories, of effective heading of the country.

Based on the same illuminist ideas and with a view to develop juridical education, the bourgeois conceptions about the state were amplified; it was gradually created a scientific terminology; the juridical notions were advanced and works with high scientific level were published. Therefore, the main characteristics of juridical sciences in the century XVIII – the beginning of the century XIX-lea consisted in the preoccupation of spreading juridical knowledge and creating a Romanian legislation according to the requirements of Romanian people. Consequently, during the lordship of Constantin Mavrocordat (1711-1769)[3] more consolidated forms of studying law appeared, and during the times of Ioan Gheorghe Caragea (1812-1818)[4] it was constituted a position of Latin and jurist professor occupied by Nestor Craiovescu[5], author of a law course, highly appreciated by contemporaries.

[1] Whose main author was Ionică Tăutu (1798-1830), social-political thinker from the beginning of XIX century in Moldavia, partisan of the ideas of French Revolution and active participant to the political fights, being speaker of middle and small aristocrats and thus a predecessor of forty-eighters.

[2] Law of property, freedom of consciousness, individual freedom, equality in front of law etc.

[3] In the Romanian Country, he reigned six times: September 1730 - October 1730; 24 October 1731 - 16 April 1733; 27 November 1735 - September 1741; July 1744 - April 1748; c. 20 February 1756 - 7 September 1758 and 11 June 1761 - March 1763 and in Moldavia four times: 16 April 1733 - 26 November 1735; September 1741 - 29 June 1743; April 1748 - 31 August 1749 and 29 June 1769 - 23 November 1769.

[4] Former Fanariot lord of Romanian Country he became famous for the first *Code of laws* from Walachia bearing his name, *Caradja Legislation*.

[5] Erudite aristocrat from Romanian Country, knowing the laws of the country and Roman-Byzantine law.

The Charter from February 1816, of constitution of the position of *professor of laws teaching this science to those who want to learn it*, included significant recitals, *since the science of law, both for judges, and for those summoned and eventually for all people is useful, as one which, based on a natural principle, stands as the most healthy support for humanity*.

The Fanariot lords, like bourgeois, to whom juridical attributions were assigned, knew the Byzantin and occidental legislations in original.

During the same period, it was manifested as well the wish of juridical specialisation on superior schools.[1]

The development of capitalist relations influenced the development of the process of systematising the law on subjects. Thus, at the *College from Saint Sava*, Constantin Moroiu[2] (1837-1918) was teaching Roman law[3], criminal law and commercial law, and at Mihăileană Academy from Iaşi it was made the proposal to present during the classes the public legislation and private legislation of peoples. Between 1839-1840, Petru Câmpeanu[4] (1809-1893) sustained for the first time a course of public law and theory of law, and Gheorghe Costaforu (1821-1876), the first rector of the University of Bucharest, professor of civil law, published, in the form of a magazine, *Historical Magazine*, including studies of civil law.

At the beginning of the century XIX the political-juridical conceptions of the era encountered their expression in the *Organic Rules*, introduced by tsarist occupation, in 1831 in the Romanian Country and in 1832 in Moldavia. They were considered by specialists our first constitution, since the state organisation relied on the principle of separation of powers in the state. Thus, the legislative power is entrusted to the Public Assembly, the executive power – to the lord, elected for life, and the court power – to county courts, independent bodies. Also, one stipulated measures concerning the organisation of the profession of lawyer. By the document entitled *Science of collectivity* dated 30 September 1831, published in the *Official Gazette*, it was issued the

[1] In this respect, in 1817 Gheorghe Bibescu and Barbu Ştirbei went to Paris, followed in 1820 by the brothers Filipescu, Bălăceanu, Racoviţă, and the sons of Dinicu Golescu left to Switzerland.

[2] Pioneer of national education, he was officer of Royal Army, with degree of captain. He participated to the Russian-Turkish war against Ottoman Empire. He was one of the most important masons from Romania and also a very active philatelist.

[3] Deemed right of the country.

[4] Of Transylvanian origin, professor of philosophy, successor of Eftimie Murgu.

registration certificate of Ilfov Bar[1], further turned into the Bar of Bucharest.

During the revolutionary year 1848, the juridical science expressed the basic ideas of the political acts of revolution concerning the state and law.

Thus, Nicolae Bălcescu (1819-1852) criticised acerbically the existent social-juridical structures, supporting the need of a new and modern constitution, state suzerainty, equal rights of states. In this respect, he supported with legal arguments, the right of Romanian principalities to independence towards the Ottoman Empire, proving that the so-called *Capitulations* were in fact, treaties of alliance, based on which suzerain power was to provide to Romanian Countries military protection and support.[2]

By its form and contents, *the Proclamation from Islaz* (9/12 June 1848) was above all political acts of the times, being considered an authentic constitution. Among the *social-economic claims*, recorded in the program of Romanian revolution we state: observance of the principles concerning freedom and equality; putting peasants in possession of lands, with or without compensation; removal of feudal privileges; overall tax contribution.

As for the *rights of people and citizens*, one drafted a range of petitions concerning: removal of feudal ranks; abolishment of bondage; political equality of all citizens of any nationality; securing the rights and freedoms of citizens; elaboration of democratic reforms in administration, justice and army; enforcement of the principle of justice and equality in exercising public functions.

As for the *modernisation of political life*, the program of Romanian revolution, includes a range of principles characteristic to bourgeois constitution: constitutional monarchy; separation of powers in the state; ministerial responsibility; inamovibility of judges; equality of all citizens opposite to laws; institution of national guards.

An important representative of this period of national renaissance, who expressed his convictions, both in his scientific, historical and legal

[1] An *authentic Board of lawyers,* subscribed by the Great Logothete of Justice Iordache Golescu, where are mentioned 22 lawyers *ranged at the Divans from Bucharest*, see Mircea Duţu, *History of Bar of Bucharest* (Bucharest: Herald, 2006), 50 and the following.
[2] Ionaşcu and Duţu, *History*, 28.

works, and in the reforms' program targeting a modern state organisation, was Mihail Kogălniceanu (1817-1891). In this respect, he stated that social evolution may be achieved by reforms, as well as by the spread of culture. In the revolutionary program entitled *Desires of national party of Moldavia* (Iaşi, 1848), drafted by him, measures and reforms were included finding continuation, in the juridical form, in the *Constitution Project for Moldavia*, document to which he had as well a significant contribution: removal of any ranks and personal or birth privileges; equality in civil and political rights; *Public Assembly* to include all states of society; lord elected by all states of society; ministerial responsibility and of public officers; individual freedom, of domicile and press; equal and free school education; incorporation of jury for political, criminal and press cases; introduction of civil, commercial and criminal bourgeois registers; removal of beat to death and beat; reform of county courts, inamovibility of judges, removal of county courts and special commissions; freedom of cults; political rights for all inhabitants of Christian religion; gradual emancipation of Jewish; secularization of monasteries' fortunes; new norms concerning policy and prisons; measures for removal of corruption.

Innovative political and juridical conceptions were presented as well by the lord Alexandru Ioan Cuza (1859-1866), jurist. With Mihail Kogălniceanu will incorporate the modern Romanian state, creating a range of reforms such as: agrarian reform (putting peasants in possession of lands), electoral reform based on qualification (but with a lower qualification), reform in education; modern state organisation, development of national institutions, unification and modernisation of legislation by adoption of civil code, criminal code, code of civil proceedings, code of criminal proceedings.

In parallel, the social-economic and national claims of Romanians from Transylvania in the revolutionary year 1848, were sustained with strong juridical arguments by Avram Iancu[1], *Rake of mountains (1824-1872)*, being himself a good knower of law. In this respect, on 20 December 1850 he bequeath all his movable or immovable fortune, *as support for the incorporation of an Academy of Laws, strongly believing*

[1] He was head in fact of the Motilor Country in the year 1849, leading the army of Transylvanian Romanians, in alliance with Austrian Army, against Hungarian revolutionary troupes under the heading of Lajos Kossuth.

*that the fighters with the weapon of law may impose the rights of the nation.*[1]

A remarkable Romanian politician, historian, philosopher and jurist, university professor, Simion Bărnuţiu (1808-1864) was one of the main organisers of the revolution of 1848 in Transylvania. He participated to the *National Meeting from Blaj* on 18/30 April 1848 and in May 1848. He conceived and shared his famous manifest *Proclamation from March* 1848, presenting his principles, previously formulated, starting with 1842, about Romanian nation and the fate of Romanians from Transylvania. His social claims were indissolubly related to acquiring independence and suzerainty of Romanian nation, acknowledgement of the nationality of Romanians, observing the principles of equal rights of all nations living in Transylvania. He was a partisan of national-idealist theory of equity putting it in accordance with the requirement of the era, using it in the scope of satisfying the desires of social and national release of Romanians from Transylvania, as well as democratic organisation of Romanian national state. In his works, *Dereptulu naturale privatu* (1868) and *Dereptulu naturale publicu* (1870), defining equity as *primitive fontana and conditioning validity of all positive law*, he elaborated the practical precept according to which, *any honourable and noble man cannot observe but that positive law corresponding to a national law*.

As professor at the Mihăileană Academy (1855-1860) and then at the University of Iaşi (1860-1864), Bărnuţiu educated people with new thinking, people who further on asked for democratic reforms, universal vote, expropriation of aristocrat and monasteries' properties.

## CONCLUSIONS

The Romanian modern state, before becoming an institutional reality, was imagined as a political project, of entire generations of tourists, thinkers, political people. This project was outlined in the XVIII century. He continued in the XIX century, when the juridical and political thinking created a program of reforms and national emancipation, which outlines the project of modern Romanian state. In this respect, the programs of the revolutions from 1821 and 1848, as well as of secret political societies, between the two revolutions contributed to the clarification of the political project.

[1] Dr. Ioan Fruma, "About Transylvanian juridical spirit", *Transylvania Magazine, Organ of Astra*, no.2 (February 1944):101.

In conclusion, we may assert that, in the first half of XIX century, the Romanian society developed progressively, looking for new models and forms of organisation. Between the reforming theoretical activity (reform projects, reports) and social-political action (revolutions, secret societies), the official reform programs only accelerated the achievement of this political project.

## BIBLIOGRAPHY

### Books

1. Academia Română. *History of romanians*. Bucharest: Univers Enciclopedic, 2015.
2. Rîpeanu, Andreea. *Romanian state and law history*. Bucharest: Universul Juridic, 2011.
3. Rîpeanu, Andreea. *Romanian state and law history*. Bucharest: Universul Juridic, 2012.
4. Rîpeanu, Andreea. *Romanian state and law history*. Bucharest Cermaprint, 2015.
5. Cantemir, Dimitrie. *Historia moldo-vlachica* (History of Moldavia and Wallachia). Bucharest: Academia Republicii Socialiste România, 1983.
6. Cernea, Emil. *Romanian state and law history*. Bucharest: Universitatea din Bucureşti, 1976.
7. Iorga, Nicolae. *History of Romanian, Datina românească*. Vălevii de Munte, 1925.
8. Iorga, Nicolae. *History of Romanians, Revolutionaries*, Vol. 8. Bucharest: 1938.
9. Iorga, Nicolae. *Studies on the Romanian Middle Ages*. Bucharest: Ştiinţifică şi Enciclopedică, 1984.
10. Ionaşcu, Traian and Mircea Duţu. *History juridical sciences in Romania*. Bucharest: Academia Română, 2014.
11. *Tratat de istoria dreptului românesc, I, II.* Bucharest: Academiei, 1984.

# BRIEF CONSIDERATIONS ON THE EVOLUTION OF INSURANCES. NEW REGULATIONS OF THE FINANCIAL SUPERVISORY AUTHORITY IN THE AREA OF EXTINGUISHING THE DISPUTES USING ALTERNATIVE SETTLEMENTS

**Rodica VLAICU[1]**

***Abstract:***

*The emergence and evolution of insurances has taken place during a longer process, nowadays being part of the tradition and of a means of thinking about the risk existence and covering the risks resulted from various unwanted events.*

*As novelty, the Financial Supervisory Authority Rule (FAS) No 18/2017 on the procedure for the settlement of petitions regarding the activity of insurance and reinsurance companies and insurance brokers, states the possibility of alternative settlements for disputes, by being useful and of necessity in a professional process of guidance and information of the consumer.*

***Key words:*** *insurance contract; policy holder; insurer; alternative means; dispute; arbitrage; mediation; conciliation*

## 1. BRIEF CONSIDERATIONS ON THE INSURANCES

The insurances are not a feature of our times, their history being lost in the darkness of time, the first mentions on this area being present in the Code of Hammurabi (1750 BC), according to which "*If any one owe a debt for a loan, and a storm prostrates the grain, or the harvest fail, or the grain does not grow for lack of water; in that year he need not give his creditor any grain, he washes his debt-tablet in water and pays no rent for this year*"[2]. But, the oldest means of help for covering the damages generated by different calamities, date back to about 6500 BC,

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[2] https://www.baar.ro/utile/istoria-asigurarilor/ visited on 11 March 2018

when the stone craftsmen of ancient Egypt organized, with the help of the guild, pre-formed welfare funds[1].

Over time, members of certain collectivities have understood that it is necessary for them to protect against the risks of loss of certain material assets and have started to contribute to mutual funds. Such data are from around 600 BC and come from the collectivities around the Mediterranean Sea.

The contracts stating the oldest clauses in the area of insurances, according to historical sources, have emerged in 215 BC. These were concluded between Roman traders and the Roman state, having as object a series of assets for the Roman army, assets that were supposed to arrive in Spain. The management of the Roman Empire took the obligation of covering the risk if the assets did not make it to their destination in good shape as insurance premium consisting in assets (and not in cash)[2].

The forms of protection against the risks were diversified and the first insurance policies[3], close as shape and content to the modern ones[4], were concluded in 1347 in Genoa. They referred to various risks for shipping.

After the Great Fire in London in 1666, which destroyed 13.000 houses and killed 70.000 persons, as need for the protection of citizens against fires, was established the first bureau for insurances against fire[5]. The company for insurances compelled itself to insure the citizens, in exchange for an amount of money, the firemen's services and the payment of compensation to cover the expenses for the reparation or rebuilt of the burnt house[6].

In 1852, as a need for the protection of the insured persons, was legislated the practice of insurances, from the initiative of Benjamin Franklin, by establishing the society Philadelphia Contributionship for the Insurance of Houses from Loss by Fire.

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[1] Iulia Caprian, Tatiana Covalschi and Ecaterina Ulian, "Aparitia si evolutia asigurarilor in lume", *Studia Universitatis Moldavie* 77, no 7 (2014): 40

[2] Violeta Ciurel, *Asigurări şi reasigurări: abordări teoretice şi practici internaţionale* (Bucharest: All Beck, 2000), 3, quoted by Vasile Nemeş, *Dreptul asigurarilor*, 2nd Edition (Bucharest: Universul Juridic, 2011), 9

[3] https://www.baar.ro/utile/istoria-asigurarilor/ , visited on 11 March 2018

[4] Nemeş, *Dreptul asigurarilor*, 9

[5] Subsequently, this practice spread throughout the world.

[6] Caprian, "*Aparitia si evolutia asigurarilor in lume*", 42

In Romania, in 1744, in Brasov, was established the House for Fire and for over a century, in the same location was established the General Institute for Pensions[1].

The first state institution specialized in the regulation of insurances – the Autonomous Administration of State Insurances is established in 1942. This institution practices all types of insurances, by holding the monopoly regarding the insurance of state assets.

During the communist time, the monopoly of insurances was a property of the state, between 1953 and 1990, the insurances functioning under the auspices of the Administration for State Insurances (ADAS) the only such company in Romania. This monopoly ended in December 1990, when Government Decision No 1279/1990 on the establishment of several joint stock companies in the area of insurances, the ADAS has been disbanded, its activity being transferred to three joint stock companies: Asigurarea Românească S.A, Societatea de Asigurare şi Reasigurare Astra S.A., Carom S.A. This is the starting point for the insurance market.

Subsequently, the major insurance companies in Romania started to form, concluding partnerships with foreign companies with a tradition in the field. Also, beside the insurers were established intermediary insurance companies, which assumed the role as agents, and in some cases as insurance brokers[2].

Even if the area of insurances and re-insurances is a private one, still this activity is of interest for the state which, in the virtue of the principle of the organization of market economy, shall, on the one hand, interfere in order to provide an appropriate framework for the performance of the activity of insurance by the insurers and, on the other hand, in order to adopt rules of prudence, to protect the insurants or possible insurants[3]. Thus, it has been established the Commission for Supervision of Insurances (CSA), having as purpose the protection of the insurants' rights and the promotion of the stability for the insurance activity in Romania.

[1] https://www.asigurari-sanatate.ro/istoria_asigurarilor_din_romania.htm/ , visited on 11 March 2018

[2] https://www.asigurari-sanatate.ro/istoria_asigurarilor_din_romania.htm/ , visited on 11 March 2018

[3]http://www.hamangiu.ro/upload/cuprins_extras/dreptul-asigurarilor-curs-universitar_cuprins.pdf , visited on 11 March 2018

## 2. THE CURRENT LEGISLATION OF INSURANCES

Nowadays, the Financial Supervisory Authority (ASF) by its Emergency Ordinance No 93/2012[1], as an autonomous specialized authority, has assumed and reorganized all the attributions and prerogatives of the National Committee of the Movable Values, of the Insurance Monitoring Committee of Insurances and the Commission for Supervision of the Private Pensions system which, among others, has attributions for provisions in the area of insurances, as regulations, norms and instructions (Art 6 Para 2 of the E.O No 93/2012).

The activity in the area of insurances in Romania is stated by the Civil Code, Law No 32/2000 on the activity and supervision of intermediaries in insurances and reinsurances[2] and the Law No 132/2017 on the compulsory insurance against civil liability for the damage to third parties caused by vehicle and tram accidents[3].

These normative acts are completed by the regulations, norms and instructions issued by the ASF as authority in the area of insurances[4].

The Explanatory Dictionary of the Romanian Language states that the insurance is "a financial operation, resulting from a contract or a legal obligation, by which the insurer compels itself that, in return for a specified periodically sum of money, to compensate the insurant for the damages suffered under certain circumstances".

The insurance is being concluded based on an insurance agreement, by which, according to Art 2199 of the Civil Code, "*the insurance contractor undertakes to pay a premium to the insurant and the latter undertakes that in case of the insured risk he will pay indemnity as the case may be, to the insurant, the beneficiary of the insurance or the injured third party*". The insurance agreement shall be concluded in writing. Its conclusion consists in the insurance policy or the certificate for insurance issued and signed by the insurer or by the term note issued and signed by the broker. The insurance policy, according to Art 2201 of

[1] Emergency Ordinance No. 93/2012 on the establishment, organization and operation of the Financial Supervisory Authority, published in the Official Gazette of Romania, Part 1, No 874/21 December 2012

[2] The title of this law has been modified from "Law on insurance undertakings and insurance supervision" into "Law on the activity and supervision of insurance and reinsurance intermediaries", starting with 1 January 2016

[3] Which abolished the Law No 136/1995 on the insurance and reinsurance in Romania

[4] https://asfromania.ro/en/ , visited on 2 April 2018

the Civil Code shall indicate: name or title, domicile or headquarter of the parties, as well as the name of the beneficiary of the insurance, if he is not part of the contract, the object of the insurance, the risks to be insured, the duration of the insurant's liability, the insurance premiums, the insured sums of money. It may also include other elements established by norms adopted by the state authority, whose competence falls, according to the law, on supervision of the activity in the insurance area.

The drafting of the elements essential for the insurance contract by the insurer represent an obligation stated by the current norms.

Thus, Art 3 Para 2 Let i) of the Annex to the Order No 23/2009[1] states in the competence of the insurance companies the obligation to provide for the clients the documents stated by the Rules concerning the information which shall be provided to clients by insurers and insurance intermediaries, and other elements that the insurance contract must contain – annexes to the Order, which must state information about "the procedure to solve the possible litigations resulted from the performance of the contract, namely information about the means for amiable resolution of the claims stated by insurants or by the beneficiaries of the insurance contracts, where appropriate, not representing a limitation of the client's right to use the judicial procedures".

## 3.LEGISLATIVE NOVELTIES IN THE AREA OF EXTINGUISHING THE CONFLICTS USING ALTERNATIVE MEANS IN THE FIELD OF INSURANCES

For the purpose of protecting the rights of the insurants and promoting the stability of the activity for insurances in Romania, the ASF has issued the Rule No 18/2017 on the procedure for the settlement of petitions regarding the activity of insurance and reinsurance companies and insurance brokers[2].

Art 4 Para 3 of the above rule states that the "*A.S.F. does not express an opinion on the issues complained by petitioners if their settlement is determined by the manner of administering evidence of a*

[1] Order No. 23/2009 for the implementation of the Rules concerning the information which shall be provided to clients by insurers and insurance intermediaries, and other elements that the insurance contract must contain – amended by the Order No 1/2012
[2] Published in the Official Gazette of Romania, Part 1, No 555/13 July 2017

*technical and legal nature the quality, admission and administration of which does not exclusively relate to the application of insurance laws; in all these cases, natural persons are directed to settle the dispute through the 3 alternative dispute resolution entity in the non-banking area, and the legal ones through mediation or arbitration, without restricting their right to act in court*".

These provisions are amended by Art 7 Para 3 of the same Rule, which states that "*with a view to amicably settle disputes between companies, brokers and insured persons, contractors, beneficiaries, injured parties or their representatives, at the request of one of the parties, the alternative dispute settlement methods provided by the legal provisions in force shall be used, respectively, in the case of natural persons SAL-FIN, the Entity for Alternative Resolution of Disputes, and in the case of legal persons, mediation or arbitration; the amicable settlement or alternative dispute resolution methods do not limit the right of the parties to appeal to competent courts*".

Also, Art 7 Para 4 Let d) of the Rule No 18/2018 the executive management of companies and brokers and the coordinator of the petitions analysis and settlement team shall ensure "*ensuring participation in alternative dispute resolution procedures such as conciliation through SAL-FIN, mediation or arbitration, as the case may be, when requested by the consumer*".

The insurance companies and brokers have, based on Art 5 Para 4 and Art 6 Para 4 of the above mentioned rule, the obligation that the "*petitions settlement procedures, information on how to settle them amicably, including through the ADR, mediation or arbitration, as well as information on the email address and telephone number to which information on the status of petitions may be requested is accessible to the public at the office and on the website of companies*".

The above mentioned provisions represent an adjustment of the Romanian legislation with the European regulations and also, they fit in the spirit of the new codes guiding the parties in litigation to a solution outside the courts.

The novelties of the Rule No 18/2017 are:

a) The guidance of the litigants towards alternative means into solving cases;
b) The use of alternative means for conflict settlement at the request of one of the parties;

c) The liability of the executive management of the companies and brokers and of the coordinator for the analysis and solution of claims, in order to insure the participation in the alternative procedures for conflict settlement – when requested by the client;
d) The compelling of insurance companies and brokers to give information about the procedures for conflict settlements in the area of insurances.

Regarding the three options for conflict settlement stated by the Rule No 18/2017, these are effective, fast, confidential and low-cost solutions in relation to the national judicial system.

By analyzing the three options for conflict settlement mentioned by the Rule No 18/2017, each of them has a series of advantages and disadvantages for the client.

Thus, from a cost perspective, it is eligible the conciliation promoted by the structure SAL-FIN, because its use is free, except the cases in which the parties require the administration of evidence, their costs being charged to the solicitor.

Regarding the term for solving the litigation using alternative means, the mediation is by far the quickest one, with the condition that the document stating the agreement between the parties, the *Mediation Agreement*, shall not require its approval by the court or authentication of the public notary.

Concerning the finality of the procedures emphasized by the normative act, the arbitrage is the most effective one, because the litigation shall be concluded by the issuance of a decision exempted from appeals, the arbitrary decision being "*definitive and mandatory after its communication to the parties*". It has the force of an authentic writing and represents an enforceable title.

From the perspective of the Rule, it must be mentioned that, while the entity for alternative settlement of litigations in the non-bank area represent a new structure functioning within the ASF, and the mediation began being stated in Romania in 2006, the oldest one of these three means being the arbitrage[1].

[1] Alexandra Raluca Roşca, "Arbitrabilitatea litigiilor izvorâte din încheirerea şi executareacontractelor de asigurări", *Revista de investigare a criminalităţii*, no. 1 (2017): 16

## CONCLUSIONS

From all the above information, the following conclusions are to be taken:

- Regulations such as the Rule No 18/2017 on the procedure for the settlement of petitions regarding the activity of insurance and reinsurance companies and insurance brokers, which state the possibility of alternative means for conflict settlement are useful and efficient in a society which protects the consumer's rights;
- The answer to current difficulties that a citizen may encounter in accessing the legal system is represented by the alternative means for conflict settlement, namely the arbitrage, mediation and conciliation. These three means are mentioned by the Rule No 18/2017, which enlists the benefits they provide and represent a fast, current and practical alternative for conflict settlement in the area of insurances.
- The Romanian justice seeker needs more information in this meaning in order to consciously choose the appropriate means to follow when prejudiced.

## BIBLIOGRAPHY

**Books**

1. Nemeş,Vasile. *Dreptul asigurarilor*, 2nd Edition Bucharest: Universul Juridic, 2011
2. Gheorghe, Piperea and Cătălin Antonache, Petre Piperea, Alexandru-Paul Dimitriu, Mirela Piperea, Alexandru-Şerban Răţoi and Alina-Gabriela Atanasiu. *Noul Cod de procedură civilă: note, corelații, explicații*. Bucharest: C. H. Beck, 2012

**Articles in a print journal**

1. Caprian, Iulia, Tatiana Covalschi and Ecaterina Ulian, "Aparitia si evolutia asigurarilor in lume", *Studia Universitatis Moldavie* 77, no. 7 (2014): 40
2. Roşca, Alexandra Raluca. "Arbitrabilitatea litigiilor izvorâte din încheirerea şi executareacontractelor de asigurări", *Revista de investigare a criminalităţii*, no. 1 (2017)

**Legislation**

1. Law No 32/2000 on the activity and supervision of intermediaries in insurances and reinsurances
2. Law No 132/2017 on the compulsory insurance against civil liability for the damage to third parties caused by vehicle and tram accidents, published in the Official Gazette of Romania, Part 1, No 431/2017
3. Rule No 18/2017 on the procedure for the settlement of petitions regarding the activity of insurance and reinsurance companies and insurance brokers
4. Regulation No 4/2016 regarding the organization and operation of the Alternative Dispute Resolution Entity in the Non- Banking Financial Sector (SAL-FIN)
5. Emergency Ordinance No. 93/2012 on the establishment, organization and operation of the Financial Supervisory Authority, published in the Official Gazette of Romania, Part 1, No 874/21 December 2012
6. Order No. 23/2009 for the implementation of the Rules concerning the information which shall be provided to clients by insurers and insurance intermediaries, and other elements that the insurance contract must contain

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# LAWYERS` PLEAS AND THEIR COPYRIGHT

**Rodica VLAICU**[1]

***Abstract:***

*The copyright is that particular connection between authors and their works which entitles creators to have moral rights on their actions, which can be further turned into patrimonial rights.*

*The plea is defined as "an oral account sustained by a lawyer in front of a court in order to defend the case of one of the parts involved in an action at law" .*

*The plea can also represent an oral or written assertion or argumentation with reference to a cause or idea.*

***Key words:*** *copyright; patrimonial right; moral right; work; creation; plea; lawyer; plagiarism*

## 1. ASPECTS OF INTEREST ON COPYRIGHT

Ever since ancient times people have been concerned to protect their ownership rights on material goods, but they have hardly taken into consideration the necessity of protecting the products of their intellectual activity under legal proceedings. As a result, legal actions regarding the protection of human brainwork started to be undertaken much later than in the case of other categories of rights. The aim of the intellectual ownership right is to regulate the connection between creators and their work, as well as the relationship between copyrights and third parties.

The copyright refers to that particular connection between authors and their works "*which is due to the fact that the authors` personality leaves its mark on their works in such a powerful way that their relationship is more similar to a lineage report than to a bond between persons and their material assets or between different persons regarding their goods*"[2].This connection

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[2] Viorel Roș, *Dreptul proprietății intelectuale, Dreptul de autor, drepturile conexe și repturile sui-generis,* 1st Volume (Bucharest: C. H. Beck, 2016), 10

entitles creators to have moral rights on their works, which can be further turned into patrimonial rights.

The copyright is a special entitlement, because "*the right of the creator is not given by law, which only acknowledges it, but it is brought into existence in the process of creation*"[1]. During a conference aiming to revise The Convention of Bern, Pierre Recht stated that the copyright is "*a new form of ownership, the creation property, whose true right extends over intellectual works*"[2].

Law No 8/1996 on copyright and neighboring rights[3] did not defined the copyright, but it stated in Art 1 Para 1 that this right "*shall be guaranteed as provided in this Law*" and "*vests in the author and embodies attributes of moral and economic character*". Also, it asserts in Art 1 Para 2 that „*a work of intellectual creation shall be acknowledged and protected, independently of its disclosure to the public, simply by virtue of its creation, even though in an unfinished form*".

According to Art 7 and 8 of the above-mentioned law "*the subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose*", as well as "*derived works created on the basis of one or more pre-existing works*".

We have to specify that not all intellectual works are protected by copyright, although some of them imply creative activities and originality. Among these works there can be mentioned official political, legislative, administrative and juridical texts, as well as their official translations, the reason of expulsion being the fact that they are considered of public interest.

Although art. 12 of Law No 8/1996 on copyright and neighboring rights states that an author shall have the exclusive economic right on his work, Art 33 of the same law mentions some limitations on the exercise of copyright. Therefore, some uses of a work already disclosed to the public shall be permitted without the author's consent and without payment of remuneration, provided that such uses conform to proper practice, are not at

[1] Roș, *Dreptul proprietății intelectuale*, 41

[2] Pierre Recht is a professor, specialized in intellectual property law, president of the Belgian National Commission for Copyright, has represented his country in several conferences for revising the Convention of Bern

[3] Published in the Official Gazette of Romania, Part 1, No 60/1996, with subsequent modifications and amendments

variance with the normal exploitation of the work and are not prejudicial to the author or to the owners of the exploitation rights. As a rule, the right of the third parties to use a work without the consent of the author is confined to short extracts, according to the intended purpose.

The Convention of Bern and the Romanian law regard the quotation right as a traditional practice in the issue of copyright. Thus, Art 33 Para 1 Let b) of Law No 8/1996 allows "*the use of brief quotations from a work for the purpose of an analysis, commentary or criticism, or for illustration, to the extent justified by use thereof*".

This use shall conform to proper practice and be justified by the intended purpose. The quotations must mention the source and the name of the author, provided the name is clearly stated in the source.

## 2. GENERAL ASPECTS REGARDING THE PLEA

According to The Illustrated Encyclopedic Dictionary[1], *the plea* is defined as "*an oral or written assertion or argumentation with reference to a case or an idea*" or as "*an oral account sustained by a lawyer in front of a court in order to defend the case of one of the parts involved in an action at law*".

From a legal perspective "*the plea is the oral exposition which supports, in front of the court, the conclusions regarding the justification of the dissertation presented by the lawyer in order to give a solution for the trial, in favor of the part he represents*"[2].The same legal dictionary states that "*the plead is, in fact, a form of oratory, as it involves ability, legal knowledge and thorough documentation, as well as a previous study of the case file*"[3].

For the past years, the term of *plea* has been more and more used in the meaning of an oral speech with the purpose of arguing for a case in public[4]. Also, the word *plea* has been used in the name of certain campaigns for public utility, such as the "Advocate for dignity", developed by the Center for Human Resources[5].

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[1] Lăcrămioara Chihaia, Lucia Chifor, Alina Ciobanu, Mircea Ciubotaru, Doina Cobeț, Eugenia Dima, Cristina Florescu, Maria Teodorovici, Constantin Teodorovici, *Dicționarul Enciclopedic Ilustrat,* (Chișinău: Cartier SRL, 2008) 751

[2] http://legeaz.net/dictionar-juridic/pledoarie

[3] http://legeaz.net/dictionar-juridic/pledoarie

[4] Advocate for moderation, Advocate for health, Advocate for the intelligent state and knowledge society in the 21st century

[5] http://www.crj.ro/en/advocate-for-dignity/

The plea, in the meaning of legal speech held in the final phase of the trial, for the past years, has lost enough ground. First of all, the *plea* has been replaced by "*conclusions*", after that they began be limited as duration. Though the plea could have played an essential role in the decision solving the litigation, the current trend in courts is the simplification of the hearings, the judges trending to limit the time for pleas, by demanding the defenders to submit "*written conclusions*".

In a questionnaire promoted in the online, on websites[1] visited by jurists, the general opinion was that "*the time of carefully chosen words has passed*", that "*the pleas have lost their importance*". The respondents also claim that "*during civil and commercial trials, less and less often, the advocates have prepared their pleas*", for most cases these being replaced by wording like "*We ask the court to approve our litigation as it has been stated and submitted and to rule…*". Nevertheless, the subjects have pointed that "*a brief plea, in which the legal norms are mixed with the general knowledge, shall always be listed with interest both by the panel of judges, as well as by the persons in the courtroom*"[2].

These conclusions are also supported by the advocate Adrian Toni Neacșu[3], who stated that "*that romantic time of the interwar advocates who when held the final plea charmed an entire courtroom and even an entire state, by the articles published by present journalists, is long gone. Nowadays the trials are more technical*"[4]. Neacșu also referred to the fact that the pleas had only one purpose, namely "*persuading the judge*".

In the advocates' world it is claimed that the plea is the advocate's weapon in performing his job, the single tool in his attempt to persuade the judge to point the balance in the favor of his client. They consider that a trial is very rarely won just by the final plea, but this is the advocate's final trial to emphasize the legal version of his client.

The art of the legal speech and oratory originates in "Ars Retorica" by Marcus Tullius Cicero, whose oratorical technique is of actuality and, may be successfully applied by the advocates. The archives are full of numerous

[1]http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID_56798/Pledoaria-avocatului-in-contextul-actual.html
[2]http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID_56798/Pledoaria-avocatului-in-contextul-actual.html
[3]In the interview given to Teodor Burnar, chief editor of the website www.avocatura.com,
[4]http://castigaprocese.ro/interviu-despre-avocati-judecatori-legal-writing-performanta-si-dezvoltare-personala/

exceptional pleas, models for oratory, but also logics and legal argumentation, in which figurative speech intelligently and moderately used, give a touch of refinement and originality to a high class legal speech.

We may find famous examples starting with the Greek antiquity, in the famous "Apology" of Socrates or the Demosthenes' speech against Midas, by continuing with the pleas of the French oratory of the 16th and 18th centuries and even by taking into consideration the representatives of the Romanian legal oratory at the end of the 19th century and beginning of the 20th century, as Delavrancea, Titulescu, Eugen Herovanu or Vintilă Dongoroz. The weapon of these orators was one less used nowadays, but no less important – the word – though even if everyone has the possibility to speak, the form in which he expressed the ideas and uses the inflexions of the voice and the tone used is what turns an advocate into a great advocate.

Another great advocate, Mircea Manolescu, preoccupied in finding the fundaments of "*the art of advocacy*", stated that the value of the defender's work is given by the conversion of the primitive conflict – empirical – between the parties, into litigation, dominated by the objectivity of the reasoning and the nobility of the attitude.

Starting from this ascertainment, one can understand that the manner in which each advocate acts, generally, to persuade, is unique, personal and unrepeatable. The "*gift*" is passed over, from one generation to the next, the advocates' pleas sometimes being "*true lessons of judicial and social philosophy, representing a real treasure of national legal culture and in most cases are connected with the treasure of the world legal culture. The advocates' pleas in courts are elements of the professional patrimony, true diamonds of culture*"[1].

## 3. THE COPYRIGHT FOR THE ADVOCATES' PLEAS

Art 7-8 of the Law No 8/1996 on the copyright and the neighboring rights, state the categories of creations which enjoy the protection of the copyright, among these works being the advocates' pleas. Moreover, this law removes from protection other works, even if the conditions for copyright are fulfilled, among them being the judicial decisions and by assimilation, the arbitral decisions.

[1]https://www.juridice.ro/413394/poezia-profesiei-de-avocat-sau-ganduri-de-ziua europeana-a-avocatului.html, visited on 3 February 2017

Concerning the pleas, regardless if these represent the advocate's speech, with the occasion of concluding a litigation or argumentation in the interest of a case, it is indisputable that they belong to the category of protected works subject to the originality and susceptibility of being brought to the attention of the public. These are the result of the creative minds of their authors, some of them being true literary creations, lectured with pleasure both by those serving in the legal area, as well as by the general public.

"*The advocate's performance is in its broader meaning – lato sensu – a masterpiece and what defines a masterpiece is its originality, as expression of the author's personality*"[1], the feature of this creation being the fact that it is brought for the first time to the public's attention as oral speech.

The use of the plea shall be made only with the author's approval. Nevertheless, under certain conditions, the work may be used without his consent, but only under the conditions and limitations stated by the Law No 8/1996.

The French law protects the advocates' pleas through the copyright and it considers that the principle of public debates hampers the author to oppose its reproduction in the media watching the trial, but for its subsequent publication being necessary the author's approval.

In the Romanian law, the pleas enjoy protection within the copyright, as in France, fragments of the advocates' speech being often inserted in the media news showing information about the trial, by invoking the need to inform the public[2].

As previously mentioned, though the author has an exclusive patrimonial right for his creation, there are cases for which the legislator has considered as necessary to limit this right, under the idea of fulfilling the conditions stated by Art 33 of the Law No 8/1999.

As emphasized in the part dedicated to copyright, the Convention of Bern and the Law No 8/1996 allow the "*quoting*", namely "*the use of short paragraphs taken from a paper for analysis, comment or critic, or as example, to the extent to which their use justifies the extent of the quote*".

Within this quotation, in order to avoid being accused of plagiarism, the person using these quotes from a plea susceptible of falling under

[1] Roș, *Dreptul proprietății intelectuale*, 10

[2] André Françon, *Cours de propriété littéraire, artistique et industrielle*, (Paris: Litec, 1996), 154; Claude Colombet, *Propriété litéraire et artistique et droits voisins*, 8th Edition (Paris: Dalloz, 1997) 162

copyright, including the judge or arbitrator in the reasoning of the judicial or arbitral decisions[1], is compelled to refer to the source and author's name, if this is available.

## CONCLUSIONS

1. The pleas which may represent the object of protection provided by the Law No 8/1996 on copyright and neighboring rights are the product of the mind of different advocates who had or have the gift called love or passion for their profession and the aim to self-improvement by transforming their profession into art…
2. The plea bears the touch of its creator's personality, being a prolongation of the author's ego.
3. The advocate has moral and patrimonial rights over his work, when it fulfills the conditions to be included among the "*works of literary creation*".
4. The advocate's right over his work (the plea) can be limited only after the fulfillment of certain conditions such as: the work to be brought to public knowledge, its use is in accordance with the common uses without being contrary to the normal exploitation of the work and without prejudicing its author.

## BIBLIOGRAPHY

### Books

1. Chihaia, Lăcrămioara and Lucia Chifor, Alina Ciobanu, Mircea Ciubotaru, Doina Cobeț, Eugenia Dima, Cristina Florescu, Maria Teodorovici, Constantin Teodorovici. *Dicționarul Enciclopedic Ilustrat*. Chișinău: Cartier SRL, 2008
2. Colombet, Claude. *Propriété littéraire et artistique et droits voisins*, 8th Edition. Paris: Dalloz, 1997
3. Françon, André. *Cours de propriété littéraire, artistique et industrielle*. Paris: Litec, 1996

[1] Cezar-Marius Pantea, *Dreptul de autor și hotărârea arbitrală*, presented during the Conference "Arbitrage – a different justice", Bucharest, 2016, available at http://arbitraj-institutionalizat.ro/dreptul-de-autor-si-hotararea-arbitrala/, visited on 9 February 2017

4. Roș, Viorel. *Dreptul proprietății intelectuale, Dreptul de autor, drepturile conexe şi repturile sui-generis*, 1st Volume. Bucharest: C. H. Beck, 2016

**Legislation**

1. Law No 8/1996 on copyright and neighboring rights

**Other sources**

1. http://legeaz.net/dictionar-juridic/pledoarie
2. http://www.crj.ro/en/advocate-for-dignity/
3. http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID_56798/Pledoaria-avocatului-in-contextul-actual.html
4. www.avocatura.com
5. http://castigaprocese.ro/interviu-despre-avocati-judecatori-legal-writing-performanta-si-dezvoltare-personala/
5. https://www.juridice.ro/413394/poezia-profesiei-de-avocat-sau-ganduri-de-ziua-europeana-a-avocatului.html
6. Pantea, Cezar-Marius, *Dreptul de autor și hotărârea arbitrală*, presented during the Conference "Arbitrage – a different justice", Bucharest, 2016, available at http://arbitraj-institutionalizat.ro/dreptul-de-autor-si-hotararea-arbitrala/, visited on 9 February 2017

THE INTERNATIONAL CONFERENCE
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# NATIONAL AND EUROPEAN VALENCES OF PUBLIC ADMINISTRATION INVOLVEMENT IN AND OF THE SOCIAL ENVIRONMENT

**Maria URECHE**[1]

***Abstract:***

*The current context in which we find ourselves, both at national and European level, is one that is subject to intense turmoil and changes. All this is a permanent challenge for the public administration, administration that finds itself forced to cope with these impulses coming from its outside, to adapt and reinvent itself to perform through the act of administration. Thus, public administration is a living mechanism that responds to social needs. It also addresses the social environment directly, establishes directions to follow and manages local, central or even European interests, more or less happily.*

**Key words**: *public administration; legislation; cooperation; European context; citizen; administrative decision*

## INTRODUCTION

The state, through its authorities, is the one who manages the population of the territory he owns and manages. This is not a matter of chance, because management involves organizing, coordinating, implementing and controlling all elements that are in the process of organization and execution. The state, in relation to the social environment, is in the service of this environment even if it is the one who represents and leads it. Public administration is the one that penetrates into the social environment, responds to its needs and comes to support the fulfillment of existing requirements. Also, the social environment conveys its demands to the public administration, it is not just a silent partner in these relations and established relationships. Even if they do not address the administrative authorities directly on these

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issues, the authorities, through the levers they have at their disposal, identify these needs ex officio and have the measures they deem appropriate in relation to the given issue. The way in which national and European relations are being developed and established defines public administration and its citizens.

## SOCIETY AND ADMINISTRATION

Society is defined as the totality of people who live together, being linked to each other through certain production relationships[1]. Public administration as a system of authorities representing executive power is a subsystem within state authorities and, implicitly, a component of the global social system[2].

Man, considering his nature, has the tendency to associate and to establish relationships with his fellow human being[3]. Thus, living in the community is not done by chance but generally by pre-established rules. In this community, the role of authority in regulating these relationships but also in meeting social needs is very great. Social relationships can not be conceived without running the administrative work[4].

Public administration carries out a wide range of services, such as those related to culture, health, education, and satisfying the primary needs of the citizen in territorial administrative units. Without meeting the needs of civil society, we can speak of a poor public administration that is unable to carry out viable projects for its community. Fundamental rights and freedoms are guaranteed by the text of the fundamental law in the state and their protection is a major objective for public authorities. All public services fulfilled or not, enter the social environment and define it in terms of degree of achievement and fulfillment.

The administration is the one that is subject to entry into society and, depending on how open it is to these penetrators, we have a type of

[1] *Dicționar explicativ al limbii române* (Bucharest:, R.S.R, 1975), 873
[2] Ioan Santai, *Drept administrativ și știința administrației,* vol.I (Sibiu: Alma Mater, 2011), 25
[3] Nicoleta Miulescu, *Știința administrației* (Bucharest: Universul Juridic, 2010), pp.234-235
[4] Ioan Vida, *Puterea executivă și administrația publică* (Bucharest: Regia Autonomă Monitorul Oficial, 1994), 13 and the next ones

open administration or a type of administration closed to the social environment[1].

The relationships thus established between public administration and the social environment are strong, interdependent and beneficial for both parties. Decalogue, subordination, and coercion relationships arise, so that the administration can be in harmony with, or separate from, the social environment[2].

The first to which we can refer is the collaboration between administrative authorities and citizens. It is clear that the administration must collaborate with the citizens, but the question is whether citizens should do so. Collaboration, in its very meaning, implies the contribution of both sides to the good performance of the established relationship. The achievement of the established objectives depends largely on the measure of administration but also on the citizen who must also bring his contribution to the achievement of the proposed objectives by fulfilling the part of his obligation through a quick and rapid response and action. Otherwise, the activity becomes inefficient or poorly effective, and the citizen becomes unhappy, vocal but unimpressed.

There are many examples in this aspect. In the management of localities, regardless of their size, bigger or smaller, citizens can intervene directly by different methods. For example, in the winter, under heavy snowfall and frost, citizens have to cooperate and fulfill their obligation not for fear of contraventions that may be available, but for personal conviction and willingness to collaborate with the administrative authority. Thus they clean the sidewalks for the real estate that they own, in the desire to provide fluid pedestrian traffic. On the other hand, the local authority is the one who, due to increased care for its citizens, decides accordingly in relation to given situations. In Bărăgan, the climate and the relief are such that in the winter, the blizzard beats powerfully and brings snowflakes into the households of the people. Roads are closed and access to households is almost impossible. As the plains are stretched out, the wind vents vigorously. Thus, the local authority has decided to purchase landfills to be planted

[1] On the ways in which the administration penetrates the administration, what sociological, institutional and functional social, see Cezar Corneliu Manda, *Elemente de ştiinţa administraţiei*, (Bucharest: Universul Juridic 2012), 77

[2] See Alexandru Negoiţă, *Drept administrativ şi ştiinţa administraţiei*, (Bucharest: Atlas Lex, 1993), 20 and the next ones

alongside the road at a reasonable distance, so that they can provide a wind protection curtain that snows the snow. Citizens were very pleased with the action of the local council and the mayor, so at their own expense they also purchased saplings that they planted as they wanted to protect their home. This type of action was also carried out in other parts of the country, for example in Moldova. This kind of action was generally involved both in the Prefecture and the Forestry Division in the area.

Many of the country's municipalities are facing a massive decline in the population of the area and an aging population. The houses remain empty, abandoned after the death of the elders who lived there and after the refusal of their descendants who reside in other areas of the county, country or even abroad. Effects are multiple, including in school education. Educational institutions remain without pupils, so that the school is being abolished over time. A mayor and local council in the Botoşan area[1], in Botosani commune Conceşti have implemented a unique project in Romania since 2016. To save the town from aging and disappearing through depopulation, local authorities have offered free houses to all Romanians willing to move there. Local authority, with financial resources from the local budget, bought in 2016 five abandoned houses from the heirs of the deceased. They have been renovated, connected to utilities and data free of charge to the beneficial beneficiaries during their lifetime, without being charged. There have been hundreds of requests, which is why the authority has continued to build houses and even started to build such dwellings. The ten families that came have brought more than 50 children to the village. The population is rejuvenated as an average age, the population is populated, and the school has been rescued since its dissolution. The action is one with major implications in the social environment.

In Sebeş[2], Alba county, a city where the number of unemployed is zero and the number of foreign investments is steadily increasing, the

[1] The local authorities in Conceşti shared homes for all who wanted to go to the commune. The basic condition was that applicants should be able to work and have children. This has resulted in a strongly affected by the pros of aging, to considerably increase the number of inhabitants. Population has increased over two years by over 50%.

[2] Sebes is one of the most important cities in Alba County due to its economic development, especially in the last decade, being advantaged by its geographical position. Situated in the central part of Alba County, in the southwest of Transylvania,

administrative authority has understood to manage its community in a practical way with multiple positive effects. For example, given that much of the investment is made by German investors, German education has been set up not only from high school, but also from primary and zero grades respectively. Teaching is entirely in German and the number of places is insufficient because the demand is very high.

Another example could be awareness raising actions on environmental issues[1]. It Is the citizens who often offer their collaboration in activities related to the cleaning of certain areas, such as parks, banks of waters or other locations in the respective territorial administrative units. Supporting and collaborating citizens on the problems of people in disadvantaged or disadvantaged social categories is vital. In communes that include villages and hamlets in the mountain area or dwellings are in great disarray, we find an elderly population, generally elderly, who await the end of their existence on this land in their homes in their households, alone, their children going to town with families and jobs that do not allow them to provide the daily support they need for their parents.

Thus, the role of local authority in this situation is very important because they are the ones who watch these people. Household wood should be cut and taken from the storehouses in the house, the snow must be cleaned, the bread and small shopping should be made and taken to the households of the people. This identifies those who can provide these services, either on the basis of the social benefits they receive, to provide these services either through the social assistance service or other available resources that the authority identifies at its own level.

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Sebeșul is at the intersection of the two European roads E 68 (Deva-Sibiu-Brasov) and E 81 (Cluj-Sibiu-Pitesti).

[1]Athanase Joja and collaborators, in *The Romanian Encyclopaedic Dictionary* (Bucharest: Political Publishing House, 1962-1966), show that:

*The environment, as specified as environment, environment, or natural environment, is a concept that refers to the totality of natural conditions on Earth or a region of it in which the beings or things evolve. These conditions include atmosphere, temperature, light, relief, water, soil, etc., as well as other living beings and things. The environment plays a very important role in the process of evolution of living beings, which in turn are a factor of transformation of the environment*

Ciugud commune in Alba, a commune close to Alba Iulia, is an example for the whole country related to how local authorities managed to access non-reimbursable funds and manage their citizens[1].

We also recall, by way of example, the initiative of the Alba County Council through the General Directorate of Social Assistance and Child Protection Alba together with the "Cusset Aiud Echange" Association France and the Diakonia Alba lulia Help Society. Together with the non-governmental organizations in Alba County, the Alba County Council annually organizes the action to promote the rights of people with disabilities, entitled *The Handicap of People with Disabilities - The Heart of the Alba City*, under the motto *Let's Go Together!*. This march is an action to promote the participation of people with disabilities in community life as these people are people with special needs and also seeks to involve citizens who can and wish to show solidarity with this action and to know better the needs of their peers.

Another example is the *March for Life* annual event, initiated 40 years ago in the US, an event that is organized in more and more European and American countries, and in 2017 it was organized in nearly 300 cities in Romania and the Republic of Moldova. This march aims to support the right to life for all human beings, starting with the moment of conception, but also to support women who have to give birth or have just given birth. This support is provided by the child's father, family, cults, authority, and civil society. Also, this marsh pulls an alarm on the growing number of abortions[2]. Slogans were different and extreme suggestions from year to year: 2014 *Adoption, a noble choice*, 2015 *Every life is a gift*, 2016 *For life, for woman, for family*, and in 2017 *Helps mother and child, it depends on you*.

An initiative by which the state wishes to consult its citizens refers to the organization of a referendum redefining the family as a

[1] Ciugud, a commune located a few kilometers from Alba Iulia, may rival many cities in Romania. Here, the population grows from year to year, all houses have utilities, there are paved roads even between farm plots, free internet in public areas, bicycle paths and wind-generated public lighting and solar panels. Inaugurated including a golf course on the pasture area, a major private investment. Local government in Ciugud, Alba County, has an investment budget of over 6 million euros in 2018. The money raised by European funds exceeded 27 million euros, or more than 9 thousand euro per inhabitant, European money. Local government plans for the next period are impressive, with a major impact on society.

[2] We refer to the induced interruption of pregnancy, not to spontaneous abortion

union between a man and a woman, a text that is wanted to be modified in the Covenant. *Coalition for the Family*[1] has collected more than three million signatures for this citizenship initiative in 2016. We can also mention the stimulation of the employment of some categories of people in the workplace. According to the unemployment insurance system and employment stimulation, employers who employ young people within 12 months of completing their studies can benefit on request from financial incentives ranging between 500 and 750 lei. Graduates registered in the AJOFM records may also benefit from financial incentives: the first to qualify as a graduate (500 lei), the first placement fee (if they employ a distance of more than 50 km from the home town, but only if it is a beneficiary unemployment benefit), the installation premium (if you are in a different place than your home but only if you are a beneficiary of unemployment benefit). Also, if the graduates find a job during the period when they receive the unemployment allowance, they will receive, besides the salary, a monthly amount equal to the unemployment allowance they would have been entitled to until the end of the grant period.

Public service delivery relationships to citizens are particularly important because inadequately rendered service can have particularly serious consequences on the social life of the territorial administrative unit in question. Although there may be many examples in this aspect. We stop on one. The sanitation service, rendered inappropriate or untimely for a certain period of time, implies the existence of a possible outbreak of infection, disease-bearing animals, a heavy scent and an attempt at community anesthesia and population health.

The public administration meets the needs of citizens regarding the preparation of birth, marriage, the issuance of documents such as certificates. It also provides social protection measures in the nature of social assistance, fulfills its specific duties in the case of the establishment of guardianship, all of which are extremely important for citizens and for the observance of their rights.

The relationships of authority or subordination of citizens to public administration authorities are relationships in which the consent of the citizens involved is not necessary. Thus, they can do nothing but obey

[1] The Coalition for the Family is a civic initiative without legal personality, independent of any political and confessional non-affiliated party, open to those who share the values of the family

the legal provisions and, depending on them, they have to do something or do something. Thus, they have to pay local taxes and fees, contraventions fines, or refrain from disturbing peace and public order at certain time intervals or in certain public places.

## CONCLUSION

Given that the cooperation between states operates on the basis of international treaties and conventions, the public administration has adapted to the current criteria. What is national is very easy to acquire European and even world-wide valences. Citizens move, by law, through different states, establish their domicile and workplace in different countries. They fit into the administrative system of the place but also keep in touch with the administrative authority in the country. There is cooperation between authorities, cooperation that is often also frustrated by establishing interlining agreements. All this co-operation and permanent collaboration between the administrative authority and the social environment through the citizens leads to a better knowledge and understanding of the administrative system and of the administrative functioning mechanisms, but also a correct perception of the functioning of the social mechanism. The public authority can thus adapt to permanent changes in the social environment, it can rely on the social needs to satisfy and the citizen, becomes the partner of the authority by increasing its active and useful involvement in the community.

## BIBLIOGRAPHY

### Books

1. *Dicționar explicativ al limbii române*. Bucharest: R.S.R, 1975.
2. Joja, Athanase and collaborators, *Dicționar Enciclopedic Român.* Bucharest: Political, 1962-1966.
3. Manda, Cezar Corneliu. *Elemente de știința administrației*. Bucharest: Universul Juridic, 2012.
4. Miulescu, Nicoleta. *Știința administrației*. Bucharest: Universul Juridic, 2010.
5. Negoiță, Alexandru. *Drept administrativ și știința administrației*. Bucharest: Atlas Lex, 1993.

6. Santai, Ioan. *Drept administrativ și știința administrației*, vol.I. Sibiu: Alma Mater, 2011.
7. Vida, Ioan. *Puterea executivă și administrația publică*. Bucharest: Regia Autonomă Monitorul Oficial, 1994.

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# THE IMPACT OF THE ORGANIZATIONAL CULTURE MODEL IN THE EUROPEAN SPACE WITHIN THE ORGANIZATIONAL CULTURE OF THE ROMANIAN COMPANIES

**Maria PESCARU**[1]

***Abstract:***

*The organizational culture is a structured set of material and spiritual results of the organization, integrating a system of values and beliefs that is cultivated and transmitted systematically among its members and outside of the respective unit.*

*The realization of an organizational culture should not be limited to managers, but it is also necessary to consider those who are led. In doing so, we take into account that the performance of an economic unit depends to a large extent on the way in which, besides managers and shareholders, all or most of the employees respond to the requirements of an efficient management, they harmoniously integrate into the system, participate actively in the realization its values.*

*Each country can be characterized by a set of peculiarities that make its mark on the management of organizations in that country, and the culture's influence on management makes it necessary to study the similarities and differences between management systems in different countries, thus justifying the concern of specialists for a new domain, that of the comparative management.*

*Once implemented, the organizational culture represents a true "way of life" for the organization's members, it tends to be stable over time as it involves hypotheses, values, basic beliefs, and once it has acquired identity, organizational culture can persist despite staff fluctuations, ensuring the social continuity. When compared to that of other organizations, an organization's culture is more prominent, and this happens when it is subdued to change.*

*Organizations try to select the new members that best fit the culture of the organization. Similarly, those looking for a job try to find the organization where their values and personality are compatible.*

***Key words:*** *organizations; management systems; organizational culture; performance, results*

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## INTRODUCTION

Economic organizations (firms) are the components of society that create or mediate the creation of the goods and services necessary for existence, representing the space in which the occupied population spends most of their active life, receiving a material and moral reward proportional in general to the qualities of who possesses them and their work. In addition to companies or businesses that number the majority, there are other categories of organizations: cultural, educational, sanitary institutions, etc. designed to meet the social needs of the population, funded by the state, trade unions, various public organizations and foundations, etc.

Organizations, viewed as open systems, do not work *in vitro*, but interact with the outside world, with their external environment, which plays a fundamental role, influencing them decisively, because all inputs used by organizations come from the environment (raw materials, energy, labor, machinery, etc.), and the output of the organization targets a particular market that is - itself - a part of the environment. The evolution of the modern enterprise is currently marked by the amplification of interdependencies with the environment in which it operates. The fundamental problem, however, is to understand how the environment affects an economic agent. As a company manages to know the needs and opportunities of the environment, it significantly improves its overall activity, enhancing its functionality and effectiveness.

According to several specialists and taking into consideration the scope and nature of the country, four categories of cultures can be delimited: national, economic, by branches of economic, organizational activity.

Two of the categories presented are of particular importance: national culture, a defining element for a nation that strongly marks the evolutions of each country; organizational culture, a component and a major determinant of the status, functionality and performance of each organization, regardless of its nature.[1]

The manager profession, one of the most complex and appreciated professions in contemporary society, is based primarily on the native and acquired qualities of the leaders, and secondly, on a

[1] Ovidiu Nicolescu and Ion Verboncu, *Fundamentele managementului organizației* (Bucharest: University, 2008), 322.

general management culture, which manifests both at the level of the organization and of the country, on an organizational and national culture. In such a vision, which is nowadays embraced by many management specialists worldwide, one can speak of a managerial culture of managers, as well as of a general one, of the company, of the country.

National managerial culture is essentially the result of organizational managerial cultures. There are complex interconnections between national and organizational culture.

Now, for Romania, there is a new issue, namely that of integration into a European management culture. The national-European report is one of the most complex contemporary management phenomena. In doing so, we take into account not only the challenge that has arisen for Romanian managers, but even for the countries that have established the European Union, where harmonization issues still arise in the context in which each country wants to preserve some traditions.[1]

## PARTICULARITIES OF ORGANIZATIONAL CULTURE IN ROMANIAN COMPANIES

The outline of a Romanian cultural matrix should not be based on the socio-cultural destruction that emerged after December 1989, but on certain traits that have proven their continuity, perenniality, over time. The roots of the cultural matrix must be sought in the most profound, more stable elements of the human personality. Political power and political structures have changed over these years, but at group and individual levels, people are the same. In their consciousness and behavior, changes can not take place from day to day. As sociologists in Romania have repeatedly shown, a period, sometimes long, is needed to establish new socio-cultural models.

Even for a long time, man is a limited biosystem capable of change. His actions, latencies, those features and behavioral practices that have enabled him to adapt in the past, but which are no longer appropriate now, interfere with his actions. The individual and the group prove to be incapable of abandoning them, as lateness constitutes inertial behavior, in a comfortable automatism of human behavior. Satisfactory

[1] Alexandru Puiu, *Management. Analyzes and comparative studies* (Piteşti: Independenţa Economică, 2007), 183.

behaviors and practices in the past may now prove ineffective. By analogy with the characteristics of the Romanians, we can say that positive features proven over time can become, in another socio-historical context, defects with serious consequences at the economic level.

Taking into account these considerations, we will try an inventory of the positive and negative traits of the Romanians, as it results from the consultation of some papers elaborated by Romanian sociologists, psychologists, philosophers and literati[1]. What has been written about us, about the Romanian spirituality are the philosophical-literary approaches, of the essayist type, which make more or less plausible sentences but can not be controlled or proven. For the time being, there is no nation-wide research to say on the grounds that a people are characterized by certain traits; there are only scientific studies of imagology that present the image of a nation seen by others. In this case, there is the methodological risk of generalization. Rationally, it is good to keep from generalizations because they are elaborate mentalities that cannot be confirmed or empirically disfavored, and even less scientific. It could be said at first sight that a series of positive and negative features does not offer a "scientific picture" of a people, but C. Rădulescu-Motru expressed his belief that "the revelation of its qualities and defects is a serious one work of science."

Romanians oscillate between tradition and the desire for change. While the older age population has a traditionalist mentality, wanting to take advantage of the freer but non-confident freedom of change, the younger and middle-aged population is characterized by ambition, idealism and responsibility. Under these circumstances, the Romanian management will be oscillating, "corrugated" and in order not to create conflicting states, management has to choose a middle way between the assault on new ideas, the entrepreneurship that will develop in us, and the desire to preserve some rules, preference for compromise and avoidance of uncertainty.

From the beginning we must emphasize that the lack of performance of the Romanian economy at present can not be justified by a lack of managerial tradition in our country. On the other hand, it is true that the current Romanian managerial doctrine is confusing and

[1] Constantin Noica, *Selected pages about the Romanian soul* (Bucharest: Humanitas, 1991), 60-72.

inconsistent, validating only certain condensation centers, from a mass of eclectic categories imported from all over and not harmonized with the Romanian mentalities and ethos.[1] Having this starting point, I insist on the need to consider culture as a catalyst for the development of management. One of the parents of modern management, Peter Drucker, remarked in this regard that "... when leadership fails to capitalize on the specific cultural heritage of a country and a people, economic and social development can not take place".

The evolution of the managerial principles developed in Romanian space is, of course, part of the general coordinates in Europe, with the amendment that because of the migratory peoples who attacked Europe from the east, the peoples of this part of the country have had tremendous conditions that have sometimes delayed the economic evolutions.

After 1989, a process of transformation, marked by the appearance of many organized structures (the Romanian Institute of Management in Bucharest), which supports the development of a wide range of educational activities in the field, is triggered. The Romanian management is today, in a phase of theoretical and practical searches and recoveries, of conceiving and realizing viable management systems that involve decentralization, consolidation of economic and financial mechanisms, competitive integration in the structures of the globalized economy and promotion of some methods and techniques that have proven their worth in developed economies. It is time to show here that these searches are natural, but they should not lead to infant mimetism in everything that means managerial models. Ioan Abrudan argues that "the import model mentality is perhaps one of the most retrograde legacies of the past, which we have practiced for many years, a symptom of conformism and the crisis of creativity and imagination. The Romanian model does not have to be stubbornly promoted or promoted as an objective but simply needs to be aware and enriched with corrections and experiences gathered from all over the world"[2].

Due to their peculiarities and characteristics, cultures retain their identity and do not allow copying of a model as efficient as this, which does not mean that the economic experiences of other states have to be

[1] Ioan Abrudan, *Premises and landmarks of Romanian managerial culture* (Cluj-Napoca: Dacia, 1999), 52.
[2] Ibidem, 33.

ignored or underestimated. But the possible dilemma that arises must be solved by a creative approach that takes the positive elements and integrates them into the construction of a model only when it is not in contradiction with its own culture. The most conclusive example is once again found in the two great economic powers of the world: the US and Japan. Although the foundation of Japanese economic development has stood in the face of the imitation of Western managerial practices, the philosophy actually applied was "wa kon yoh sal" = "Japanese spirit and Western technology"; therefore, adapting US management strategies and policies to the Japanese cultural specificity. The reverse situation - the later takeover of the management principles of the Japanese organizations by the Americans - did not enjoy the same success in the American area precisely because of the circumvention of cultural specifics.

Prior to taking on foreign models, one of the issues faced by management in developing countries is finding and identifying those elements of tradition, history, and culture that can be used to build a system of organization and leadership. As we all know, management is about people, and since management, by engaging people in action involving risk-sharing, is closely linked to culture. If we look realistically on the relationship between management and culture from the perspective of implementing models, we can conclude that the most relevant lesson offered by cultural managerial orientation is that adopting models requires a subtle approach to targeting organizations in a way that can not ignore values in which is the life of her members. This means that no matter how effective an organization is if it does not relate to the cultural context in which it operates, it will lose one of the important sources that give it power.

Beyond the traditions of the management system in our country, the managerial culture can not ignore the Romanian matrix.

## THE INFLUENCE OF THE EUROPEAN CULTURE ON THE CHANGE OF THE ORGANIZATIONAL CULTURE IN THE ROMANIAN COMPANIES

Organizations try to select the new members that best fit the culture of the organization. Similarly, those looking for a job try to find the organization where their values and personality are compatible.

Every culture is customized by the answers given by its members to major problems, such as the relationships between people, the perception of time and human relationships with nature. Starting from these important issues, the components of different cultures have developed certain concepts of life, have adhered to certain norms of conduct, which have a bearing on all the activities carried out, including management processes.

These cultural features are important for organizational management only to the extent that they lead to different choices in designing, designing and implementing management systems. Practice has shown that the management of organizations operating in different cultures is to a considerable extent different due to these cultural differences.

Cultures are differentiated from the point of view of these cultural dimensions, resulting in certain peculiarities that influence the behavior of the components of each culture, influencing management at the level of organizations, more or less, in all its behaviors.

Each country can be characterized by a set of peculiarities that impress the management of organizations in the country and the influence of culture on management makes it necessary to study the similarities and differences between the management systems in different countries, so it justifies the specialists' concern for a new domain, that of the comparative management[1].

When it comes to a "European management mode", we tend to think of an alternative to US management and Japanese management, which is based on a specific, relatively homogeneous culture. Specialists point out that a "cultural management model" is not appropriate for Europe, as the Japanese one, for example, because the European context is characterized by a great cultural diversity.

Thus, for the traditional capitalist countries, which include the United Kingdom, France, Germany, Northern Italy, Belgium and the Netherlands, characterized by urbanism and a strong middle class, the characteristic value system is based on the entrepreneurial spirit, innovation, risk-taking, freedom to act, all based on a strong national identity.

[1]Eugen Burduşi, *Internationally Managed Management* (Bucharest: Economica, 2006), 124-125.

The southern European countries, including Spain, most of Italy, part of southern France, Greece, Ireland, which later industrialized and combine agriculture with services, are characterized by a strong debt group and family, nepotism, and money is considered to be proof of forgiveness.

The Scandinavian countries, which include Denmark, Sweden, Norway and Finland, where the most developed social assistance sector is, the state and citizens assuming mutual obligations, are characterized by a wide range of opportunities, free access to resources, responsibilities, and putting out money, which is associated with safety, is considered bad taste.

The former communist countries, which include Poland, the Czech Republic, Slovakia, Romania, Bulgaria, Albania, which have recently emerged from a communist regime and a centralized economy, are characterized by two systems of values, one imposed by the communist regime and another specific population regime in each country. Among the official values imposed by the communist regime can be mentioned the respect of the hierarchy, the work place is not separate from the life of the individual, the function more important than the person, the money has no value in itself and the specific values, although they differ from one country to another, responsibility for mutual obligations, the importance of patron-client relationships, obligations to network can be retained.

For the group of countries in northern Europe, the predominant feature is "thinking", which leads to a bureaucratic culture, focusing on goals, knowledge orientation, strategic planning, emphasis on managerial control, long-term forecast, and a manager which emphasizes change.

As regards the group of countries in southern Europe, for which Spain is representative, the essential characteristic is "feeling", and the culture is of a family type, inclined towards teamwork, sharing the values of social affiliation, the emphasis on human resources, in which it acts generally a visionary manager.

The group of countries in Western Europe, for which the UK is representative, is characterized by "perception", predominant being a commercial culture, inclined to action, enthusiasm, entrepreneurial spirit, short-term perspective, and a manager with leadership qualities.

The fourth group of countries in Eastern Europe is characterized by "intuition', an industrial culture, inclined to work ethics, technical

appraisal, labor discipline, long-term perspective and an architect's manager.

We can conclude that in the field of management it is difficult to find the optimal solution, because the way of solving the management problems is dependent on the culture in which the managers act. Whatever the definition given to culture, it is layered on the surface, being the most concrete elements, with which first contact (products, symbols) of basic concepts about life is taken.

As pointed out in an interesting study, the so-called "Balkanization" of organizations is manifested in North American companies, meaning organizational tensions generated by employees' beliefs, conflicts at the boundaries between compartments and, in general, the company's past. Under these circumstances, human energy wastage, loss of strategic resources, non-fulfillment of professional careers of employees doubled by additional costs. It is obvious that the main cause of these multiple human and economic negative consequences is the inability of organizational culture to evolve appropriately to changes in other segments[1].

Organizations try to select the new members that best fit the culture of the organization. Similarly, those looking for a job try to find the organization where their values and personality are compatible. The same basic methods used to maintain an organizational culture can help to change it. Culture could be changed, for example, by: changing elements that managers pay attention to; changing the way crisis situations are managed; changing the criteria for recruiting new members; changing criteria for promoting staff in the organization; changing criteria for reward allocation; changing rituals and organizational ceremonies, etc.

The last decades are marked by the emergence of new managerial and organizational approaches, some with intense conditioning and implications in relation to corporate organizational culture. Without insisting on them we still point out some of the most significant elements on this plane.

In order to cope with contemporary economic, scientific and managerial dynamism, the ambitious organization has emerged in recent years. Each organization goes through increasingly gradual or

[1] Ovidiu Nicolescu and Ion Verboncu, *Fundamentals of Organization Management*, (Bucharest: University, 2008), 344-345.

progressive growth periods, with increasingly frequent and profound discontinuities or radical changes. The challenge faced by managers in these circumstances is to achieve the adaptation of culture and organizational management to current environmental developments without, however, undermining the organization's ability to cope with radical change. The solution is the ambidextrous organization, so with double dithering in the sense of the ability to simultaneously achieve gradual and radical development. Given the dynamics and sensitively different requirements of the two types of change, the pressure on organizational culture is very strong. Possession of the necessary qualities can only be achieved through an organizational learning process, strongly embedded in a well-designed and sustained organizational transformation implemented.

*The internationalization of economic activities* is one of the strongest trends in the contemporary economy with a rapid expansion, in the context of the transition to a knowledge-based economy. Under these conditions, the interface between the organizational culture of the organization, the national culture in which it operates and the cultures of the other countries involved becomes an increasingly widespread and important issue. Its solution, of course, involves an organizational culture open to exogenous cultural elements, overcoming the inherent difficulties generated by the cultural differences involved.

*Reengineering* is another managerial and organizational approach that has been particularly emphasized lately. Reengineering means rethinking fundamentally new redesign of the organization's activities to achieve major improvements in cost, quality, service and response speeds. Operationalization of reengineering is not possible without an innovative, flexible, dynamic, participative organizational culture.

Many comments can be made about the multiple interdependencies between modern managerial and organizational approaches and organizational culture. It is not possible to operationalize major organizational changes in the firm without changing the organizational culture involved, and therefore a correlated approach of the two categories of problems in a foresight vision is necessary. In other words, professional organizational transformations, based, of course, on professional management.[1]

[1] Nicolescu and Verboncu, *Fundamentals*, 353-354.

## CONCLUSION

The outline of a Romanian cultural matrix should not be based on the socio-cultural destruction that emerged after December 1989, but on certain traits that have proven their continuity, perenniality, over time. The roots of the cultural matrix must be sought in the most profound, more stable elements of the human personality. Political power and political structures have changed over these years, but at group and individual levels, people are the same. In their consciousness and behavior, changes can not take place from day to day. As sociologists in Romania have repeatedly shown, a period, sometimes long, is needed to establish new socio-cultural models.

Even in the long run, man is a limited biosystem capable of change. His actions, latencies, those features and behavioral practices that have enabled him to adapt in the past, but which are no longer appropriate now, interfere with his actions. The individual and the group prove to be incapable of abandoning them because the latencies constitute inertial behavior, in a comfortable automatism of human behavior. Satisfactory behaviors and practices in the past may now prove ineffective. By analogy with the characteristics of the Romanians, we can say that positive features proven over time can become, in another socio-historical context, defects with serious consequences at the economic level.

The dominant values of a national culture can induce restrictions for organizations by the way they operate. For example, government composition can have a significant impact on how an organization is doing business in a country. Finally, the increase in global operations has highlighted that differences between national cultures can significantly affect organizational efficiency[1].

The diversity and complexity of the world economic space require specific business strategies and tactics based on an intercultural approach: management must take into account both the economic and social structure differences and the cultural model between the trading partners. Through internationalization, a company does not change its nature, but it becomes more complex and acquires more diversity. Management must ensure the managing of this complex structure in

[1] Gheorghe Militaru, *Organizational Behaviour* (Bucharest: Economica, 2005), 199-200.

order to capitalize on diversity and at the same time to ensure the integrity of the firm.

## BIBLIOGRAPHY

### Books

1. Abrudan, Ioan. *Premises and landmarks of Romanian managerial culture*. Cluj-Napoca: Dacia, 1999.
2. Burduși, Eugen. *Internationally Managed Management.* Bucharest: Economica, 2006.
3. Cobianu-Băcanu, Maria. *Culture and values during the transition period.* Bucharest: Economica, 1994.
4. Drucker, Peter. *The Realities of the World of Tomorrow*. Bucharest: Teora Publishing House, 1999.
5. Militaru, Gheorghe. *Organizational Behaviour*. Bucharest: Economica, 2005.
6. Nicolescu, Ovidiu and Verboncu Ion. *Fundamentals of Organization Management*. Bucharest: University, 2008.
7. Noica, Constantin. *Selected pages about the Romanian soul*. Bucharest: Humanitas, 1991.
8. Puiu, Alexandru. *Management. Analyzes and comparative studies*. Piteşti: Independenţa Economică, 2007.

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# LOCAL PUBLIC ADMINISTRATION FROM THE PERSPECTIVE OF THE RECENT DECISIONS OF THE ROMANIAN CONSTITUTIONAL COURT

**Mihai-Cristian APOSTOLACHE** [1]

***Abstract:***

*The article deals with several jurisprudential aspects of the practice of the Romanian Constitutional Court with an impact on the organization and functioning of local public administration and the status of local elected representatives. The analysis envisages two decisions of the constitutional litigation court which declared unconstitutional two normative acts that modified the procedure for validating the mandate of the local and county councilors and the regime of incompatibilities of certain categories of local elected representatives. After the legislator changed the framework law of local public administration and the law regulating the incompatibility regime of the local elected representatives, the Constitutional Court, within the framework of the previous constitutional control, has declared the legislative interventions analyzed as being unconstitutional.*

***Key words:*** *jurisprudence; Constitutional Court; local elected representatives; law; local public administration*

## PREAMBLE

Lately, there is a constant concern on behalf of the legislature to amend both the local public administration law and the law regulating the incompatibility regime of local elected officials. The attention of the legislature is directed, in particular, towards the legal regime of validating the mandates of local elected officials and the legal regime of incompatibilities of local officials. If, in the first case, there are reasons behind the need to eliminate the shortcomings affecting the administrative practice, in the second case, there is an aim at relaxing the integrity framework specific for the local elected representatives, namely

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the elimination from the incompatibility sphere of the mayors, vice-mayors, presidents and vice-presidents of county councils of the quality as natural person trader. In its jurisprudence[1], the Constitutional Court has shown that the incompatibilities are intended to ensure the neutrality of the mandate by the persons exercising a public office of authority, in full compliance with the principles of impartiality, integrity and transparency. The Court has also emphasized that incompatibilities do not constitute a restriction on the exercise of certain rights and freedoms, but a guarantee of undeniable moral authority to the persons exercising certain mandates. Regarding the possibility of cumulating certain qualities or functions in the public and private spheres, the constitutional litigation court[2] pointed out that such a situation "could lead to the achievement of the public interest and the citizens' trust in the public administration authorities".

The local public administration framework law and the law on the incompatibility regime have been amended and supplemented by two normative acts, namely the Law on the modification and completion of the Law on local public administration no. 215/2001, and the Law amending Law no. 161/2003 regarding certain measures to ensure transparency in the exercise of public dignities, public functions and the business environment, to prevent and sanction corruption, both of which being brought to the Constitutional Court by the President of Romania, and the constitutional litigation court, within the previous constitutionality control, declared them unconstitutional. The decisions of the Constitutional Court highlight, on the one hand, the conception of the legislator reflected in the legal solutions subjected to the constitutional control, and, on the other hand, the view of the constitutional court regarding the compatibility/incompatibility of these solutions with the fundamental act. As the guarantor for the supremacy of the Constitution, the Constitutional Court has analyzed the legal provisions of the two normative acts adopted by the Parliament, and found that they violate the constitutional provisions. In the doctrine[3], it has been appreciated that

[1] Decision of the Constitutional Court no. 304/2013, Official Gazette of Romania, Part I, issue 449 of 22 July 2013.
[2] Decision of the Constitutional Court no. 93/2015, Official Gazette of Romania, Part I, issue 351 of 21 May 2015.
[3] Ioan Muraru, "Există un garant al supremației Constituției Române?", *Romanian Journal of Private Law*, 1(2011): 130-155.

within the concept of supremacy of the Constitution we find traits and political and juridical values expressing its overruling position, not only in the legal system but also in the whole political system of a country.

## THE DECISION OF THE CONSTITUTIONAL COURT REGARDING THE LAW AMENDING AND SUPPLEMENTING THE LOCAL PUBLIC ADMINISTRATION LAW NO. 215/2001

Decision no. 53/2018[1] of the Constitutional Court has been pronounced following the examination of the objection of unconstitutionality invoked by the President of Romania regarding the provisions of the Law amending and supplementing the Local Public Administration Law no. 215/2001. These are the additions to Article 31, which received two new paragraphs, Article 40, which at paragraph 1 has undergone a change and Article 95, which also underwent a change in paragraph 1. Article 31 of the local public administration law is part of the series of articles regulating the legal regime of the mandate validation of local councilors, and Articles 40 and 95 regulate the meeting quorum (the local council meeting, respectively the county council meeting). By the law submitted to the analysis before the Constitutional Court, the Parliament instituted a new procedure regarding the validation of local/county councilors mandates after the constitution of the local/county council and, also, introduced new rules regarding the quorum of the local or county council meetings, whereby the validation/invalidation of the mandate of a local or county councilor is proposed. In his petition, the President of Romania pointed out that the law contains unclear regulations, imprecisely drafted, which contravene the constitutional norms and principles and violate the provisions of Article 1 paragraph (5), Article 16 paragraph (1), Article 120 paragraph (1), Article 121 paragraph (2) and Article 123 paragraph (2) and paragraph (4) of the Constitution.

The law subject to analysis by the Constitutional Court establishes a different way of validating the mandate of a local/county councilor, if this operation intervenes during the mandate of a local/county council, compared to the procedure provided by the current regulation. Thus, while validating the mandate at the constituting meeting

[1] *Decision of the Constitutional Court no.53/2018*, Official Gazette of Romania, Part I, issue 277 of 28 March 2018.

of the local/county council, the validation commission draws up the validation/invalidation report for the mandate and proposes to the local/county council to validate/invalidate the mandate of the local/county councilor, if the validation operation for the mandate takes place during the mandate of the local/county deliberative authority, the validation commission within the local/county council will no longer propose the validation/invalidation of the respective mandate to the local/county council, but to the prefect.

Such a legislative solution leads to the emergence of a different legal regime for the *validation operation of a mandate*, determined by the moment at which it intervenes. We appreciate that the validation operation must benefit from the same legal regime, regardless of the moment it takes place. The fact that two different procedures are established for the same legal operation violates the norms of legal technique of Law no. 24/2000, according to which the regulation should establish clear, precise and predictable norms and, implicitly, Article 1 paragraph 5 of the Romanian Constitution stipulating that "In Romania, the observance of the Constitution, of its supremacy and of the laws is mandatory". We can not agree with the thesis accredited by the Constitutional Court that an identical procedure for the validation of the mandate of a local councilor would not be necessary if the operation occurred when the local/county council is established or during the exercise of the mandate of the local/county council. In support of its thesis, the constitutional litigation court uses the analogy and argues that even in the text of the Constitution there are different procedures for the appointment of members of the same institution, referring to the Government. In our opinion, as long as we refer to validation, this legal operation must benefit from the same legal regime, regardless of the moment it occurs (when establishing a local/county council or while exercising the mandate of a local/county council). Moreover, it is unnatural for the constitutional court to report, to justify its support, to an authority that has a different manner of designation, namely the Government. The Government is appointed based on a vote of confidence granted by the Parliament, while the local/county council is elected by the citizens by universal, equal, direct, secret and freely expressed vote. In addition, in the case of the Government, the validation operation for the mandate does not intervene as in the case of deliberative local authorities. The comparison should be drawn with another collegial

authority elected by the citizens by voting, not by an appointed authority. The Constitutional Court should have related to the Parliament, for example. If, however, the Constitutional Court had related to the Parliament as an authority elected by the citizens, its entire reasoning would not have been supported, because, in the case of this institution, the procedure for validating a parliamentary mandate is identical at the stage of the constitution of the legislative authority, as well as during the exercise of the mandate.

The Constitutional Court, conversely, rightly points out that the introduction of the institution of the prefect in the procedure for validating the mandate of a local/county councilor violates the principle of local autonomy, regulated by Article 120 paragraph 1 of the Romanian Constitution, as well as the provisions of Article 121, paragraph 2, regarding communal and town authorities, and the provisions of Article 123, paragraphs 2 and 4, concerning the prefect. If the prefect's right is given to validate the mandate of a local elected representative, the substance of the principle of local autonomy is affected because thus is confined the competence of a constituted authority, which operates on the principle of local autonomy, and new prerogatives are conferred to the prefect, a state authority, the representative of the Government in the territory.

The legislative changes regarding the quorum have been analyzed by the Constitutional Court in relation to the constitutional provisions contained in Article 1, paragraph 5, in its components on the quality of the law and the principle of legal security. The Court considered that the quorum for validation may be, in principle, different from the quorum in the exercise of the duties of a local council. However, for the fact that the validation quorum, regulated by the law under consideration, is established under the condition of validating the mandates of some councilors, the legislative solution weakens the local decision-making mechanism and thus violates Article 1 paragraph 5 of the Constitution in its component regarding the principle of juridical security.

The Constitutional Court also found that the law does not precisely describe the mechanism of the prefect's involvement in the validation procedure, and some newly introduced provisions are not correlated with the existing ones, such situations leading to the violation of Article 1 paragraph 5 of the Constitution.

In trying to draw a conclusion from the analysis, the court of administrative contentious considers that "in order to solve certain problems in the law enforcement process, the legislator has adopted the criticized legal provisions that they considered appropriate, but these have a risk of generating other implementation problems in practice". Or else, the law, emphasizes the Court, "has to regulate legal relations in an optimal manner, helping to solve as many situations as possible, without generating additional problems".

An interesting observation made by the Court and which, in our estimation, will mark the administrative practice in cases of validation of the mandate of a local/county councilor, validation that takes place during the exercise of the mandate of a local/county council, is the one concerning the quorum presence and legal majority required to validate the mandate. In such a case, the Court points out that, in the absence of a special procedure for the validation of the respective mandate, and for the fact that the legislature did not include the hypothesis of validating the mandate of a new councilor after the legal council had been constituted in the decisions to be taken by vote of the majority of local councilors in function, the validation of the mandate of a new local councilor is done with the majority vote of the councilors present, and the quorum of attendance is represented by the majority of the councilors.

## THE DECISION OF THE CONSTITUTIONAL COURT ON THE LAW AMENDING LAW NO. 161/2003 REGARDING CERTAIN MEASURES FOR ENSURING TRANSPARENCY IN THE EXERCISE OF PUBLIC DIGNITIES, PUBLIC FUNCTIONS AND THE BUSINESS ENVIRONMENT, THE PREVENTION AND SANCTION OF CORRUPTION

On March 6th 2018, the Constitutional Court of Romania admitted[1] the objection of unconstitutionality, invoked by the President of Romania, on the Law amending Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and in the business environment, the prevention and sanction of corruption and found that the legal provisions analyzed are unconstitutional. In his petition, the President of Romania considered that

[1] The Constitutional Court of Romania, *Press release*, 06.03.2018, https://www.ccr.ro/comunicate/COMUNICAT-DE-PRESA-541

the contested normative act violates the provisions of Article 1 paragraph (3), Article 11 paragraph (1), Article 65 paragraph (2) letter j), Article 75 paragraph (1) and (5) as per Article 105 paragraph (2) and Article 148 paragraph (4) of the Constitution.

The Constitutional Court of Romania, within the previous constitutional control, declared as being unconstitutional the law that allowed the senators, deputies, mayors, vice-mayors, presidents and vice-presidents of the county councils to hold, at the same time, the status of trader as a natural person. Practically, from the law submitted before the Constitutional Court of Romania by the Romanian President, there has been eliminated the quality of trader as a natural person among the incompatibilities of the dignitaries and local elected officials. If the law had entered into force, in the form adopted by the Parliament, all the categories of elected persons listed could have held and exercised, at the same time with the dignity entrusted by citizens by vote, the status of trader as a natural person. The Constitutional Court has held that the law amending the incompatibility regime of local and national elected officials violates the provisions of Article 1 paragraphs 3 and 5 of the Constitution. The decision of the Constitutional Court is final and generally binding.

We must emphasize that this is not the first time that the members of the parliament are trying to eliminate from the sphere of incompatibilities certain qualities or functions of national or local elected officials, either with the desire to escape allegations of violation of the incompatibility regime, or to be able to exercise in the future, unhindered, certain functions or qualities which, according to the regulations in force, are considered incompatible with the function of public dignity held.

By its decision, the Constitutional Court respects its jurisprudence and points out that these attempts to restrict the integrity framework are incompatible with the rule of law and with the standards of a democratic society. The holder of a public function or dignity must aim to satisfy the general interest, not their own interest, to comply with the exigencies of the exercise of a public office or dignity and to advocate for transparency, integrity, legality and impartiality in public life.

## CONCLUSIONS

The recent decisions of the Constitutional Court have prevented the entry into the active fund of the legislation of such normative acts containing unconstitutional legislative solutions that, on the one hand, disturbed the procedure for validating the mandate of a local/county councilor, and, on the other hand, restrained the integrity framework for certain categories of public officials. The constitutional litigation court brought into question the notifications submitted by one of the subjects of the referral regulated by the Constitution, namely the President of Romania, and within the framework of the previous constitutional control, qualified by the doctrine[1] as a form of control with a preventative role, considered that the laws subject to the analysis violate the provisions of the fundamental act. Even if the legislature is meant primarily to regulate, the regulation must comply with the constitutional provisions.

## BIBLIOGRAPHY

**Books**

1. Toader, Tudorel and Safta, Marieta. *Curs de contencios constituțional.* Bucharest: Hamangiu, 2017.

**Articles in a print journal:**

2. Muraru, Ioan. "Există un garant al supremației Constituției Române?", *Romanian Journal of Private Law,* no. 1(2011)

**Legislation**

3. *Decision of the Constitutional Court no.53/2018*, Official Gazette of Romania, Part I, issue 277 of 28 March 2018
4. *Decision of the Constitutional Court no. 304/2013*, Official Gazette of Romania, Part I, issue 449 of 22 July 2013.
5. *Decision of the Constitutional Court no. 93/2015*, Official Gazette of Romania, Part I, issue 351 of 21 May 2015.

[1] Tudorel Toader and Marieta Safta, *Curs de contencios constituțional* (Bucharest: Hamangiu Publishing, 2017), 97.

**Websites**

1. The Constitutional Court of Romania, *Press release*, 06.03.2018, available at: https://www.ccr.ro/comunicate/COMUNICAT-DE-PRESA-541, accessed on March 12, 2018

THE INTERNATIONAL CONFERENCE
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# THE INDEPENDENCE OF THE COURTS – PRINCIPLE ON WHICH IS BASED THE ACT OF JUSTICE

**Florina MITROFAN** [1]

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***Abstract:***

*The compliance with the independence of the justice performing the act of justice insures the finality of the compliance with the rights and legitimate interests of the parties, the equality in front of the law and non-discriminatory treatment for all participants.*

*This refers to the fact that, the independence of the judge, in solving the cases which are brought in front of him, cannot be limited by any person or state authority.*

*The independence of judges does not mean arbitrary, they are subjected to the law too, and by their activity to contribute in strengthening the trust of the citizens in the legal act.*

***Key words:*** *justice; independence; principle; responsibility; prerogatives; limitations; guarantees*

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## INTRODUCTION

The independence of the courts can be analyzed, on the one hand as a guarantee of the state of law, and on the other hand as principle grounding the act of justice.

This principle has been legally stated, both by the internal legislation, as well as the international one and refers to the independence of each judge in the performance of his judicial position.

The independence of justice does not refer to the absolute freedom of the judge to express according to arbitrary criteria, but to the compliance with the obligation of reserve.

This is the reason why this principle must be seen correlated with the independence of the judge who enjoys the protection of the internal civil law.

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In the performance of its role, the justice must be independent, circumstance resulting from the constitutional norms mandatory for the legislative power, which has the obligation to train mechanisms appropriate to insure a real independence for the magistrates, in whose absence there is no state of law.

The judges' irremovability – as guarantee of his independence, cannot prevent the application of sanctions proportional with his actions, if the judge has committed an offence entailing his disciplinary liability.

The principle of the independence of the judge is applicable only for the judicial activity and cannot be seen in the absence of appropriate legal guarantees, such as: the existence of a judicial control having the nature to insure the compliance with the legality, the publicity of the debates, the secret of deliberations, the iremovability of the judges, the disciplinary liability of the judges, the independence of the courts towards the other state authorities.

The independence of the courts refers to the independence of the judges, which entails an appropriate statute for them, created to establish an uncontestable value for the act of justice.

A democratic society refers to an independent justice, created to provide justice, equity and impartiality.

## ROMANIAN CONSTITUTIONAL JURISDICTION REGARDING THE PRINCIPLE OF THE INDEPENDENCE OF THE COURTS

One of the constant preoccupations of the Constitutional Court was to analyze the independence of justice both from an institutional and individual perspective, when being entrusted with the solution of objections or exceptions for unconstitutionality aiming provisions referring to the above mentioned principles.

In its jurisprudence, the Constitutional Court has noted that the legislator has stated the independence of the judge in order to protect him from the influence of the political authorities and, especially, from the executive power; this guarantee can only be interpreted as having the nature to determine the lack of the judge's liability. The fundamental law does not state only prerogatives – which, in the above mentioned text, are circumscribed with the concept of "independence" – but also establishes limitations for their exercise – which, in this context, are circumscribed

to the wording "subjected only to the law". The institutionalization of certain forms of liability for the judges expresses these limits, in accordance with the exigencies of the principle of separation and balance of the state powers, stated by Art 1 Para 4 of the Constitution. One of the forms of the judicial liability, personal and direct of the judge is the disciplinary liability, deriving from him being faithful to his role and position, as well as from the exigency that he must prove in the performance of his obligations in front of the justice seekers and the state. Therefore, it results that the independence of the judges, both functionally (in their relations with the representatives of the legislative and executive powers), as well as personally (namely the statute that must be given to the judge by law), represents a guarantee for an independent, impartial and balanced justice, in the name of the law.

Because justice refers to individuals, all constitutional or infra-constitutional guarantees referring to its achievement, finally serve to the compliance with their rights and freedoms. Also, this is the framework in which a series of international documents of constitutional interpretative value use the concept of "independent court"[1].

Also, through the above mentioned decision, the Constitutional Court has ascertained that the independence of the judges – regardless of the aspects under which it may be approached – it is not stated as a self-standing goal, nor as a privilege but, by serving justice, it represents a guarantee provided for the citizens. They must have the certainty that the magistrates are independent of the legislative and executive representatives and that, regardless of their statute, they are subjected to the law, including to the norms stating the disciplinary liability, in order to perform their powers in a responsible manner.

This conclusion is also expressed by the international documents which, even if are without mandatory value in the meaning of Art 11 of the Constitution, represent a reference framework to which the authors of the notification relate to. Regarding the principles stated by this jurisprudence, the Court has ascertained that they have been taken and developed by the Decision of 13 June 2006 issued in the case *Traghetti del Mediterraneo SpA v Repubblica italiana* (C-173/03), another recent decision in the same area being ruled on November 24th, 2011 in the case European Commission v Italy (C-379/10). In its decision in the case file

[1] Decision of the Constitutional Court of Romania No 2/11 January 2012, published in *The Official Gazette of Romania*, Part 1, 131 (2012).

C-173/03, the Court of Justice of the European Union has stated that "the communitarian law is against a national legislation which generally excludes the liability of the Member State for the damages offered to individuals as consequence of a breach of the communitarian law imputable to a national court acting as final court, for the reason that the breach results from an interpretation of a legal norm or from an ascertainment of the actions and evidences collected by such court. The communitarian law shall also be opposed to a national legislation limiting the engagement of such liability only for the cases of dolum or serious guilt of the judge, if such limitation leads to the exclusion of the Member State's liability for the cases in which an obvious breach of the applicable law has been committed, as stated by Points 53-56 of the decision ruled on September 30th, 2003 in the case *Köbler v Republik Österreich* (Para 46).

According to the cited jurisprudence, Member States cannot avoid the liability for the violation of the European law by invoking the fact that this violation is determined by the means in which the national courts interpret the law, consider the facts or evidences, this liability of the states generating effects affecting the national judge's liability.

All the above considerations lead to the conclusion that the constitutional principle of the independence of judges necessarily implies another principle, that of their responsibility. The judge's independence does not represent nor can it be interpreted as his discretionary power or as a hindrance to the engagement of his liability under the law, whether it is criminal, civil or disciplinary liability. It is the obligation of the legislator to achieve the balance required between the independence and liability of the judges, in accordance with the constitutional provisions and the engagements that Romania has assumed by the treaties to which it is part.

Regarding these engagements, the Court states that, the Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354/14 December 2006, the Commission recognizes "matters remaining unsolved, especially regarding the responsibility and efficiency of the Romanian judicial system". The Commission Report to the European Parliament and the Council concerning on progress in

Romania under the Cooperation and Verification Mechanism, of 20 July 2011 states that in this area "Romania did not engaged itself in a process of reformation of the disciplinary system".

The Court also mentioned that the principle of the independence of the judge has two aspects, namely the functional and personal independence. The functional independence refers to the fact that the organs trialing a case shall not belong to the executive or legislative power and, on the other hand that the courts be independent, not subjected to the intervention of the legislative or executive power or from the justice seekers. The personal independence aims the statute provided by the law for the judge. Mainly, the criteria for appreciation of the personal independence are: the means of recruitment of the judge; the period of the appointment; irremovability; collegiality; determining the salaries of judges by law; the freedom of expression of judges and the right to form professional organizations; incompatibilities; prohibitions; continuous training; motivation of judgments; the liability of judges. Thus, there are numerous factors contributing in the same time and in different proportions to the performance of the independence of justice and magistrates, none of these being either despised or absolutized. Therefore, the application of legal norms at an inter-constitutional or inter-legal level, enjoying the presumption of legality until a possible recognition of an action for annulment of an administrative act with normative feature, shall not endanger the independence of the judge entitled to solve this litigation[1].

The Court has stated that the constitutional phrase "the judges shall be independent and subjected only to the law" currently in force, represents the constitutional guarantee of the "disobedience" of the judge to another power, to another person or interest, within or outside the judicial system and his "obedience" to the law alone, so that any subordinate or command structure on him is excluded and cannot affect his independence. The notion of the "law" is being used in its wider meaning including the Constitution, as fundamental law, but also all the other normative acts, with force equal to the law or below it, representing the normative ensemble which must support the act of justice[2].

[1] Decision of the Constitutional Court of Romania No 497/4 July 2017, published in *The Official Gazette of Romania*, Part 1, 955 (2017).
[2] Decision of the Constitutional Court of Romania No 799/17 June 2011, published in *The Official Gazette of Romania*, Part 1, 440 (2011).

The independence of the judge does not mean that the judge does not have to submit to the court of judicial control, the judicial authority of the decision of the judicial control court cannot be questioned by the hierarchically controlled court because the essence of the judicial control is the verification of the legality and the validity of the judgment. As such, the compliance with the decisions ruled by the court of judicial control does not lead to the violation of the independence of the judge[1].

## CONCLUSIONS

The independence of justice is the expression of the state of law, a democratic principle which can operate only within the limits established by the law.

It cannot be performed in a discretionary or abusive manner or with the violation of the provisions stating this principle, the legislator establishing forms for the judicial liability of the judge, liability entailed under different forms, depending on the nature of the violated norms.

Thus, the independence of the judge represents a base for the performance of the act of justice, the right of every citizen of a democratic society to enjoy a justice that is independent both from the legislative and the executive.

The principle of the independence of justice contributes to the strengthening of the supremacy of the protection of the rights and individual freedoms within the democratic states.

## BIBLIOGRAPHY

### Case Law

1. Decision of the Romanian Constitutional Court, No 2 of January 11th, 2012, published in *The Official Gazette of Romania*, Part 1, 131 (2012).
2. Decision of the Romanian Constitutional Court No 497 of July 4th, 2017, published in *The Official Gazette of Romania*, Part 1, 955 (2017).

[1] Decision of the Constitutional Court of Romania No 557/12 July 2016, published in *The Official Gazette of Romania*, Part 1, 897 (2016).

3. Decision of the Romanian Constitutional Court No 799 of June 17th, 2011, published in *The Official Gazette of Romania*, Part 1, 440 (2011).
4. Decision of the Romanian Constitutional Court No 557 of June 12th, 2016, published in *The Official Gazette of Romania*, Part 1, 897 (2016).

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# THE PRINCIPLE OF LEGALITY – A COMPONENT OF THE STATE OF LAW

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***Abstract:***

*The state of law insures the supremacy of the Constitution, the conformity of the laws and of all the other normative acts with it, the separation of state powers and their performance according to the law.*

*Justice must answer certain fundamental exigencies, one of them being the legality.*

*The principle of the legality of justice refers to the fact that the jurisdictional feature can only be fulfilled by those state authorities to whom the Constitution and the laws recognize this quality.*

*The courts can solve litigations only within the limits of the competences entrusted by the law, and the means of attack can only be performed according to the law.*

***Key words:*** *legality; state of law; limitations; power; balance; features; principle*

## INTRODUCTION

The principle of legality represents the rule according to which the compliance with the Constitution, its supremacy, the laws and the other normative acts is mandatory.

The requirement for the analysis of this principle is justified by the fact that regardless of the performance of justice or the performance of the public administration, the principle of legality represents the base of the activity of the public authorities.

Though the "principle of legality is a principle which naturally exceeds the justice, being related to the essence of the rule of law, has an obvious applicability in the area of justice, namely: the legality of the courts and the legality of the offences and the penalties"[2].

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[2] Ioan Muraru and Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, 13th Edition, 2nd Volume (Bucharest: C.H. Beck, 2009), 279.

## 1. THE PRINCIPLE OF THE LEGAL ORGANIZATION OF JUSTICE

This principle can be analyzed from the perspective of the judicial organization, as well as from its accomplishment.

In relation to the constitutional provisions and the Law No 304/2004 on the judicial organization[1], this principle refers to the following:

a) Justice shall be rendered in the name of the law, and the judges shall be independent and subject only to the law (Art 124 of the Constitution[2]);

b) Justice shall be achieved through the High Court of Cassation and Justice and through the other courts established by the law;

c) The jurisdiction of the courts of law and the judging procedure shall only be stipulated by law (Art 126 Para 2 of the Constitution);

d) The composition and establishment of the panels of judges shall be made according to the law;

e) The use of the ways of appeal, in accordance with the law.

This rule equivalent to a principle is stated by Art 129 of the Constitution.

The ways of appeal submitted against judicial decisions shall only be stated by the law.

The constitutional text states not only the fact that the procedural means for the performance of the hierarchical control are stated by the law, but also that their performance shall be made according to the law.

## 2. THE PRINCIPLE OF LEGALITY IN THE PUBLIC ADMINISTRATION

The dominant principle applicable for all the public administrations of the European Union's Member States is the principle of legality mainly consisting in the necessity that the entire activity of

[1] Published in *The Official Gazette of Romania*, Part 1, 576 (2004).
[2] Published in *The Official Gazette of Romania*, Part 1, 233 (1991), re-published in *The Official Gazette of Romania*, Part 1, 758 (2003).

these authorities be performed based on the laws and in accordance with them, mainly aiming their application[1].

By establishing the above mentioned principle, according to which all the activities of the public administration shall be in accordance with rules or norms predetermined, the legislator aimed to provide appropriate guarantees for the administered ones.

The public administration shall be based on the law, the activity of the administration being performed according to the law and to insure the application of the law.

Though it is not expressly stated in Art 120 of the Constitution, this principle comprises organizational and functional aspects which insure the performance of the public administration, such as: the identification of the local public administration authorities, the composition and establishment of the local public administration authorities, the attributions and functioning of the public administration authorities, the acts adopted by these authorities, their relations to other public authorities, national or international organisational structures.

## 3. THE PRINCIPLE OF LEGALITY OF TAXATION

According to Art 139 Para 1 of the Romanian Constitution, "taxes, duties and any other revenue of the State budget and State social security budget shall be established only by law".

The principle of legality shall not be seen in a narrow sense, all the more so at a local level, certain taxes or duties may be established, based on the local administration autonomy, by the decisions of the local councils, in compliance with the constitutional principles.

Also, in the meaning of the above mentioned elements, certain organs of the central public administration draft and approve the secondary legislation in financial matters, such as: methodological norms, norms for application, instructions, regulations etc.

[1] Dana Apostol-Tofan, „Principii aplicabile administraţiei publice în ţări ale Uniunii europene şi în România" in *Despre Constituţie şi constituţionalism Liber Amicorum Ioan Muraru* (Bucharest: Hamangiu, 2006), 42; Dana Apostol-Tofan, *Drept administrativ. Tematica prelegerilor. Repere bibliografice*, university class, 1st Volume (Bucharest: All Beck, 2003), 53.

## 4. THE PRINCIPLE OF LEGALITY DURING THE PENAL TRIAL

It represents the principle according to which the entire procedural activity is being performed only in accordance with the law and cannot be analyzed without mentioning the fundamental obligation stated by Art 1 Para 5 of the Constitution, according to which "the observance of the Constitution, its supremacy and the laws shall be mandatory".

The constitutional provision does not clearly states the legality as principle of the penal trial, but Art 23 Para 12 of the Constitution states that "penalties shall be established or applied only in accordance with and on the grounds of the law". In other words, the application of a penalty can only be established after a criminal trial, the fundamental law thus stating the principle of legality in the judicial activity.

Even if Art 2 of the Code of Criminal Procedure[1] states that the principle of legality shall be applied both during the criminal investigation, as well as the trial, the legality is a basic rule applied even after the remaining as definitive of the decision, thus becoming a rule of the entire criminal trial.

Also, the rule of legality is applicable for the judicial rehabilitation (Art 494-503 of the Code of Criminal Procedure), the damage repair in case of conviction or unlawful preventative measure (Art 504-507 of the Code of Criminal Procedure).

The compliance with the principle of legality during the criminal trial does require a better attention especially since measures can be ordered involving the limitation of individual freedom by detention or preventive arrest, confiscations, seizures, etc.

A series of procedural guarantees have been established for the insurance of legality, but also certain sanctions for those cases in which the criminal law is violated.

Thus, it can be entailed the criminal, civil, administrative or disciplinary liability of certain subjects or it can be ascertained the nullity of the procedural acts performed through the violation of certain legal provisions.

[1] Law No 135/2010 on the New Code of Criminal Procedure, published in *The Official Gazette of Romania,* Part 1, No 486/15 July 2010.

"The compliance with the Constitution and the other normative acts is an obligation both for all subjects of law, but also for the public authorities, as well as for the citizens"[1].

## 5. THE ROMANIAN CONSTITUTIONAL JURISDICTION ON THE PRINCIPLE OF THE LEGALITY

The principle of legality represents a component of the rule of law, because all the attributions/competences of the authorities are established by the law. The principle of legality mainly refers to the fact the judicial organs act based on the competence given to them by the legislator, and subsequently, it refers to the fact that they must comply to all the rules of the substantial law, as well as to those of the procedural law, including the norms of competence (Para 55). Regarding the legislator, the principle of legality compels it both to clearly state the competence of the judicial organs, as well as to adopt provisions which shall determine its practical application, by stating appropriate sanctions. This is because the effective application of the legislation may be obstructed by the absence of appropriate sanctions, as well as by insufficient or selective regulation of the relevant sanctions (Para 56). Also, the Court has ascertained that proving a damage of the rights of an individual exclusively by the non-compliance by the organ for judicial investigation with the provisions regarding the competence shall become a hard to find evidence by the interested party, which is equivalent with a real *probation diabolica* therefore determining the violation of the fundamental right to a fair trial. This is why the legislator of the previous codes for criminal procedure has stated under the sanction of the absolute nullity the non-compliance with the norms for material competence and the quality of the judicial organ for criminal investigation, the procedural damage being presumed *iuris et de iure* (Para 62)[2].

Therefore, the Court has ascertained that, by the elimination from the category of the absolute nullities of the non-compliance with the provisions regarding the material competence and the quality of the judicial organ for criminal investigation, the legislator did not fulfilled its

[1] Ioan Muraru and Elena-Simina Tănăsescu, *Constituţia României – Comentariu pe articole* (Bucharest: C.H. Beck, 2008), 18.
[2] Decision No 466/27 June 2017, published in *The Official Gazette of Romania*, Part 1, 768 (2017).

obligation resulted from the compliance with the principle of legality, which is contradictory to Art 1 Para 3 and 5 and Art 21 Para 3 of the Constitution (Para 63)[1].

The principle of legality – component of the rule of law – compels it to clearly state the competence of the judicial organs. In this meaning, the Court has stated that the law must clearly state the extent and means for performance of the power of consideration of the authorities in that matter, given the aimed legitimate purpose, in order to provide an appropriate protection against the arbitrary[2]. However, the Court considers that the task of the legislator cannot be considered as fulfilled only by the adoption of regulations regarding the competence of the judicial organs. Given the importance of the rules of competence in criminal matters, the legislator states its obligation to adopt provisions to determine its practical compliance, by stating appropriate sanctions for each case. This is because the effective application of the law can only be obstructed by the absence of appropriate sanctions, as well as by an insufficient or selective application of the relevant sanctions.

Also, the Decision of the Court No 460/13 November 2013[3] established that "the meaning of Art 124 Para 1 of the Constitution is that the organs performing the justice and which, according to Art 126 Para 1 of the Constitution, are the material or procedural courts which must comply with the law, being the determinant of the behavior of the natural and legal persons in the public area and in the civil circuit". The constitutional provision states the principle of legality of the act of justice and shall be correlated with Art 16 Para 2 of the Constitution, according to which "no one is above the law" and with Art 124 Para 3 of the same law, which states other two constitutional principles: the independence of the judge and its subjected only to the law.

According to Art 132 Para 1 of the Constitution the "public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control".

Of these three principles, which base the activity of prosecutors, the principle of impartiality, applicable to judges by the nature of their

[1] Decision of the Constitutional Court No 302/4 May 2017, published in *The Official Gazette of Romania*, Part 1, 566 (2017).
[2] Decision of the Constitutional Court No 348/17 June 2014, published in *The Official Gazette of Romania*, Part 1, 529 (2014).
[3] Published in *The Official Gazette of Romania*, Part 1, 762 (2013).

jurisdiction, derives from the membership of the prosecutors in the judicial authority and the role of the Public Ministry, established by Art 131 Para 1 of the Constitution, to represent, in the judicial activity, the general interests of the society, and not just the interests of certain persons or categories of persons – the state, the public authorities, other persons, natural persons.

The principle of legality is, in its meaning given by the fundamental law, specific to the activity of prosecutors who, in the virtue of this principle, have the obligation that in the performance of the activities stated by the law to mandatory monitor the legal provisionsm, without the possibility to act based on opportunity, either by the adoption of measures, or the choice of procedures. Thus, acting based on the principle of legality, the prosecutor cannot refuse the initiation of the criminal investigation for other cases than the ones stated by the law, nor he has the right to request the court to acquit a defendant guilty of an offence, based on the fact that his political, economical, social or other type of interests make as inappropriate his conviction[1].

## CONCLUSIONS

The compliance with the principle of legality in the legal activity refers to the exclusion of any form of subordination, the judges being subjected only to the law, being the managers of decisional acts drafted for the application and interpretation of the law.

The constitutional legitimacy of the interpretation of the law by the judge derives from the statement of the constitutional text which states the analyzed principle.

The judicial control performed within the activity of interpretation and application of the law represents a guarantee for the establishment of the rule of law, within which the free access to justice is constitutional norm.

[1] Nicolae Cochinescu, "Constituţionalizarea normelor care reglementează sistemul judiciar în România," *Buletinul Curţii Constituţionale* no.2 (2009).

## BIBLIOGRAPHY

**Books**

1. Apostol-Tofan, Dana. „Principii aplicabile administraţiei publice în ţări ale Uniunii europene şi în România." *Despre Constituţie şi constituţionalism Liber Amicorum Ioan Muraru*. Bucharest: Hamangiu, 2006.
2. Apostol-Tofan, Dana. *Drept administrativ. Tematica prelegerilor. Repere bibliografice*, university class, 1st Volume. Bucharest: All Beck, 2003.
3. Muraru, Ioan, and Elena Simina Tănăsescu. *Constituţia României – Comentariu pe articole*. Bucharest: C.H. Beck, 2008.
4. Muraru, Ioan, and Elena Simina Tănăsescu. *Drept constituţional şi instituţii politice*, 13th Edition, 2nd Volume. Bucharest: C.H. Beck, 2009.

**Articles in a print journal**

1. Cochinescu, Nicolae. "Constituţionalizarea normelor care reglementează sistemul judiciar în România." *Buletinul Curţii Constituţionale* No 2 (2009).

**Case Law**

1. Decision of the Constitutional Court No 302/4 May 2017, published in *The Official Gazette of Romania*, Part 1, 566 (2017).
2. Decision of the Constitutional Court No 348/17 June 2014, published in *The Official Gazette of Romania*, Part 1, 529 (2014).
3. Decision No 460/13 November 2013, published in *The Official Gazette of Romania*, Part 1, 762 (2013).
4. Decision No 466/27 June 2017, published in *The Official Gazette of Romania*, Part 1, 768 (2017).

**Legislation**

1. Law No 135/2010 on the New Code of Criminal Procedure, published in the Official Gazette of Romania, Part 1, No 486/15 July 2010.

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"EUROPEAN UNION'S HISTORY, CULTURE AND CITIZENSHIP"
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# COMMUNITY SERVICES OF PUBLIC UTILITIES – BRIEF LEGAL CONSIDERATIONS

**Viorica POPESCU** [1]

***Abstract:***

*Belonging to the category of public services of general interest, the community services of public utilities have a fundamental role in improving the quality of the citizen's lives.*

*The institutional reforms over the past 20 years have attempted to provide the general conditions needed to increase the well-being of citizens, irrespective of their economic situation.*

*The adhesion of Romania to the European Union has determined the correlation of the internal regulations with the directives in this area, the purpose being of creating a European area in which the citizens shall benefit from services of European quality.*

*In Romania, the community services of public utilities were initially stated by the Law No 326/2001, nowadays being applied the Law No 51/2006, the current study having as purpose a brief analysis of the legal provisions in this area.*

***Key words:*** *public service; public utilities; public administration; local community; legal statement*

## INTRODUCTION

The community services of public utilities are part of the area of the companies with public participation and of the enterprises of general economic interest, as defined by the White Paper on European Governance, published during the meeting of the European Parliament on 15th of February 2000, being based on the following fundamental principles:

- Decentralization of public services and increasing the responsibility of local authorities regarding the quality of the services provided to population;

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- The expansion of the centralized systems for basic services (water supply, sewerage, sanitation) and the growth of the degree of access for the population to these services;
- Restructuring the social protection mechanisms of the deprived segments of the population and reconsidering the price/quality ratio;
- Promoting the principle of market economy and reducing the monopoly;
- Attracting private capital into financing local infrastructure investments;
- Institutionalizing the local credits and expanding its contribution into financing the community services;
- Promoting durable development measures;
- Promoting social partnership.

Seen everywhere throughout the European Union as necessary, changes in public administration aim to adjust the old systems to the current needs of the European society. The modernisation of the public administration and function represent the head start for the reform[1]. In this context, in Romania was also considered that the administration oriented towards the citizens has become the path to be followed in order for the first to be oriented towards success. Of course, such orientation was focused equally on increasing the degree of receptivity in the public sector and on establishing certain standards for public services, with the purpose of transforming the services from "recommendable assets" into "experimented goods", and then into "required goods"[2].

[1] Armenia Androniceanu, *Sisteme administrative în statele din Uniunea Europeană. Studii comparative* (Bucharest: University Press, 2007), 71
[2] Lucica Matei, *Managementul serviciilor publice: suport de curs* (Bucharest: Teora, 2007), 24

# THE LEGISLATIVE FRAMEWORK ON COMMUNITY SERVICES OF PUBLIC UTILITIES. AREA OF APPLICATION AND DEFINITION

In our country, the community services of public utilities have been initially stated by the Law No 326/2001[1], and currently by Law No 51/2006[2].

According to Art 1, the public services of general utilities are defined as representing the ensemble of the activities and actions of utility and local interest, performed under the authority of the local public administration, having as purpose the provision of services of public utility, thus insuring:

a) Water supply;
b) Sewage and sewage treatment;
c) Collection, channelling and evacuation of rain waters;
d) Production, transport, distribution and provision of thermal energy using a centralized system;
e) Sanitation;
f) Public illumination;
g) Administration of the public and private area of the administrative-territorial units, and others alike;
h) Local public transportation.

This enlistment is not limitative, because the legislator has chosen to allow local and county authorities the establishment of community services of public utilities with different areas of activity, depending on the needs.

[1] Law No 326/2001 on the community services of public utilities was published in the Official Gazette No 359/4 July 2001

[2] Law No 51/2006 on the community services of public utilities was published in the Official Gazette, Part I, No 254/21 March 2006 and has been modified by: *Law No 329/2009 on the reorganization of certain public authorities and institutions, rationalization of the expenditure, supporting business environment and compliance with the framework-agreements with the European Commission and the International Monetary Fund*, published in the Official Gazette, Part I, No 761/9 November 2009, with subsequent modifications and amendments; *Law No 187/2012 for the application of the Law No 286/2009 on the Criminal Code*, published in the Official Gazette, Part I, No 757/12 November 2012 and republished in the Official Gazette No 121/5 March 2013.

## THE FEATURES OF THE COMUNITY SERVICES OF PUBLIC UTILITIES

As any other public service of general interest, also this category of public services is characterized by the following features:

a) Universality;
b) Continuity, from a qualitative and quantitative perspective, under contractual terms;
c) Adaptability to users' requirements and long term management;
d) Equal and non-discriminatory accessibility to a public service, under contractual conditions;
e) Transparency and protection of users.

## SUPLIERS OF COMUNITY SERVICES OF PUBLIC UTILITIES

Services for public utilities are under the responsibility of the local public administration and are being established and managed according to the decisions adopted by local or county councils, by the associations for community development or, where necessary, by the General Council of Bucharest, depending on the degree of urbanization, of the socio-economic importance of the localities, of their size and degree of development and in relation with the existing technical-utility (Art 3).

The management of the services of public utilities is organised and performed by two means: direct or delegated management.

Art 29 defines the direct management as being the means in which the public local authorities or the community development associations, as the case may be, assume, as operator, all their duties and responsibilities, according to the law, regarding the performance/render of public utility services and the management and operation of the related public utilities systems.

Public utilities services may be provided through certain operators who are delegated with the management of these services by the authorities. The operators conclude contracts with the local authorities, subjected to the regime of the public or private law, depending on the form of management used.

## NATIONAL AUTHORITY FOR MANAGEMENT OF COMMUNITY SERVICES FOR PUBLIC UTILITIES – A.N.R.S.C

Law No 326/2001 establishes the National Authority for Management of Community Services, with legal personality and initially under the coordination of the Ministry of Public Administration, subsequently moved under the coordination of the Ministry of Development and Public Administration.

Modus operandi and functioning of this authority has been established by the Decision No 373/2002[1], subsequently, by repealing, to be mentioned by the Law No 51/2006 on the community services for public utilities.

Currently, the National Authority for the Management of Community Services represents an autonomous public institution of national interest, with legal personality, functioning under the coordination of the Prime Minister, on the basis of its own organization and functioning regulation approved by Government Decision.

According to Art 13 Para 2 it has attributions in the following areas:

a) Water supply;
b) Sewage and sewage treatment;
c) Collection, channelling and evacuation of rain waters;
d) Production, transport, distribution and provision of thermal energy using a centralized system, except the activity of generating thermal energy in co-generation;
e) Sanitation;
f) Public illumination;
g) Administration of the public and private area of the administrative-territorial units.

The attributions of the A.N.R.S.C include issuing licenses, developing framework methodologies and framework-regulations for the public utilities sector and for the market of these services, and monitoring the compliance and implementation of the legislation applicable to these services.

[1] Decision No 373/2002 on the organization and functioning of the National Authority for the Management of Community Services for Public Utilities – A.N.R.S.C, published in the Official Gazette, No 272/23 April 2002

Regarding its financing, Art 15 has stated the fact that the A.N.R.S.C shall be completely financed from own revenues derived from the fees charged for the granting of licenses, from the charges levied for the issuance of permits for the installation and operation of cost sharing systems, from consultancy fees and on-demand services, from public services providers or international bodies, as well as from other sources, according to the legal provisions on public finances.

## CONCLUSIONS

The community services of public utilities play a very important role in the development of the local communities. They are the responsibility of the local public administration authorities, which is either directly assumed by the establishment of services or departments or indirectly, by the conclusion of contracts with operators appointed by public auction.

The key element in the functioning of the community services for public utilities was and is the general interest of the local community.

The European exigencies in this area represent not only a desideratum for the Romanian local authorities, but also a purpose for the improvement of citizens' lives.

## BIBLIOGRAPHY

**Books**

1. Androniceanu, Armenia. *Sisteme administrative în statele din Uniunea Eu*ropeană. *Studii comparative.* Bucharest: University Press, 2007.
2. Matei, Lucica. *Managementul serviciilor publice: suport de curs*. Bucharest: Teora, 2007.

**Legislation**

1. Law No 326/2001 on the community services of public management, published in the Official Gazette, Part I, No 359/4 July 2001.
2. Law No 51/2006 on the community services of public utilities was published in the Official Gazette, Part I, No 254/21 March 2006 and has been modified by: *Law No 329/2009 on*

*the reorganization of certain public authorities and institutions, rationalization of the expenditure, supporting business environment and compliance with the framework-agreements with the European Commission and the International Monetary Fund*, published in the Official Gazette, Part I, No 761/9 November 2009, with subsequent modifications and amendments; *Law No 187/2012 for the application of the Law No 286/2009 on the Criminal Code*, published in the Official Gazette, Part I, No 757/12 November 2012 and republished in the Official Gazette No 121/5 March 2013.

3. Decision No 373/2002 on the organization and functioning of the National Authority for the Management of Community Services for Public Utilities – A.N.R.S.C, published in the Official Gazette, No 272/23 April 2002.

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# THE BREXIT ISSUE AND THE TRANSITIONAL REGIME OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

**Mihaela Adina APOSTOLACHE**[1]

***Abstract:***

*The paper addresses an atypical situation for the overall evolution of the EU, namely the transitional regime applied to the United Kingdom of Great Britain and Northern Ireland following the notification to the Union under Article 50 of the TEU. Such a transitional regime, which is part of the withdrawal agreement, must be in the interest of the Union, clearly defined and limited in time. In order to ensure conditions of fair competition based on the same rules that apply throughout the single market, the acquis amendments adopted by the EU institutions, bodies, offices and agencies apply both in the United Kingdom and in the Union. Moreover, all existing Union instruments and structures relating to regulatory, budgetary, supervisory, judicial and law enforcement matters, including the jurisdiction of the Court of Justice of the European Union, shall also apply.*

***Key words:*** *transitional regime; Brexit; withdrawal agreement; notificatio; European acquis; competence*

## PRELIMINARIES

The United Kingdom's exit process from the Union is particularly complex, based on a procedure under Article 50 of the Treaty of Lisbon[2], involving the negotiation of two agreements, one concerning the withdrawal and another the future relations between the European Union and the United Kingdom, the latter being dependent on the completion of the exit agreement from the Union.

Following the United Kingdom's notification dated 29 March 2017 of its intention to withdraw from the European Union in accordance

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[2] *Treaty on European Union and the Treaty on the Functioning of the European Union*, consolidated versions, Official Journal of the European Union, C 326, 26/10/2012 P. 0001 – 0390.

with Article 50 of the TEU, the European Council adopted on 29 April 2017 a series of *Guidelines*[1] after the European Parliament has previously adopted, on 5 April 2017, a *resolution*, the *"Red lines on Brexit negotiations"*[2], where the key principles and conditions of the European Parliament were officially presented to approve the withdrawal agreement with the United Kingdom. In the resolution approved by a large majority (516 votes for, 133 against and 50 abstentions), it was shown that Great Britain remains a Member State until official departure, this implying certain rights and obligations, including financial commitments that might extend beyond the date of withdrawal. According to this document, only when "substantial progress" is made in the negotiations regarding UK's way out of the EU, can the discussion on possible "transitional arrangements" begin, which can last no longer than three years, and the agreement on the future relation can not be completed until the UK has left the EU[3].

On 22 May 2017, the General Affairs Council authorized the European Commission to open the negotiations with the United Kingdom and adopted negotiating directives[4]. The European Council has been tasked with monitoring progress and determining when these developments are sufficient to allow negotiations to pass to the next stage. In the conclusions adopted following its meeting on 20 October 2017, the European Council appreciated the progress made on citizens' rights, suggesting that the negotiator should "capitalize on the convergence achieved so as to ensure the legal certainty and necessary guarantees for all citizens concerned and the members of their families, who will be able to directly exercise their rights under Union law and which are protected by the Withdrawal Agreement..." [5].

*The negotiation directives* provided a clear structure and a unified approach on behalf of the EU for the negotiations, during which the

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[1] European Council, *Guidelines following the United Kingdom's Notification under Article 50 TEU*, April 29, 2017.

[2] European Parliament, *Red lines on Brexit negotiations*, Press release, April 06, 2017.

[3] Mihaela Adina Apostolache, "From EU 28 to EU 27. The activation of Article 50 of the Lisbon Reform Treaty", volum of International Conference *History, Culture, Citizenship in the European Union*, (Bucharest: CH Beck, 2017), 621.

[4] Council of the European Union, *Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, May 22, 2017.

[5] *Conclusions of European Council*, Brussels, October 20, 2017, 1-2.

Union maintained its unity and acted united. In practice, *six rounds of negotiations with the United Kingdom* took place *in the first round of negotiations*: the first round on 19 June 2017; the second round between 17-20 July 2017; the third round between 28-31 August 2017; the fourth round between 25-28 September 2017; the fifth round between 9-12 October 2017, and the sixth round on 9 and 10 November 2017. Later, Commission Chief Negotiator Michel Barnier and that of the UK, the British Minister for Brexit, David Davis, had direct permanent contacts.

Although progress has been made on a number of elements related to the orderly withdrawal, in line with the guidelines and the negotiating directives, only three *issues* have been considered particularly important in the first stage of the negotiations in order to ensure an orderly withdrawal: *citizens' rights, the dialogue concerning Ireland/Northern Ireland and the financial statement*.

In addition, the negotiations also addressed other issues related to the separation[1], but for which *progress was limited*: aspects related to Euratom; ensuring continued availability of the products placed on the market under Union law prior to withdrawal; judicial cooperation in civil and commercial matters; police and judicial cooperation in criminal matters; judicial proceedings in progress at Union level; administrative procedures in progress at Union level; aspects of the functioning of the Union's institutions, agencies and bodies[2]. Discussions have also been held on the general governance of the aspects of the withdrawal agreement that are not related to citizens' rights.

The issues that have not been the subject of discussions but for which the Union has presented documents on the essential principles since 21 September 2017, were: intellectual property rights (including geographical indications); ongoing public procurement procedures; the customs issues necessary for an orderly withdrawal from the Union and the use of data and the protection of information obtained or processed before the withdrawal date.

[1] Paul Craig, "Brexit, o tragedie: Interregnul", *Romanian Review of European Law*, no.3 (2017): 28.

[2] *Communication from the Commission to the European Council on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union*, Brussels, December 8, 2017.

## THE ROLE OF THE EUROPEAN COMMISSION IN THE NEGOTIATIONS

It was the European Commission that ensured, throughout the negotiations, the involvement of all stakeholders through close contacts and regular meetings with the EU-27 on the one hand, but also maintained a close relationship with the European Parliament to ensure that its opinions and positions are duly taken into account. A good example in this respect is the meeting of President Jean-Claude Juncker, on 4 December 2017, with the Brexit Coordination Group within the European Parliament, the purpose of which was to review the progress made on three aspects connected to the withdrawal (one of which is the important issue of citizens' rights).

One thing to be mentioned is that the negotiations were carried out in a transparent manner, in the sense that there have been made public all the documents relating to: the essential principles defining the Commission's negotiating position, the agenda of each round of negotiations, the Commission's recommendation on the opening of negotiations[1].

The first stage of the negotiations, as set out in point 4 of the Guidelines[2], aimed at: ensuring maximum possible clarity and legal security for citizens, businesses, stakeholders and international partners about the immediate effects of the United Kingdom's withdrawal from the Union; the establishment of the United Kingdom's "separation" from the Union and all the rights and obligations of the United Kingdom coming from the commitments assumed as a member state.

The Guidelines of 29 April 2017 stated that the negotiations could be aimed at establishing *transition arrangements* which should be in the interest of the Union. These transition arrangements, made on the basis of Article 50 of the Treaty on the European Union, may be considered, by their very nature, limited in time, but would require the application of existing Union instruments and structures regarding regulation, budget, supervision, judicial matters and insurance of the application of the provisions. Even if it is a transitional period, the whole corpus of EU legislation will continue to apply in the United Kingdom.

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[1] European Commission, *Taskforce on Article 50 negotiations with the United Kingdom*.
[2] European Council, *Guidelines following the United Kingdom's Notification under Article 50 TEU*, April 29, 2017.

If the European Council considered that sufficient progress had been made, the Commission would proceed immediately with the development of *transitional arrangements*, considered as "bridges to building the future relations", on the basis of *preliminary discussions* on the future relationship between the European Union and the United Kingdom.

The European Commission has shown from the very beginning its readiness to negotiate at any moment through Michel Barnier, its chief negotiator. In this respect, the Commission presented its position on the content of citizens' rights in the document "Essential Principles on Citizens' Rights", published on 12 June 2017. In turn, on 26 June 2017, the United Kingdom published the document "The United Kingdom's exit from the European Union - Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU".

Another very important issue was linked to the financial settlement, the Commission also publishing on 12 June 2017 the document "Essential Principles on Financial Settlement"; The United Kingdom has not published any position paper on the financial settlement.

As for governance, on 13 July 2017 the Commission presented the document "Position paper on Governance", but the United Kingdom has not published any position papers on this issue.

Another widely debated topic was the Ireland/Northern Ireland Dialogue, which led the United Kingdom to publish its position paper "Northern Ireland and Ireland" on 16 August 2017, followed by the Commission, which, on 21 September 2017, drafted the document entitled "Guiding Principles for the Dialogue on Ireland/Northern Ireland".

The Communication of the European Commission on 8 December 2017[1] was intended to provide the European Council with its assessment as a negotiator of the Union designated by the Council[2] regarding the state of negotiations with the United Kingdom under

[1] *Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union*, Brussels, December 8 2017, 3.

[2] The Heads of State or Government, in their Declaration of 15 December 2016, called on the Council to designate the Commission as a negotiator of the Union. The designation by the Commission of Michel Barnier as chief negotiator was welcomed by the Heads of State or Government.

Article 50 of the Treaty on the European Union. The assessment was required for its meeting of 15 December 2017, which allowed for negotiations to pass in the second stage. The Commission's assessment was based on the Joint Report[1] agreed by the Commission negotiator and that of the UK Government, published on 8 December 2017.

It should be noted that the *Joint Report* and the *Withdrawal Agreement* are different documents. In the event that the European Council considers that sufficient progress has been made in the negotiations, the Withdrawal Agreement, based on Article 50 of the TEU, shall be drawn up on the basis of the Joint Report and the outcome of the negotiations on other issues related to the withdrawal. In procedure, the withdrawal agreement, concluded by the Council on a proposal from the Commission, after obtaining the consent of the European Parliament, shall be subject to the approval of the United Kingdom in accordance with its own internal rules.

The British Prime Minister Teresa May confirmed at the meeting with President Juncker on 8 December 2017 that the UK Government approved the Joint Report. As such, the Commission recommended the European Council to conclude that sufficient progress has been made in the first phase of the negotiations regarding UK's orderly withdrawal from the European Union, so that *the negotiations can move to the second phase*. It was considered that the negotiations should be completed by the autumn of 2018 so as to leave enough time for the Council to conclude the Withdrawal Agreement, after having obtained the consent of the European Parliament, and for the approval by the United Kingdom in accordance with its internal procedures before March 29, 2019.

## THE EVOLUTION OF THE UK-EU NEGOTIATIONS AFTER THE EUROPEAN COUNCIL SUMMIT OF 14-15 DECEMBER 2017

The European Council's calls for Union negotiator, Michel Barnier, to conclude the work on all the issues relating to the withdrawal, including those not yet resolved in the first stage, were based on the European Council's Guidelines of 29 April 2017. The European Council therefore suggested reinforcing the results obtained and beginning

[1] European Commission, *Joint report*, December 8, 2017.

drafting the relevant parts of the withdrawal agreement, as the second stage negotiations can only be advanced if all the commitments assumed in the first stage are fully respected and faithfully transposed in legal terms as soon as possible.

At the *European Council meeting of 14-15 December 2017*, EU-27[1] leaders analyzed *the latest developments* within the Brexit negotiations and agreed that there is enough progress to move to the next stage. As such, they adopted the *draft guidelines*[2] to move to the second stage of the negotiations, during which they will start talks on a transition period and the framework for the future UK-EU relationship.

The statement of the President Donald Tusk[3] is relevant in this regard, after the European Council Summit of 14-15 December 2017: "The opening of the second phase of our negotiations would not be possible without the EU-27 unity, the intense work of Michel Barnier and the constructive effort of the Prime-Minister May. As far as the framework for future relations is concerned, it is time for internal preparations within the EU-27 and for preliminary contacts with the United Kingdom in order to get clearer information on its vision".

The United Kingdom's advanced proposal concerning the transition period has been of approximately two years and the European Council has agreed to negotiate a transitional period that covers the entire EU acquis, while the United Kingdom, as a third country, will no longer participate in the EU institutions, will no longer appoint or elect their members, nor will they participate in the decision-making process of the Union's bodies, offices and agencies[4].

*The transitional regime,* which is part of the withdrawal agreement, must be in the interest of the Union, clearly defined and limited in time. In order to ensure a level playing field based on the same norms that apply throughout the single market, changes to the acquis

[1] As a result of the notification under Article 50 of the TEU, the member representing within the European Council the withdrawing Member State shall not participate in the debates or in the decisions of the European Council concerning the State concerned. Thus, without the participation of the UK representative, we talk about the EU-27.

[2] The European Council Guidelines of 15 December 2017 specified that the transitional regime must be clearly defined and limited in time. The date proposed in the Negotiating Directives for the end of the transition period is 31 December 2020.

[3] Donald Tusk, *Declaration after the European Council Summit of 14-15 December 2017*, Press release, December 15, 2017.

[4] European Council, *Guidelines*, Brussels, December 15, 2017.

adopted by EU institutions, bodies, offices and agencies will have to apply both in the UK and the EU. Moreover, all the existing Union, regulatory, budgetary, supervisory, judicial and law enforcement instruments and structures, including the jurisdiction of the Court of Justice of the European Union, will also be applied. Since, during the transition the United Kingdom will continue to participate in the Customs Union and the single market (with all four freedoms), it must continue to comply with EU trade policy, to apply EU customs tariffs and to collect EU customs duties, as well as to ensure that all EU checks are carried out at the border with other third countries.

On 29 January 2018, within the General Affairs Council, EU-27 Ministers adopted a new set of *negotiation directives*[1] on Brexit, which sets out in detail the EU-27 position on a *transitional period*. According to the EU position, it is reiterated, as in the European Council of 29 April 2017, that during the transitional period the entire EU acquis will continue to apply to the United Kingdom as if it were a Member State; being already a third country, the United Kingdom will no longer take part in the functioning of the institutions and in the EU decision-making process. These negotiating directives provide the Commission, in its capacity as EU negotiator, with a *mandate* to start the discussions with the United Kingdom on this issue.

The first round of the second stage of negotiations took place between *6 and 9 February 2018 in Brussels*, being, chronologically speaking, *the seventh round of negotiations on Brexit*. Prior to this, on February 5, an *informal meeting* was held in London between Michel Barnier and David Davis, where the discussions focused in particular on three aspects: the transition period; Ireland, especially solutions to avoid a strictly controlled border; the governance of the withdrawal agreement.

[1] European Council, *Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union* , Brussels, January 19, 2018.

In the EU-27 formula, at the works of the General Affairs Council of 27 February 2018, the Council was briefed by the EU Chief Negotiator on Brexit on the latest developments regarding the negotiations with the United Kingdom, and the ministers communicated their main priorities and concerns in terms of preparing the guidelines for the future relation with the United Kingdom, before the meeting of the Heads of State or Government in the European Council in March 2018.

On 28 February 2018, the European Commission published the *draft withdrawal agreement between the European Union and the United Kingdom*. *The draft withdrawal agreement* transposes in legal terms the Joint Report of the European Union and United Kingdom Government negotiators of December 2017 concerning the first stage of the negotiations. It also proposes a text based on EU positions on other withdrawal issues that are mentioned in the Joint Report but have not been agreed so far. The draft agreement includes the text on the transitional period, which is based on the additional negotiating directives to be adopted by the Council[1] (based on Article 50). The agreement comprises six parts and a protocol on Ireland/Northern Ireland, covering the following areas[2]: the introductory provisions; citizens' rights; other separation issues, such as goods placed on the market before the date of withdrawal; the transitional regime; financial provisions; institutional provisions.

The next step was to submit the draft withdrawal agreement to the Council and the European Parliament Brexit Coordination Group to debate, before being sent to the UK for negotiations. On 1 March 2018, in London, President Donald Tusk saw with Prime Minister Theresa May, a meeting that first sought out the content of the future post-Brexit relation and the realization process, also addressing the issue of the transition and of Northern Ireland. At the press conference of 7 March 2018 in Luxembourg, President Tusk presented the *draft guidelines* transmitted to the 27 Member States immediately, guidelines to be adopted by the Heads of State and Government within the European Council in March.

[1] The additional negotiation directives were adopted by the Council on 29 January 2018.
[2] European Council, *Draft agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 March 2018.

Following the negotiations from 13-19 March 2018, the EU and UK representatives presented *a draft withdrawal agreement*[1] that reflects the progress made so far in the discussions. This version identifies *the parts from the withdrawal agreement on which the two parties agreed on the legal text*, including: citizens' rights; the financial settlement; transition period; separation issues. Concerning the border issue between Northern Ireland and Ireland, a legally-functional version of the back-up solution („backstop") was agreed upon as part of the legal text of the withdrawal agreement. This solution will correspond to what was agreed on in December 2017 in the Joint Report and will only apply in the absence of another solution and until another solution is found.

The *European Parliament resolution of 14 March 2018*[2] states that the Commission's draft of 28 February 2018 on the withdrawal agreement largely reflects the Parliament's position, the draft being based on the mutually agreed joint report of 8 December 2017 and the EU positions on other issues related to separation. It is recalled in the document that the European Parliament is the institution which will have to approve any future agreement between the EU and the United Kingdom, for which the Parliament must be immediately and fully informed at all stages of the procedure in accordance with Articles 207, 217 and 218 of the TFEU and the relevant case-law.

At the same time, the European Parliament calls for an agreement to be reached without delay on all the provisions regarding separation set out in Part Three of the withdrawal agreement, and recommends the United Kingdom to present a clear position on the unresolved issues regarding its orderly withdrawal.

At the General Affairs Council of 20 March 2018, reunited in the EU-27 formula, Michel Barnier presented the ministers with *an agreement reached by negotiators referring to parts of the legal text of the withdrawal agreement* on citizens' rights, the financial settlement, other issues of withdrawal and transition. At the meeting, the EU-27 ministers also debated *the draft guidelines on the framework for the future relation with the United Kingdom*, reviewing the text before submitting it to the European Council, which adopted it at the Summit of

[1] *Idem.*
[2] European Parliament, *Resolution on the framework for future EU-UK relations*, March 14, 2018.

23 March 2018[1]. There, EU has reaffirmed its desire for a partnership as closely as possible with the United Kingdom, including commercial and economic cooperation, security and defense. Despite this manifested vision, the EU 27 leaders have appreciated that the current UK stance "limits the depth of such a future partnership".

The two European institutions, the European Council, with the support of the EU Council, will continue to closely follow all aspects related to the negotiations, and at the June meeting of the European Council, to come back to the unresolved issues afferent to the withdrawal and the framework of the future UK-EU relationship. Until this summit, the Commission, the High Representative of the Union for Foreign Affairs and Security Policy and the Member States, will continue work to prepare, at all levels, for the consequences of the UK withdrawal. A sensitive issue raised by the European Council is the *territorial application of the withdrawal agreement*, particularly with regard to Gibraltar, an issue for which it called for intensified efforts.

## CONCLUSIONS

Given the geographic proximity of the United Kingdom and the economic interdependence with the EU-27, the future relationship could be beneficial for both sides only if it includes solid safeguards to ensure fair conditions of competition[2]. In this context, the European Council argues that any agreement with the United Kingdom must be based on a balance between rights and obligations and must ensure a level playing field.

Commercial and economic cooperation, combating terrorism and international crime, foreign, security and defense policy are priority areas in the future partnership with the United Kingdom. Not participating in the customs union and the single market can inevitably lead to trade friction. Thus, the divergence in external tariffs and internal norms, as well as the absence of common institutions and a common legal system, require checks and verifications to support the integrity of the EU single market, as well as the UK market. This is why the European Council recalls that "the four freedoms are indivisible and that one cannot choose

[1] European Council, *Guidelines (Article 50) on the future relation between the EU and the UK*, Brussels, Mars 23, 2018, 1.
[2] European Council, *Guidelines*, Brussels, 23 Mars 2018, 2.

solely the convenient elements by participating in the single market based on a sectoral approach, that would undermine the integrity and good functioning of the single market" [1].

## BIBLIOGRAPHY

**Articles in a print journal:**

1. Fuerea, Augustin. „Brexit – trecut, prezent si viitor – mai multe intrebari si tot atatea raspunsuri posibile". *Curierul Judiciar*, no.12 (2016)
2. Craig, Paul. "Brexit, o tragedie: Interregnul". *Romanian Review of European Law*, no.3 (2017): 21-59.
3. Jora, Lucian. "Brexit – diplomatia publica, reforma si contrareforma Uniunii Europene". *Romanian Review of Political Sciences and International Relations*, no.1 (2018): 80-88.
4. Manolache, Viorella. "Exit: The Particle of an Entrapment". *Romanian Review of Political Sciences and International Relations*, no.1 (vol. XIV, 2017): 81-88.
5. Stoica, Marcela Monica. "Fenomenul Brexit. Vechi si noi oportunitati si provocari pentru Regatul Unit si Uniunea Europeana". *Polis*, no.1 (February 2017): 29-36.

**Articles in volum of conferences**

1. Apostolache, Mihaela Adina. "From EU 28 to EU 27. The activation of Article 50 of the Lisbon Reform Treaty", volum of International Scientific Conference *History, Culture, Citizenship in the European Union*, 12 - 13 May 2017, University of Piteşti. Bucharest: CH Beck, 2017

**Legislation**

1. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal of the European Union*, December 12, 2007 , (2007/C 306/01)

[1] *Idem*, 3.

**Websites**

1. European Parliament, *Red lines on Brexit negotiations*, Press release, 06 April 2017, available at: http://www.europarl.europa.eu/news/en/news-room/20170329IPR69054/red-lines-on-brexit-negotiations, accessed on March10, 2018.
2. European Council, *Guidelines following the United Kingdom's Notification under Article 50 TEU*, (EUCO XT 20004/17), Brussels, 29 April 2017, available at http://www.consilium.europa.eu/media/21754/29-euco-art50guidelines-ro.pdf, accessed on March12, 2018.
3. Council of the European Union, *Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, 22 May 2017, available at: http://data.consilium.europa.eu/doc/document/XT-21016-2017-ADD-1REV-2/ro/pdf, accessed on March10, 2018.
4. European Council, *Conclusions*, Brussels, 20 October 2017, (EUCO XT 20014/17) available at: http://www.consilium.europa.eu/media/23503/20-euco-conclusions-art50-ro.pdf , 1-2, accessed on March10, 2018.
5. European Commission, *Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union*, Brussels, 8.12.2017 COM(2017) 784 final, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2017/RO/COM-2017-784-F1-RO-MAIN-PART-1.PDF, 3-4, accessed on March 22, 2018.
6. European Commission , *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, Brussels, 8 December 2017, available at https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf , Published on the website on 8 December 2017, accessed on March10, 2018.

7. European Council, *Guidelines (*EUCO XT 20011/17), Brussels, 15 December 2017, available at: http://www.consilium.europa.eu/media/32256/15-euco-art50-guidelines-ro.pdf, accessed on April 2, 2018.
8. European Council, *Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, (XT 21004/18 ADD 1 REV 2 BXT 5), Brussels, 29 January 2018, available at: http://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf, accessed on March10, 2018.
9. European Parliament, *European Parliament Resolution of 14 March 2018 on the framework for future EU-UK relations*, (2018/2573 RSP), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0069&format=XML&language=RO accessed on April 3, 2018.
10. European Council, *Guidelines (Article 50) on the future relation between the EU and the UK* (EUCO XT 20001/18), Brussels, 23 March 2018, available at: http://www.consilium.europa.eu/media/33510/23-euco-art50-guidelines-ro.pdf, accessed on April 4, 2018.
11. European Commission, *Taskforce on Article 50 negotiations with the United Kingdom*, available at: https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en , accessed on March 22, 2018.
12. Donald Tusk, *Declaration after the European Council Summit of 14-15 December 2017*, Press release, 15 December 2017, available at: http://www.consilium.europa.eu/ro/press/press-releases/2017/12/15/remarks-by-president-donald-tusk-on-the-european-council-meetings-on-14-and-15-december-2017/, accessed on April 3, 2018.

# CRIMINAL BEHAVIOUR – DEFINING ELEMENTS OF THE CRIMINAL INVESTIGATION

**Carmina TOLBARU**[1]

***Abstract:***

*The etiology of the criminal behaviour must be studied both individually, as well as socially. Thus, we are facing a complexity of factors generating the criminal behaviour of individuals, in this respect specific measures must be identified to prevent such behaviours and their effectiveness in relation to the social reality. This is one of the areas of criminological interest, their study aiming the correlation between different types of personality and the category of crimes to which individuals appeal, the share of the researches being large in terms of generating conditions.*

***Key words:*** *criminal; behaviour; personality; investigation; crime; generating factors*

## 1.GENERAL CONSIDERATIONS OF THE CRIMINAL PERSONALITY

The criminal's personality presents a real interest for criminological studies, representing a criminological concept with a complex nature, given the fact that it involves both the psycho-social notion of personality, as well as the judicial-criminal nature of the offender[2]. The attention given to the criminal by studying his personality is circumscribed to the understanding of the so-called motivation representing the base of his illicit behaviour, an essential role in this direction being represented by the deep and detailed knowledge of the psycho-behavioural features of such individual. In this meaning, referring to the social reality that marks one way or another through the reflection of various criminal conducts, we can say that the social factors and the

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[2] Eufemia Vieriu, "Infracțiunea ca act individual", *Revista de drept penal* no. 3 (2011): 99.

economic situation, the lifestyle and the tensions propagated by the others are constants affecting the conjunctive behaviour of the individual. It emerges as inherent the establishment of a prophylaxis of the deviant behaviour that automatically involves the interference over the causes, conditions and circumstances that can generate criminal acts, the starting point of such an incursion being both the individual and the micro and macro social environment to which it belongs[1].

The etiology of the criminal behaviour must be studied both individually, as well as socially. Thus, we are facing a complexity of factors generating the criminal behaviour of individuals, in this respect specific measures must be identified to prevent such behaviours and their effectiveness in relation to the social reality. This is one of the areas of criminological interest, their study aiming the correlation between different types of personality and the category of crimes to which individuals appeal, the share of the researches being large in terms of generating conditions.

Thus, the entire behaviour of the individual is generated by a series of factors, both subjective and objective, which requires the investigation of the personality of the offender to be made in the light of all the particularities of his psychic structure and moral conception but also of the concrete conditions of the individual's life[2]. The interest for this direction of the study is supported as effect of the real influence exerted upon the individual's behaviour.

It cannot be disputed that human personality is not only the consequence of heredity, the interactions between the individual and the environment naturally interfering with what is perceived over the components of the personality. Thus, the socialization, the biological and social maturity has the nature to shape the individual's personality, by acquiring the socio-cultural complex promoted by society[3].

[1] Emilian Stancu and Carmina-Elena Aleca, *Elemente de criminologie generală* (Bucharest: Prouniversitaria, 2013), 51.
[2] Gheorghe Ivan and Mari-Claudia Ivan, "Periculozitatea infractorului – criteriu general si principal de individualizare a pedepsei in conceptia noului Cod penal roman", *Dreptul* 1(2012): 88.
[3] Vieriu, "Infracțiunea ca act individual", 100.

## 2.THE CRIMINOLOGICAL INVESTIGATION OF THE CRIMINAL BEHAVIOUR

The criminological investigation assumes a multilateral approach, namely in the light of all the individual and social factors which have determined and influenced the deviant behaviour. A special weight in the investigation is owned by the corollary of the psychical features of an individual and the possible existing dysfunctions. The role of the research of the criminal behaviour is essential, because only by knowing the personality and psychology of the offender can be identified specifically, correctly and efficiently the measures for preventing and combating crimes.

The steps of the investigation must aim the ensemble of the circumstances which contribute in the commission of each offence, capturing the specificity of the factors and conditions in which it has been committed and the psychical features of the perpetrator. Thus, the personality of the perpetrator can be defined by an ensemble of particularities equally related to his temper, skills and features, having a different influence over the individuals' behaviour[1].

It is normal that when talking about the criminal's personality, to take into consideration not only things related to the hereditary behaviour of the individual, as well as things related to the tempers acquired during his existence, through the inherent contact of the individual with the physical and social environment in which he lives. Thus, deviant behaviours appear, as consequence of the interactions between the individual and the environment, but in close association with the type of nervous system that characterizes him, as this is a peculiarity of personality that accompanies the individual throughout his life.

Therefore, the delinquent attitude of the individual is not only related to the type of acquired behaviour and moulded by the interaction with the environment or by the skills of an individual in performing a certain activity, but also related to his physical and moral characteristics, determining a certain action or inaction.

In considering the psycho-moral peculiarities of the personality, a series of defining elements is specific for delinquents, such as the emotional instability and social inadequacy related especially to certain

[1] Stancu and Aleca, *Elemente de criminologie generală*, 51.

educational gaps, material or emotional deficiency, duplicative behaviour in society or the criminal language used.

## 3.THE CONCLUSIVE OF USING THE CRIMINAL ACT – LANDMARK IN THE BEHAVIOURAL INVESTIGATION

What is the meaning of the mechanism of acting? It goes without saying that the criminal act bears the mark of the perpetrator himself, and therefore its understanding cannot be made in abstraction, with the disregard of the responsible person. Thus, the understanding of the criminal action emerges as a consequence of understanding the perpetrator through the bio-psycho-social peculiarities.

Also, each act of delinquency has its own specificity resulting from the delinquent's specificity, through all his particularities. Under this aspect, various factors related to the offender's age and sex, possible physical or mental deficiencies, including belonging to a particular race or ethnicity may be affected, these individuals becoming, consciously or not, socially subjugated to the so-called inferiority complex.

The moment of action captures the reaction of the offender's personality who must, in a certain context, choose, decide and act. Which is the context and who is creating it? Obviously, the external environment is the one creating the opportunity and determining the criminal reaction. So, we are free to talk about a criminogenic environment.

The criminological investigation includes an incursion in the observation of the intrinsic state of the offender's psychical state[1], which requires knowledge about his psychology preceding the decision, until the moment of acting, including during the performance of the action, as well as after its conclusion.

Thus, the performance of the offence mainly represents the final stage of a long deliberative process which comprises both the ensemble of the causes and conditions, endogenous and exogenous factors that shape the personality of the offender. In other words, the emergence of the idea to commit an offence determines the deliberative process, concluded with the decision of committing the act itself. Only as effect of

[1] Marc Ouimet, *Les causes du crime, Examen dés theories explicatives de la délinquance, du passsage à l'acte et de la criminalité* (Quebec:Presses de l'Universite Laval), 55-168.

a good knowledge of the psychical structure of the offender it is possible the adoption of an efficient criminal policy by adjusting to reality the entire normative apparatus.

## 4.CAUSES, CONDITIONS AND CIRCUMSTANCES – DETERMINANTS OF THE CRIMINAL BEHAVIOUR

Knowing and clarifying the causes, conditions and circumstances as dominant elements of the criminal behaviour represents an essential role in achieving the purpose of the criminal investigation. This is the only way for the premises of performing the prevention, as main objective assumed by the investigation authorities, in the meaning of identifying and selecting the most effective means of combating such illicit behaviours[1].

The circumstances in which the offence may be committed are extremely various, having a different weight, from case to case, and are important in the establishment of the severity of the offence and of the severity of the specific social danger[2].

It is necessary to continuously search for real solutions under the aspect of their efficiency in combating deviant behaviours[3], thus a thorough investigation of the causes of individual level, specific to each individual case, but also of psychological and social factors generating deviant behaviours. Currently, the excessive consumption of alcohol and narcotic or psychotropic substances is often the factor that causes deviant behaviour, contrary to the most elementary norms of social cohabitation, characterized by violence, aggression, loss of judgment and irresponsibility[4]. Also, we need to mention the lack or precariousness of education and professional training, as well as the negative influence of the family, entourage, society, media and the inaction of the responsible factors or the inefficiency of the prevention measures.

What is decisive in the criminal act lies in the fact that there is a general lack of any collaboration between the state institutions, amid the

[1] Lazăr Cârjan, *Compendiu de criminalistică*, (Bucharest: România de Mâine, 2005), 378; Adrian Iacob, Horaţiu Mândăşescu, Sebastian Bălţatu and Cosmina Ignat, *Metodologia investigării infracţionalităţii* (Craiova: Sitech, 2008), 63.
[2] Constantin Băbălău, "Criteriile de stabilire în concret a gradului de pericol social", *Dreptul* 2 (1999): 84.
[3] See Valerian Cioclei, *Manual de criminologie* (Bucharest: C.H. Beck, 2016), 54.
[4] Iacob et al., *Metodologia investigării infracţionalităţii*, 70.

existence of certain shortcomings and inconsistencies between the criminal law measures and any other measures capable of exerting implications in all areas of social life.

## CONCLUSIONS

Therefore, all circumstances of time and place are interesting for the investigation, as well as the context in which the offence has been committed, by mentioning also the measures to harden the actions of the investigative authorities in their discovery of the illicit actions and their authors.

For the achievement of this desideratum, it is necessary a thorough and realistic investigation of the social and psycho-social factors "convincing" the offender to a deviant behaviour.

## BIBLIOGRAPHY

**Books**

1. Cârjan, Lazăr. *Compendiu de criminalistică*. Bucharest: România de Mâine, 2005.
2. Cioclei, Valerian. *Manual de criminology*. Bucharest: C.H. Beck, 2016.
3. Iacob, Adrian, Măndăşescu, Horaţiu, Bălţatu, Sebastian and Ignat, Cosmina. *Metodologia investigării infracţionalităţii*. Craiova: Sitech, 2008.
4. Ouimet, Marc. *Les causes du crime. Examen dés theories explicatives de la délinquance, du passsage à l'acte et de la criminalité.* Quebec: Presses de l'Universite Laval.
5. Stancu, Emilian and Carmina-Elena Aleca. *Elemente de criminologie generală.* Bucharest: Prouniversitaria, 2013.

**Articles in a print journal**

1. Băbălău, Constantin. "Criteriile de stabilire în concret a gradului de pericol social". *Dreptul* 2 (1999)
2. Ivan, Gheorghe and Mari-Claudia Ivan. "Periculozitatea infractorului – criteriu general si principal de individualizare a pedepsei in conceptia noului Cod penal roman". *Dreptul* no. 1 (2012).

3. Vieriu, Eufemia. "Infracţiunea ca act individual". *Revista de drept penal* no. 3 (2011).

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# FREEDOM OF EXPRESSION LEGAL AND THEOLOGICAL SIGNIFICANCE AND IMPLICATIONS

**Marius ANDREESCU**[1]
**Andra PURAN**[2]

***Abstract:***

*Few rational or existential categories and concepts have formed the subject of extensive analysis and discussion, so is the case of the freedom. It is natural to be so, because freedom is a property existential to man, his being and therefore one cannot understand the size of the existential man, both as an individual in his intimacy or in the social environment, outside the concept of freedom. We aim to realize a few brief comments on the meanings of the concept of freedom and especially what could it mean by its forms of imperfect freedom (precariousness of freedom) and even the failures or delusions, from what can be considered as the fullness of freedom and thereby fulfillments of freedom.*

***Key words:*** *being and existence; the legal status of man; freedom of conscience and the freedom of expression; legal and theological concepts of freedom of expression*

## I. REFLECTIONS ON THE SOCIAL PHENOMENALITY OF MAN

The report and, moreover, the dialectics between "being" and "existence" do not overlap completely with the relation and dialectics of essence and the phenomenon, because the sense and meanings of the being, both in philosophy as in theology, are not identical to the category of essence. Without going into detail, we note that the being has an ontological dimension that manifests itself in its becoming, unlike the category of essence, accepted predominantly in the theory of knowledge

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in order to distinguish the phenomenal appearance of the profound reality on which relies the existential exteriority.

For our scientific approach, we note therefore the ontological dimension of the relationship between being and existence, so that on this basis to present briefly the correspondence between man in individuality and the depth of his being, and on the other hand, his existence as a sphere of his deeds and manifestations that would exteriorize the depth of being, which, in case of genuine Christian experiences, should be a natural continuation of what is deeper than ourselves.

It is an aspect that has long been accepted in the thinking that the social phenomenality of man, we would say of his being, is a reality and this cannot be ignored. We emphasize that the social dimension of man is one of its nature and not one built or imposed by historical factors in the evolution of the forms of sociability and socialization of man. The subject does not allow a wider discussion on this, but we believe that are relevant the ideas of the great philosopher Kant, which emphasized very well the social nature of man: "We admit that the impulse to society is natural to man; the aptitude and tendency toward that, that is, sociability, are necessary for man, a creature destined to live in society, therefore these are the attributes of humanity." [1]

The "expression" and everything related to the guarantee of its freedom is nothing else but the social dimension of the human being, the way in which he builds oneself and becomes at the same time in relation to others, and not only in relationship to oneself. Therefore, this concept can be understood by what philosophy and theology refer to as "deeds" and "perpetration". The deeds of man, in the terminology we are referring to "its expression", are those that define the being in his social existence. In this sense, one can say that the social expression of the human being is the very individuality of man in his concreteness. Father Arsenie Boca very well synthesizes this reality in the famous and unique painting from Drăgănescu by saying: *"You are in us"*. There is therefore a continuation that should be natural between the inwardness of the human being, and on the other hand, the expression of man in the exteriority of his social existence. This continuity has the dimension of the natural, therefore it is "of the nature", as long as the social expression of man is a value that is constituted in the complex dialectic process of becoming into the spiritual personality of man, which he has inborn, as his first nature, as

[1] Immanuel Kant, *Critica rațiunii pure* (Bucharest: ALL Publishing House, 2007), 243.

son of God, by grace. If man's social expressiveness is not a continuation of the depth of his spiritual being, then it is in contradiction with the authentic being of man, unable to contribute to his becoming into self-conscious, the man remains only in the precariousness of his social existence whose expression is inappropriate, not being included in a values sphere and not having as target the destination of man, which is his perfection. Man, in his ontological discontinuity between the depth of his being and his social expressiveness, is the man fallen into exteriority, the one for which there is no values meaning, nor the becoming from the state of individual to the spiritual person.

We also note that what we are able to know about man, otherwise said the scientific knowledge of man no matter how it is achieved through any of the social sciences, including legal or philosophical ones, remain at the level of his expressiveness in the social environment and cannot reach the deeper inner being of man, who remains outside any scientific conceptualization. The depth of the human being in its singularity and indefiniteness can be contemplated and intuited or can be revealed, but cannot be known by means of the usual approach belonging to the sensible or rational knowledge. This aspect was very well emphasized by Father Professor Dumitru Stăniloaie, who said that *"Man is mystery and light; is a mystery of light."* It is, in fact, the distinction that the great philosopher Kant realizes between the phenomenon that can be contained in the sensitive intuition in the concepts of intellect and in the concepts of reasoning, and on the other hand, the "thing in itself", which cannot be conceptualized and known. The depth of man's individual being and its reflection in self-consciousness express "the hidden man of the heart in his perfect purity." The existential depth of the human being, that "something deeper than ourselves" means the spiritual singularity, may mean loneliness, but in no way can lead to loneliness as an accepted ontological dimension for the existence of man. Even in the depth of his being, man's self-consciousness exists only in relation to another who is his fellow man and at the same time with God. This report progresses indefinitely by what characterizes it and represents its content, that is, the depth of love and humility.

A third aspect that we want to note is that only the expressiveness and social dimension of the human being can be the subject to the normative order, thus said, it denotes, inter alia, what we call the "legal status of man's existence."

It is noteworthy that in the legal concepts it is taken into consideration not only the freedom of speech, but the freedom of expression, that is, the ensemble of the social manifestations of man, which can form the object of normativity, but also of scientific knowledge. There is a natural continuity between consciousness and the forms of social expression of man, or, in other words, between freedom of conscience and freedom of expression. If the freedom of expression confirms what we can call the consciousness of the self, that is to say, of man who considers himself sufficient, then the man remains at the level of the individual in the inevitable fall into the exteriority of his existential precariousness. In case the human expressiveness is a natural continuation of his values self-consciousness, which is built only in the infinite and indefinite relationship of love for God and his fellow man, then the deeds and the perpetration of man are in their true value. Father Arsenie Boca notices this man's ontological sustainability, talking about the self-love of man sacrificing people, and on the other hand, the self-sacrifice that leads to the consciousness of the love of men.

These modest considerations we consider to be necessary to understand the freedom of expression in its legal phenomenality, not only at the level of formal structures and concepts with normative or jurisprudential character, also in the authenticity of the value that derives directly from the nature of man, from his existence which is, firstly, ontic, and later becomes ontological.

The deep connection, we call it even dialectical, between the inner and outer dimension of man's being outlines another truth, namely, the infinite opening towards the existence of man, including the supersensible existence and the unacceptability of non-existence and nothingness. This fact was noticed by the Greek antiquity philosophers who did not have a conscience of the non-existence, but also by the contemporary philosophy based on the truths of faith. Bergson notes in this sense that non-existence or nothingness are only "ontological" constructs and have no ontological significance, otherwise said they are forms of human consciousness and thinking that remain in his existential precariousness.

To be authentic, man's expressiveness at the level of his social being must be free, that is, not be subjected to constraints that are outside the natural order that social existence demands. However, human reasoning is inherently binding through the logical laws that it implies.

The rational constraint together with the freedom of the reasoning is part of the natural order of the social dimension of human being. In this dialectical report the freedom of reasoning is the dominant term and the rational constraint is the recessive term. This is natural, because the being of man, both in his interiority and in his social expression, is self-evident only as freedom, only in an order whose foundation is freedom.

The freedom of expression, including at the level of the word, is not beyond the responsibilities. Father Arsenie Boca said, **"Prohibited words misinterpret or disorient. Therefore you must be above the words of men: neither praise nor reproach in them should touch you. The words are living beings, able to do the job to which they have been sent. And because they are living beings, life out of life, the one who created them, they accompany to the Last Judgment, as his children, with all their consequences."**

In the following we want to highlight some aspects of the juridical phenomenality of the freedom of expression, noting that the juridical state of man cannot exhaust all that means wealth and, we would say, the inexhaustibility of the forms and content of human expression within the natural and social environment.

## II. REFLECTIONS ON THE LEGAL SIGNIFICANCE OF THE FREEDOM OF EXPRESSION

As stated in the literature in specialty, that tries to highlight the specificity of this right, the freedom of expression - as stated in Article 19 of the United Nations Universal Declaration of Human Rights in 1948 - constitutes an unusual legal phenomenon: equally a right in itself and an indispensable one or, as the case may be, prejudicial for the realization of the other rights. Thus, the freedom of expression and information is necessary for the freedom of meetings, but at the same time constitutes a threat to the right to respect private life, family life or intimate life, that is, all that represents the interiority of human being

It is also an individual right that pertains to the freedom of conscience or the spiritual freedom of each person, but also a collective right, because by its essence it exists only in the phenomenal, social manifestation of man. At the same time, it is the foundation of the structure of social existence, because only through the forms of expression and the guaranteeing of their freedom, man communicates

with other peers, and at the same time constitutes the foundations of community and communion, including in the spiritual meaning of the latter one.

These realities have also been underlined since the 18th century when, in Article 11 of the French Declaration of Human and Citizen Rights adopted in 1789, the freedom of expression was "a democratic right by excellence and characterized as one of the most the valued rights of man".

Such ideas are also highlighted in the jurisprudence of the European Court in Strasbourg, since 1976 (The Handyside case against the United Kingdom) emphasizing that freedom of expression is "one of the essential foundations of a democratic society, one of the primordial conditions for its progress and the fulfillment of each person." At the same time, the freedom of information and freedom of expression "are the foundation stones of any free and democratic society."

The exercising of this right obviously implies duties and responsibilities. Therefore, as we shall see below, the freedom of expression, at least in the legal sense, is not absolute, intangible, but may be subjected to the conditions, limits, limitations or even derogations naturally arising from the limits of the human being in relationship with his fellow men. The social dimension of the human being is always legally defined, because it can be contained within quantifiable limits and determined by the legal order, unlike self-consciousness and interiority of the human being, characterized by depth, infinity, but only in a relationship of humbleness and love with God and others.

The modern legal theory reveals the complex content of the freedom of expression, which obviously does not reduce itself only to the freedom of speech. Without going into detail, there are three components of the legal content specific to the freedom of expression: *a. Freedom of opinion; b. freedom of information; c. Freedom of the press.*

Romanian Constitution consecrates and guarantees this fundamental freedom in the provisions of art. 30 par. 1 - 8. The constitutional consecration and of the freedom of expression is based on the fact that any opinion, creation, idea, theoretical conception, etc. enter into the legal circuit only if they are communicated, expressed. Communication and expression of the thoughts is not only a possibility but at the same time a necessary condition of human existence, of society organized according to civilization criteria determined historically.

That's why the freedom of expression is a natural right, to be found as such since the very first documents of constitutional value. The freedom of expression is the ability of man to express his or her thoughts aloud by writing, by images, by sounds or by other means of communication. Spiritual creations of any kind, thoughts, opinions, feelings, religious beliefs, etc. can be expressed.

From the perspective of the constitutional right, it is a fundamental right with a complex content and one of the highest values of citizens' freedom. The constitutional content refers to the following:

a. The content of communication: thoughts, opinions, religious beliefs, etc., as well as the means by which communication is realized, through live speech, sounds, images, writing.

b. The right is inviolable and cannot be arbitrarily restricted. The state authorities have the obligation to respect the right to expression of any subject of law, if realized under the conditions provided by the law.

c. The freedom of expression is interpreted in the sense of the concept of communication and must therefore be made public. The legal meaning of this notion is that conferred by the provisions of Article 152 of the Criminal Code.

d. It is forbidden the censure of any kind on the free communication in the sense that no publication can be suppressed and secondly that the state authorities cannot exercise a prior control over the content of the communication for political or other reasons. Romanian Constitution does not explicitly prohibit the suspension of publications. We consider that this restrictive measure could be taken only under the conditions of a special law expressing this possibility and the legal conditions for its exercise.

e. The freedom of expression also implies the freedom to set up publications and the freedom to set up organizational structures to support the possibility of communication: radio and television studios, publishers, editors, etc. The law may require such organizational structures to make the source of funding public, which is a guarantee of the freedom of expression.

f. The freedom of expression cannot be absolute, but is subjected to the principles of legal and moral responsibility. In this regard, the International Treaty on Civil and Political Rights establishes that the exercise of the freedom of expression entails special duties and special responsibilities and may be subjected to restrictions. The

Constitution prohibits expressions that seek to prejudice the human dignity, the individual's private life and his right to his or her own image. It is also forbidden to defame the country, to indulge in war, to aggression, to national hatred, class or religious hatred, to discrimination, to territorial separations, to political violence or obscenities against good morals.

The legal responsibility for exceeding these limits can be civil or criminal, as the case may be, the civil liability, namely the obligation to pay material or moral damages to the injured person, is in the order stipulated by the Constitution: to the editor of to the publisher, the author, the organizer of the manifestation, the owner of the means of reproduction of the radio or television station under the law. The criminal liability is governed by the Criminal Code or other special laws. It is always personal and can intervene when crimes of insult, slander, outrage, offense to authority, the spread of obscene material, etc. are committed.

## III. SOME ASPECTS OF JURISPRUDENCE REGARDING THE GUARANTEE OF THE FREEDOM OF EXPRESSION

**The freedom of expression** is a consecrated right guaranteed by Article 10[1] of the European Convention on Human Rights, adopted in Rome in 1950, according to which the jurisprudence of the European Court of Human Rights (ECHR) has contributed to the application and understanding of the conditions and limits of the exercise.

The constitutive elements of this freedom, as regulated in Article 10, are: the freedom of thinking, the freedom to seek information, the freedom to communicate ideas and information, without being restricted by borders and without any interference by the public authorities, freedom to benefit from information and ideas internally and internationally. The jurisprudence also established that art.10 guarantees also the artistic expression, the activities of the broadcasting companies, cinema or television and, of course, press. In summary, the European Court has emphasized that the freedom of expression includes the right to have and to express its opinion, but also the right to information. A

[1] The Dispositions of article 10 of the Convention are to be found in Romanian Constitution in the regulations of the two articles: article 30 – Liberty of expression and article 31 – The right to information.

democratic society is characterized by pluralism, tolerance and openness. Therefore, by protecting the freedom of expression, are protected not only the opinions or information received "favorably or indifferently, but also those that may offend or shock the state authorities or a part of the population[1]". It is stated in the doctrine that the ability of each one to have and express a minority opinion is an essential component of a democratic society.[2]

The freedom of expression has an autonomous character, in the sense that it has a value unsubordinated to the general interest or determined by the state at a certain moment[3]. The autonomy is a guarantee for respecting the principle of pluralism and at the same time excludes the arbitrary interference of the state in the act of creation, information and expression of the individual.

The state has several categories of obligations to exercise this right: the obligation to refrain from limiting the freedom of expression in all its forms; the positive obligation to ensure the exercise of this right by guaranteeing the existence of diversified means of information. In this regard, the state must oppose excessive media concentration and ensure the diversity of media, information and ideas.

The provisions of Article 10 paragraph 2 provide that exercise of the freedom of expression implies "duties and responsibilities". Also the freedom of expression may also be subjected to restrictions, but also to certain formalities or conditions. The European Court has held that Article 10 may be violated by a wide variety of measures ordered by the national authorities against persons who have exercised their freedom of expression. These measures, which constitute interference from public authorities, may consist of: civil and criminal actions, confiscation of goods, refusal to authorize publications or television stations, prohibition of dissemination of information[4], etc.

In order not to constitute a violation of Article 10, these interferences must comply with the conditions imposed by paragraph 2: the restriction must be prescribed by law, pursue a legitimate aim, be

[1] Cause Lingens versus Austria, ECHR Decision from 8th of July 1986.
[2] Frederic Sudre, *Drept european și internațional al drepturilor omului* (Bucharest: Polirom, 2006), 417.
[3] Doina Micu, *Garantarea drepturilor omului* (Bucharest: All Beck, 2007), 94.
[4] See D.J. Harris and D.Gomien and L. Zwook, *Convention Europeénne des Droits de l'Homme et Charte Sociale Europeénne: droit et pratique* (Strasbourg:Editions du Conseil de l'Europe, 1997), 382.

necessary in a democratic society for the achievement of the aim pursued, which implies the compliance with the proportionality criterion.

The basic philosophy expressed in C.E.D.O. jurisprudence on freedom of expression can be synthesized through the following ideas: Freedom of expression is one of the essential foundations of the democratic society, one of the primordial conditions for progress and flourishing of each one. Under the reserve of paragraph 2 of Article 10, it is used not only for information or ideas collected by favors or considered harmless or indifferent, but also for those who strike, shock or disturb the state or a part of the population. Therefore, they prove it: pluralism, tolerance and the spirit of openness, without which there is no democratic society. It follows, in particular, that any formality, condition, restriction or penalty imposed in the matter must be proportionate to the legitimate aim pursued. [1]

The observance of the principle of proportionality is an important condition which C.E.D.O. is examining in order to ascertain whether the restrictive measures ordered by the national authorities are appropriate to the legitimate aim invoked. The jurisprudence of the international Court reveals particular aspects of the principle of proportionality applied in the case of conditioning or restricting the exercise of the freedom of expression, particularities determined by the sphere and content of the forms of freedom of expression, the modalities of realization, the nature of the legitimate aim pursued and the concrete interests of the subjects involved.

The exceptions from the rule of guaranteeing the exercise of freedom of expression are interpreted restrictively, and the necessity and proportionality of certain limits must be established convincingly. The contracting States are recognized a certain margin of appreciation, which differs according to the legitimate aim pursued and the means of expressing of the freedom of expression. In this regard, C.E.D.O. concluded that it is impossible for the jurisprudence and law of the Contracting States to develop a uniform notion of morality and that the domestic authorities are better placed than the international judge to decide on the precise content of the requirements imposed by the morals of a society. Therefore, in these situations, C.E.D.O. has left to the

[1] See Cause Handyside versus United Kingdom, The ECHR Decision on December 7th, 1976, paragraph 49.

national authorities a wide margin of appreciation, which also has consequences on respecting the principle of proportionality.

In the opinion of Strasbourg Court, the freedom of the press is one of the most effective means by which the public learns or forms opinions about the ideas and attitudes of political leaders and, in general, about social realities. Therefore, the restrictions on press freedom, including sanctions imposed on journalists, must be "rigorously proportional and centered on statements that have in fact exceeded the limits of an acceptable criticism." [1]

The analysis of the principle of proportionality respecting, in case of the restrictions on press freedom, also takes into account the fact that the press has the task to communicate information and ideas related to the issues debated in political life. To this obligation corresponds the right of the public to assume them. Consequently, the limits of admissible criticism are much broader toward a politician or government, rather than for a simple citizen. C.E.D.O. has set a high level of media protection, stating that the general interest is better served when providing the public with the most comprehensive information possible and therefore the proportionality ratio is strictly interpreted in the sense that there must be "an imperious social need" to justify a limitation of press freedom.

The Strasbourg Court also distinguished between facts and value judgments. If the materiality of the former ones can be proved, the value judgments are not capable of being demonstrated in terms of their accuracy. Therefore, it is not justified, including in terms of proportionality, a measure to condemn a journalist for expressing valuable judgments. However, even when it comes to a value judgment, the proportionality of the interference may depend on the existence of a sufficient factual basis, because a value judgment without any factual basis for its support may be excessive.[2]

A particular aspect of the freedom of expression refers to the activity of state officials in the performance of their professional duties. C.E.D.O. jurisprudence has determined that the State may restrict the right to freedom of expression of its officials to the extent that their views relate to their duties or professional duties. In this case too, the

[1] Sudre, *Drept european și internațional al drepturilor omului,* 425.

[2] See Cause Unabhangige Inițiative Informație- sviclfalt versus Austria, Dichand and others, versus Austria Krane Verlag Con & Co. K.G. versus Austria, The ECHR Decisions on February 26th, 2002.

proportionality principle must be respected so that restrictive measures are not excessive.

In relation to these rules, the observance of proportionality, understood as an appropriate relationship between the restrictive measures adopted and the legitimate aim pursued, is analyzed in concrete terms by C.E.D.O. depending on the particularities of each case.

Thus, in Sunday Times versus the United Kingdom[1], C.E.D.O. found that the prohibition on the publication of an article relating to a case pending before a court, a ban ordered by the High Court and supported by the House of Lords, was a violation of Article 10 of the Convention because the principle of proportionality has not been respected. In order to determine whether the prohibition on publication is in this case proportionate to the legitimate aim pursued, the Strasbourg Court emphasizes the importance in a democratic society of press freedom, including for rendering the issue on justice administration: "Not only has the media the mission to communicate information and ideas on the issues that the tribunals judge, but the public also has the right to receive them." Consequently, satisfying the public's interest to be informed is essential to determine whether the interference by public authorities into the exercise of freedom of expression is justified. In relation to these premises, C.E.D.O. notes that the interest in maintaining the authority of the judiciary was not such a pressing social need to counteract the public's interest in receiving information. Consequently, the restriction imposed on the applicants is not justified and is not proportionate to the legitimate aim pursued.

The convictions imposed on journalists for the articles published in the press, are a restriction on the freedom of expression. In these cases, the Court examines very rigorously the compliance with the condition of proportionality, especially if the sanctions have been applied to criticisms made against political people or state authorities.

The assessment of the observance of the principle of proportionality is carried out in relation to the following coordinates: "In a democratic system, the actions or omissions of the government must be placed under careful control, not only of the legislative and judicial powers, but also of the public opinion. Indeed, the dominant position it occupies requires that it shows restraint in the use of the criminal path,

[1] ECHR Decision on April 26th, 1979. For the same meaning see cause Barthold versus Germania, decision on March 25th, 1985.

especially if having other means to respond to the unjustified attacks and criticisms of opponents."[1]

The competent authorities of the state have the possibility, as a guarantor of the public order, to apply criminal sanctions even in order to react appropriately and necessarily to such allegations. The national authorities have a broader margin of appreciation regarding the need to interfere in the exercise of freedom of expression, in situations where the discourse in litigation instigates to the use of violence against an individual, a representative of the State or a part of the population. In relation to those considerations, which are consistently settled in jurisprudence, C.E.D.O. ascertained the violation of the principle of proportionality in several cases where the national authorities have adopted criminal sanctions against some journalists[2].

The freedom of the press is not absolute. The press should not exceed certain limits, particularly as regards the reputation and rights of others, as well as the need to prevent the disclosure of confidential information.[3] While it is accepted that journalistic freedom includes the possible use of a certain amount of exaggeration, even of provocation, the limits of admissible criticism are narrower for a simple individual rather than for a government or a political personality.

In such cases, in order to determine whether the principle of proportionality has been respected, the Court distinguishes between injurious expressions used by a journalist in the press and the criticisms that are acceptable. Thus, in the case Tammes v. Estonia, cited above[4], the complainant was convicted for using in the press terms that are offensive to the wife of a former prime minister and minister. In assessing whether the sanction applied is proportionate to the legitimate aim pursued - the protection of the reputation or the rights of others -

[1] Cause Seker Karatos versus Turkey, Decision on July 9th, 2002. For the same meaning see cause Ayse Őztűrk versus Turkey, Decision on October 15th, 2002.

[2] See Cause Lingens versus Austria, Decision on July 8th, 1986; cause Dalban versus România, Decision on September 28th, 1999; cause Thargeirsan versus Irlanda, Decision on 25 iunie 1992; cause Jersild versus Denmark, Decision on September 23rd, 1994; cause Castells versus Spania, Decision on April 23rd, 2002; cause Lehideux and Isarni versus France, Decision on September 23rd,1998; cause Sabău and Pârcălab versus România, Decision on September 28th, 2004.

[3] Cause Tammer versus Estonia, Decision on February 6th 2001.

[4] See Cause Constantinescu versus România, Decision on July 27th, 2000; cause Chawyandalţii, versus Franţa, Decision on29 iunie 2004.

C.E.D.O. notes that the offensive terms used by the journalist are value judgments expressed in an offensive manner that were not necessary to be used to express a negative opinion. At the same time, the use of these terms to qualify a person's private life is not justified by the public interest pursued. The nature and severity of the sanction applied is another criterion for assessing the respecting of proportionality. In the present case, the claimant was convicted to a modest fine. In relation to these elements C.E.D.O. has established that the principle of proportionality has been respected and consequently there is no violation of Article 10 of the Convention.

Obliging a journalist to disclose his sources of information and the application of a fine for refusal to comply is an interference with the exercise of freedom of expression which, in order to be justified, must also respect the criterion of proportionality[1]. In order to verify compliance with the principle of proportionality, in the quoted case, C.E.D.O. has taken into account the importance of the protection of journalistic sources for the freedom of the press and the negative effect that a disclosure ordinance is likely to produce. In this respect, it was stated that: "It is necessary to give greater importance to the democratic society's interest in assuming and maintaining the freedom of the press when it comes to determining whether the restriction is proportionate to the legitimate aim pursued. The limits brought to the confidentiality of journalistic sources, demand the Court the most scrupulous exam. "In the cause was considered that the ordinance for disclosure of the sources of information used by the journalist was not a reasonable means proportionate to the legitimate aim pursued.

In the most recent jurisprudence C.E.D.O. has established that the time is a criterion for assessing whether the principle of proportionality has been respected in the event of a restriction on the exercise of the freedom of expression by prohibiting the publication of a work which is likely to reveal confidential data on the evolution of a disease suffered by an important political person[2]. The passage of time must necessarily be taken into account in order to examine the compatibility with the freedom of expression of such a grave measure as the absolute prohibition on the publication of a book.

[1] Cause Goodwin versus United Kingdom, Decision on March 27th 1996.
[2] Cause Plan (Society) versus France, Decision on May 18th 2004.

The interdiction on the cable retransmission of broadcasts,[1] the refusal by the national authorities to authorize an electronic company to receive non-coded[2] television programs by help of a parabolic antenna or the impossibility of having and operating private radio or television stations due to the monopoly[3] of the State, constitute interference in the exercise of freedom of expression requiring consideration of compliance with the criterion of proportionality. The particularities of the freedom of expression, the necessity and pluralism in a democratic society, the margin of appreciation recognized by the national authorities, depending on the protected values, constitute in these cases criteria for assessing the observance of the principle of proportionality.

The principle of proportionality has particular features in C.E.D.O. jurisprudence when it is applied in order to establish whether the restriction of the freedom of expression of office clerk is justified.

The international Court in Strasbourg has consistently held that the State may restrict the right to the freedom of expression of its officials to the extent that their views relate to their professional duties or tasks. In such cases, C.E.D.O. jurisprudence also refers to other criteria for assessing whether the restrictive measure is proportionate to the legitimate aim pursued. Thus, in case of persons having military status, the Court examines the concept of "order". The idea of order refers not only to public order, but also covers the order that must prevail within the limits of a specific social group. In case of the armed forces, the "order" imposed by the regulations has a particularly important aspect and may require the military not to undermine military discipline, including throughout written materials. Consequently, the States have a broader margin of appreciation and the measures imposed on soldiers on the freedom of expression are appropriate to the legitimate aim pursued. [4]

The duty of political loyalty imposed on an official is of a particular importance for the constitutional order of a state. However, the dismissal of a teaching staff, due to lack of loyalty to the Constitution, was appreciated by C.E.D.O. for being disproportionate to the legitimate

[1] Cause Groppero Radio A.G.and others, versus Elveţia, Decision on March 28th 1990.
[2] Cause Autronic A.G. versus Switzerland, Decision on May 22nd 1990.
[3] Cause Informaţions verein Lenetia and others, versus Austria, Decision on November 24th 1993.
[4] Cause Engeland and others, versus Olanda, Decision on June 8th 1976.

aim pursued, especially as the national authorities had other alternatives for lighter sanctions. [1]

The freedom of the political debate is a particular aspect of the freedom of expression. Maintaining and strengthening the pluralistic democracy requires constitutional safeguards restricting the freedom of exercise for some professional categories. Therefore, the interdiction by the Constitution for police officers to conduct political activities respects the principle of proportionality. [2]

In its jurisprudence, C.E.D.O. has determined that in cases where the freedom of expression of the high-ranking magistrates is at stake, the rights and responsibilities referred to in Article 10 paragraph 2 are of particular importance. "Thus, it is justified to expect the judicial clerks to use their freedom of speech with restraint, whenever it is susceptible to question the authority and impartiality of the judiciary power.[3] " Any breach of the freedom of expression of a magistrate requires careful consideration of the observance of the principle of proportionality. The premise of this analysis is the existence of a fair balance between the fundamental rights of the individual to the freedom of expression and, on the other hand, the legitimate interest of a democratic state to ensure that the public office acts for the purposes stated in Article 10, paragraph 2.

In the above-mentioned case, the Court found that there had been a violation of the right of the claimant, a high magistrate, to exercise his freedom of expression, because the national authorities criticized the content of his speech and announced its intention to sanction him for expressing his opinion freely. C.E.D.O. considers that the reasoning of the national authorities, in order to justify the infringement of the claimant's right to the freedom of expression, is not sufficient to show that the interference was necessary in a democratic society, since the disputed litigation concerned constitutional law issues. Even if there is a certain margin of appreciation, the reaction of the national authorities, namely the removal from office of the magistrate, was not proportionate to the aim pursued and therefore Article 10 of the Convention was violated.

The freedom of expression also includes artistic expression. The Strasbourg Court found that Article 10 of the Convention "includes the

[1] Cause Vogt, versus Germania, Decision on June 8th 1976.
[2] Cause Rekveny versus Hungary, Decision on May 20th 1999.
[3] Cause Wille versus Lichtenstein, Decision on October 28th 1999.

freedom of artistic expression that allows the participation in the public of the exchange of cultural, political, and social information and ideas of all kind"[1].

In most cases, the restrictive measures adopted by the national authorities on the freedom of artistic expression have legitimately aimed at protecting the morals or protecting the rights of others. Applying the principle of proportionality in such cases implies also the characterization of the concept of morality and, implicitly, of the possibility for the States to adopt restrictive measures. In this regard, C.E.D.O. has constantly stated that contracting states have a greater margin of appreciation when regulating issues likely to offend intimate beliefs in morals and religion. "In terms of morality, European countries do not have a uniform conception on the protection requirements against attacks on religious beliefs."[2]

The Romanian legal doctrine and the jurisprudence of the Constitutional Court have also contributed to the understanding and guarantee of the freedom of expression.

The doctrine states that, according to their more authoritarian or more liberal tendencies, the legal regulations on press can be grouped in the light of comparative law into two main systems: the preventive and repressive systems[3]. The legal regime applied in this area must comply with the principle of proportionality, in that the limits and conditions imposed on the exercise of that freedom must be appropriate to the aim pursued by the constituent legislator, namely the protection of the freedom of expression, but at the same time to prevent the abusive exercise of this right.

The Constitutional Court refers to the jurisprudence of C.E.D.O. and to the provisions of the Convention involving the principle of proportionality. In this respect, it has been stated that the freedom of expression is not absolute and, consequently, has certain legal limits. Thus, the establishing by law of the restrictions or sanctions are measures compatible with freedom of expression if they comply with the

[1] Cause Műller and others, versus Switzerland, Decision on May 24th 1988.

[2] Cause Wingrove versus United Kingdom, quoted previously. For the analysis of the observance of the criterion of proportionality, in cases of restriction of the freedom of artistic expression, see the cause Handyside versus United Kingdom previously quoted and cause Műller and others, versus Switzerland, previously quoted.

[3] Tudor Drăganu, *Drept constitutional si instituţii politice* (Bucharest: Lumina Lex, 1998), 176.

conditions imposed by Article 10, paragraph 2, of the Convention. "It is of principle that to a legal obligation, regarding the limiting of the freedom of expression, and even more so to a constitutional obligation must correspond a legal sanction in the event of its non-compliance."[1]

This interpretation is also confirmed by the recent jurisprudence of the Constitutional Court. By Decision no.183 / 2004[2] was established the constitutionality of the provisions of article 205 Criminal Code who incriminates the insult. In the recitals it was stated that the insult is an offense against dignity, and the dignity of man is a supreme value according to art.1, paragraph (3) of the Constitution. The limits of the exercise of freedom of expression are determined by the need to respect the dignity, honor, private life of the person and the right to their own image. The violation of these limits is sanctioned by incriminating the sanction of insult. The Court states that the determination of the limits of the exercise of a right or freedom can be made by the legislator in compliance with the provisions of Article 53 of the Constitution, implicitly respecting the proportionality criterion, although, as happened in other cases, the Constitutional Court does not analyze it. However, the cited judgment makes extensive references to C.E.D.O. jurisprudence to argue that the restriction of the freedom of expression, by incriminating by the lawmakers the insulting offence, is a necessary measure in a democratic society, appropriate to the legitimate aim pursued, namely "the protection of the reputation or the rights of others".

In the older jurisprudence, the Constitutional Court found, in our opinion on good grounds, the constitutionality of the provisions of Article 238, paragraph 1 of the Criminal Code, which incriminates the

[1] Decision no.51/1999, published in *The Official Gazette no.262/1999*; See Decision no.205/2000, published in *The Official Gazette no.702/2000*.

[2] Published in *The Official Gazette no. 431 / 2004*. See in the same meaning the Decision no.268/2004, published in *The Official Gazette no.640 /2004*, by which the objection of unconstitutionality of the provisions was rejected art.206 Criminal Code. In consideration of the decision it was stated that all the provisions of the Constitution and the international legal instruments by which is consecrated the freedom of expression, allowing the possibility of restricting this freedom, if the restrictive measures are necessary and appropriate for the defense of the rights and liberties of others. Incriminating of the defamation is such a measure appropriate to the legitimate purpose pursued, especially as the law allows the person who proves to have a legitimate interest, in whose defense he made the slanderous statement or imputation, to make the test of verity.

offense committed against authorities.[1] Although the principle of proportionality is not explicitly invoked, out of the constitutional judge's reasoning and from extensive references to C.E.D.O. jurisprudence it follows that the restrictive measure on the freedom of expression is necessary and appropriate to the legitimate aim pursued, namely the protection of the dignity and honor of a citizen who performs a public office. "Precisely the investing of a citizen with a public office attracts not only increased demands on the part of the official, but also the need for special legal protection, since the reputation of such a person indirectly affects the prestige of the authority in whose name he acts within the legal framework of the duties invested."

The freedom of expression implies "the right to reply", which in turn is considered to be a fundamental right. The Constitutional Court has applied the principle of proportionality to determine the limits of each of these rights. In this regard, the Court found that the statutory regulation of the right to reply "meets the constitutional requirements contained in the Constitution". By analyzing the limits of the right to reply, the Constitutional Court applies the principle of proportionality, expressed as a fair relationship between the allegedly defamatory information and the replica given to this information: "Even in case of pertinence of the right of reply, the question on its limits is questionable because it is natural that between the dimensions of the information allegedly defamatory and those of the injured person's reply, there is no *apparent disproportion* (s.n) in favor of the latter one, keeping the limits of a reasonable reply, focused on the defamatory aspects, fought by the replica whose publicity is required."[2] The limits of exercising the freedom of expression imply the principle of proportionality when determined by other values protected by the constitutional norms. The Court ruled that "the provisions of paragraph (6) of Article 30 of the Constitution have into regard *the limits* of the exercise of the freedom of expression, which cannot, through other supreme values of the lawful State, prejudice the right of the person to his own image." [3] In the same meaning is C.E.D.O.

[1] Decision no 140 /1996 published in *The Official Gazette no 324 / 1996*.
[2] Decision no 8/1996, published in *The Official Gazette no.129/1996.*
[3] Decision no.54/2000, published in *The Official Gazette no.310/2000.*

jurisprudence that refers to the principle of proportionality in situations where the exercise of the freedom of expression may be limited[1].

The protection of public morality is one of the legitimate purposes justifying the restriction of the freedom of speech. Having into consideration this legitimate purpose, the Constitutional Court has found the constitutionality of the provisions of Article 325 of the Criminal Code which incriminates the crime of spreading obscene material. [2] The restrictive measure is necessary in a democratic society, although the concepts of "public morality" and "good morals" have varying content according to collectivity and epoch. However, in all these cases, there is a limit to the tolerance of manifestations, the violation of which must be sanctioned by criminal law, since the constitutionally guaranteed fundamental rights and freedoms can not be exercised in a manner contrary to good morals or that would harm public morality. The principle of proportionality is a jurisprudential criterion for determining these limits.

## INSTEAD OF CONCLUSIONS

The spiritual being of man in the depth and interiority of self-consciousness has something characteristically opposed to the expressiveness of the social dimension of the being, which also denotes the primacy of the spirit, as in essence the self-consciousness is spirit, against externality, against everything that is deeds and doing. It's about *silence*. The authenticity of expressing the self-consciousness is the silence, which in principle cannot be the subjected to the legal status or normative regulation, representing, by excellence, an area of the non-right. There are however exceptions.

The philosophers and theologians spoke about "the knowledge through silence." We will discuss in detail on this in another material with more reflections on the philosophical and theological conception of silence. Here we highlight some aphorisms that we consider important to

[1] Cause Handyside versus United Kingdom - 1976; Cause Sunday Times versus United Kingdom - 1979; Cause Lingens versus Austria - 1986, in Vincent Berger, *quoted works.*, pg. 462-465; Cause Dalban versus România - 1999, in .decisions of the European Court of Human Rights, vol. I, *quoted works.*, pg. 325 – 341.

[2] Decision no. 19 / 2005 published in *The Official Gazette no.153/2005*. Nevertheless, this is our Constitutional Court constant jurisprudence on this matter. See the Decision no.108/1995, published in *The Official Gazette no.8/1996*.

appreciate silence as the self-discovery of man in the authentic of his being.

Saint Isaac Sirius said that *"Silence is the mystery of the future century, and the words are the instruments of this world."* The same wise man said, *"It is good to be friends with all, but alone in your conscience."* The loneliness of conscience is actually a silence that does not imply immutability or inactivity, but the immersion into the indefinite and infinite depth of being through continuous spiritual progress. Father Arsenie Boca identifies the ten commandments of wisdom: *"For nine times to shut up and once to talk and then only for a little."* And the Holy Saints Calist and Ignatius said: *"The prayer of the pure is the silence"*

Almost paradoxically, the phenomenality of the juridical status of man recognizes and even consecrates the "right to silence" - the right of the defendant not to make any statement. Moreover, "silence" can produce legal effects. For example, the adoption of a legal act through consensus by a collegiate body, or in some cases is recognized the value of consent to the conclusion of contracts or the acquiescence of a third party's claims. The legal meanings of "silence", however, require a separate study. In the context of the above, we limit ourselves to the emphasizing that by exception the human will in the legal plane can also be expressed by silence, therefore silence is also a phenomenal social reality, legally quantifiable, not only a dimension of self-consciousness, of interiority of the human being. Let us therefore acquire the power of silence in order to express ourselves in the authenticity of our being, in the freedom that it assumes, in all that is the social nature of our being.

## BIBLIOGRAPHY

### Books

1. Drăganu, Tudor. *Drept constitutional si instituţii politice*. Bucharest: Lumina Lex, 1998.
2. Harris, D.J. and Gomien, D. and Zwook, L. *Convention Europeénne des Droits de l'Homme et Charte Sociale Europeénne: droit et pratique*. Strasbourg: Editions du Conseil de l'Europe, 1997.

3. Kant, Immanuel. *Critica rațiunii pure*. Bucharest: ALL Publishing House, 2007.
4. Micu, Doina. *Garantarea drepturilor omului*. Bucharest: All Beck, 2007.
5. Sudre, Frederic. *Drept european și internațional al drepturilor omului*. Bucharest: Polirom, 2006.

**Case Law**

ECHR Jurisprudence.

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# BRIEF CONSIDERATIONS UPON THE ESTABLISHMENT OF DAMAGES DURING THE CRIMINAL TRIAL

**Cătălin BUCUR** [1]

***Abstract:***

*The court shall establish the moral damages not as an economic quantification of certain rights and non-patrimonial values, but as a complex evaluation of the circumstances in which the damages are being exteriorized, therefore the court shall have the possibility to valorize their intensity and gravity and to order the reparation of the moral prejudice suffered, by avoiding the case of the unjust enrichment.*

***Key words:*** *court; moral prejudice; damage;, tort liability; sufferance*

## INTRODUCTION

According to Art 1349 and 1357 of the Civil Code, "*every person shall have the duty to comply with the behavioral rules that the law or the customs state and shall not prejudice, by his actions or inactions, the rights or legitimate interests of other persons; the individual who, having discernment, violates this obligation shall be liable for all the prejudices caused, being compelled to their compensation; the person causing a prejudice to another one by an illicit action (...) committed with guilt shall be compelled to its compensation; the author of the prejudice shall be held liable for the simplest guilt*".

Also, according to Art 1358 of the Civil Code "*in the appreciation of the guilt shall be taken into consideration the circumstances in which the damage occurred and the person responsible for the offense and, where appropriate, the damage caused by a professional in the operation of an undertaking*".

In this way, the Civil Code states a principle corresponding both to ethical and social equity requirements, as well as to judicial security

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requirements: *the principle of civil liability for illicit actions, causing prejudices*.

## THE CONTENT OF THE PAPER

Art 1370 of the Civil Code emphasizes the solidarity of the liability of the persons responsible for causing a prejudice. The tort liability is a civil sanction with a reparatory feature, which shall be applied for the patrimony of the person who has committed the illicit action causing prejudice, being considered as a means of protection for the civil rights, but also as a educational-preventive function[1].

The tort liability and the penal liability are invoked as effect of an illicit action violating certain social values protected by the law. One of the fundamental principles of the judicial liability is that each individual is liable for his own actions.

The liability for his own actions is stated by Art 1357 and next of the Civil Code, of which it results that for this type of liability shall be cumulatively fulfilled the following conditions: the existence of a prejudice, the existence of an illicit action, the existence of a causality between the illicit action and the prejudice and the existence of the guilt of the person causing the prejudice, consisting in the intent, negligence or imprudence of his actions. The guilt expresses the subjective behavior of the person committing the illicit action towards that action.

The liability for covering the prejudice shall entail the obligation to full restoration.

This is why, if the existence of a prejudice of the civil parties is proven, so that it entails the liability of the defendants, they shall be liable to the extent to which they have committed the action generating that prejudice.

The prejudice refers to the result, the negative effect suffered by a certain individual, as consequence of an illicit action committed by another person.

The compensation granted for the tort liability shall always be patrimonial; either it consists in a restitution of the suffered damage, or in the financial equivalent of this damage.

[1] New Civil Code (Law No 287/2009), updated in 2018, republished in *The Official Gazette* 505/2011.

If the prejudice cannot be cash assessed, he shall be considered as a moral prejudice, such as the violation of the honor and dignity of a person, the affection for the loss of a close person, physical suffering, etc.

The prejudice shall be certain and not yet repaired. Mainly, the restitution of the prejudice shall be made in nature, and if this is not possible, the restitution shall be in equivalent as compensations.

The establishment of the prejudice for health prejudices, if it did not caused long-term consequences, shall take into consideration the medical expenses, usually the compensations being given as a total amount.

The analysis of the civil actions shall follow the chronology of the events generating the prejudice.

For the case in which it is ascertained that multiple defendants generated the prejudice, by identifying the causality between the illicit action and the prejudice, it shall be necessary to determine the contribution of each.

The judicial practice, in establishing the causality, has referred to the fact that it does not only represent the actions which are labeled as "necessary cause", but also the causal conditions, namely the illicit actions which have mediated the causal action, making it possible.

For instance, if no longer is possible the ascertainment of the seriousness of the hitting inflicted by each defendant upon the victim, it shall be considered that, in the establishment of the causal relationship, must be taken into consideration the fact that the event was caused by certain factors which, without causing a direct and dangerous prejudice, have favored the occurrence of this effect (the indivisibility between the cause and conditions), "by easing the causal procedure, hurrying and favoring the development of the process or by aggravating or insuring its negative effects".

The doctrine has considered that "from the perspective of the legal liability, such exterior conditions which have contributed to the damaging effect, together with the causal circumstance, represent an indivisible unity within which such conditions acquire a causal feature".

The consideration of the base for moral compensations shall begin from the arguments of the High Court of Cassation and Justice in Decision No 2356/2011, stating that the moral prejudices represent the

violation of the physical existence of the individual, of his body integrity and health, honor and dignity, professional reputation[1].

The purpose of these moral compensations consists in the moral satisfaction of a sufferance, and not in a patrimonial satisfaction.

While the patrimonial rights have an evaluable economic content, which may determine the quantification of the material prejudice, the non-patrimonial personal rights have a content which cannot be materially expressed, given that it aims elements of the human personality – right to life, physical integrity, honor and dignity.

The moral compensations shall be established based on the evaluation of the court.

For the offences against the human person, the evaluation of the compensations for moral damages, in order to avoid being subjective and not aiming towards an unfair enrichment, shall take into consideration the physical or moral sufferance susceptible of being caused by the defendant's action, as well as by all its consequences proved by medical documents or by other submitted evidences.

In its Decision No 3806/2013, the High Court of Cassation and Justice[2] has referred to the fact that the Romanian legislative system does not state a clear means for the insurance of a full restoration of the compensations awarded as moral damages and, therefore, the principle of the full restoration of such prejudice can only be estimated in relation to the nature of those prejudices, impossible of being financially established.

The restitution of the moral compensations must be seen as a group of non-patrimonial and patrimonial measures, created to provide for the victim a certain satisfaction or relief for the sufferance, the physical compensation no longer being possible.

## CONCLUSIONS

The court must try to establish a necessary sum, not just for the restoration of the victim to a similar situation as the one before, but to

[1] Decision No 2356 of 20 April 2011 ruled by the Section for administrative and fiscal contentious of the High Court of Cassation and Justice.

[2] Decision No 3806/2013 on 7 November 2013 ruled by the High Court of Cassation and Justice, 2nd Civil Section in the case no 39435/3/2009.

provide a moral satisfaction, susceptible of replacing the value of which he has been deprived of.

The court shall establish the moral compensation not as economic quantification of certain rights and non-patrimonial values, but as a complex evaluation of the circumstances in which the prejudice caused are exteriorized, therefore the court shall have the possibility to ascertain their intensity and gravity and to order the reparation of the moral prejudice, without generating an unfair enrichment.

According to the Convention on Human Rights, the criterion of equity in the area of moral compensations shall refer to the need that the victim must receive a fair satisfaction for the suffered moral damage, but in the same time the compensations shall not represent excessive fines for the offenders.

## BIBLIOGRAPHY

### Books

1. Antoniu, George. *Tratat de drept penal*, 1st Volume. Bucharest: Universul Juridic, 2015.
2. Antoniu, George. *Noul Cod penal Codul penal anterior*. Bucharest: All Beck, 2004.
3. Dongoroz, Vintilă *et al. Explicaţii teoretice ale Codului penal român*. 1st Volume. Bucharest : Romanian Academy Press, 1969.

### Case Law

1. Decision No 3806/2013 on 7 November 2013 ruled by the High Court of Cassation and Justice, 2nd Civil Section in the case no 39435/3/2009.
2. Decision No 2356 of 20 April 2011 ruled by the Section for administrative and fiscal contentious of the High Court of Cassation and Justice.
3. New Civil Code (Law No 287/2009), updated in 2018, republished in *The Official Gazette* 505 (2011), in force since 1 October 2011.

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# FISCAL RECEIVABLE *VS*. BUDGETARY RECEIVABLE

**Marta-Claudia CLIZA**[1]

***Abstract:***

*The present study intends to present the legislative discrepancies and the practical difficulties created by a faulty legislation. The intention to collect as much as you can has to be punished and the courts have to clarify the meaning of fiscal receivable versus budgetary receivable.*

***Key words:*** *Fiscal Code; Fiscal Procedure Code; fiscal receivable; budgetary receivable; receivable collection.*

## INTRODUCTION

This study aims to clarify from the legal and tax point of view the quality of the amounts to paid by the investors / owners for the execution of constructions under the building permit.

The premise that we start from is that any holder of a building permit is bound to pay certain amounts to the State Inspectorates for Constructions, amounting to 0.1% of the value of the authorized works and respectively 0.7% of the expenses for the execution of the constructions.

### Applicable law:

In order to clarify the proposed matter, we should take into account the following normative acts:

1. Law no. 50/1991[2] on the authorization of the execution of construction works;

2. Law no. 10/1995[1] on quality in constructions;

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[2] Republished in Official Journal no. 933 of 13.10.2004, as further amended and supplemented.

3. G.O. no. 92/2003[2] on the Fiscal Procedure Code, as further amended and supplemented;

4. Law no. 207/2015 on the Fiscal Procedure Code[3];

5. Law no. 571/2003 on the Fiscal Code[4];

6. Law no. 227/2015 on the Fiscal Code[5], as further amended and supplemented;

## 1. THE CHARACTERISTICS OF THE AMOUNTS TO BE PAID DEFINED BY LAW NO. 50/1991

Law no. 50/1991 on the authorization of the execution of construction works provides in art. 30[6] the following:

*1) The expenditures for state control under land use, urban planning and authorization of the execution of construction works shall be borne by the investors, equivalent to a share of 0.1% of the value of the authorized works, except those referred to in art. 3 letter b) and the places of worship.*

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[1] Republished in Official Journal no. 765 din 30.09.2016, as further amended and supplemented.

[2] Republished in Official Journal no. 513 din 31-iul-2007, as further amended and supplemented, normative act currently repealed by art. 354 letter A. of title XII of the Fiscal Procedure Code of 2015.

[3] Published in Official Journal no. 547 of 23.07.2015, as further amended and supplemented.

[4] Published in Official Journal no. 927 of 23.12.2003, as further amended and supplemented, normative act currently repealed by art. 502 para. (1), item 1. of title XI of the Fiscal Code of 2015.

[5] Published in Official Journal no. 688 of 10.09.2015, as further amended and supplemented.

[6] See Decision no. 1764 of September 2nd, 2010, pronounced by the Court of Appeal Bucharest, division VIII of the contentious administrative and fiscal, in Alina Nicoleta Ghica, *Urbanismul. Autorizaţii de construire, certificate de urbanism şi avize. Practică judiciară* (Bucharest: Hamangiu Publishing House, 2011), 80: According to art. 1 para. (1) of Law no. 10/1995, the quality of the constructions is the result of the exploitation performances of the constructions, in order to satisfy, throughout their existence, the demands of the users and collectivities and according to art. 30 para. (1) of the same law: "State inspection in constructions, public works, urban planning and land use within the Ministry of Regional Development and Tourism, together with other bodies, shall be held liable for the exercise of the state control on the unitary application of the legal provisions in the field of quality in construction, in all stages and component of the quality in construction system".

*(2) The transfer of the amounts established according to the provisions of para. (1) shall be performed in the account of the territorial and county Inspectorates for Constructions, respectively the Inspectorate of Bucharest municipality, as the case may be, once with the delivery of the notification on the date of starting the works, as provided for by art. 7 para. (8). The delay in the payment of the share referred to in para. (1) shall be sanctioned by 0.15% per day of delay, without the due amount being exceeded. The year-end disposals of extrabudgetary revenue are carried forward to the following year and have the same destination.*

*(3) The share established in para. (1) shall be applied and also the differences resulting from the update of the authorized works value, which is performed at the same time with the acceptance at the completion of the works*".

Art. 7 para. (8) – amendment introduced by Government Emergency Ordinance no. 214/2008:

"*The investor shall be bound to notify the authority which issued the building permit, as well as the territorial inspectorate in constructions on the date of starting the authorized works. On the contrary, if the ascertainment of the beginning of the works without notification was made within the term of validity of the permit, the date of the beginning of the works shall be deemed the day following the date of issuance of the permit".*

***Conclusion:***

***1. The share of 0.1%*** *of the value of the authorized works, which could be the value declared upon the obtaining of the building permit or the one established and recorded in the work acceptance protocol shall be due by the holder of the building permit.*

***2. The payment deadline*** *shall be the date notified for the delivery of the notification on the works starting date or, in the absence thereof, the works starting date shall be deemed the day following the date of the issuance of the permit.*

***3. The Beneficiary*** *of these amounts shall be the territorial and county Inspectorate in Constructions, respectively the Inspectorate of Bucharest, which, as of 2001 has been organized as a public institution with legal status subordinated to the Ministry of Regional Development and Public Administration according to G.O. no. 63/2001.*

***4. The delay in payment*** *of the share of 0.1% shall be sanctioned by 0.15% per day of delay,* ***without the due amount being exceeded.***

## 2. THE CHARACTERISTICS OF THE PAYMENT AMOUNTS DEFINED BY LAW NO. 10/1995

Law no. 10/1995 on constructions quality provides in art. 43 the following:

The investors or owners shall transfer on a monthly basis to the State Inspectorate in Constructions – S.I.C. subordinated to the Ministry of Public Works, Transport and Housing, an amount equivalent with a share of 0.7% of the expenses for the execution of the constructions and works provided for by art. 2 and for which building permits are issued under the terms of the law, except the owners, natural persons, who perform consolidation and repair works on the housings in their property. The calculation and the transfer of the respective amounts shall be performed in installments, at the same time with the payment of the benefits.

The delay of the investor or owner in the payment of the share shall be sanctioned by 0.15% per day of delay.

***Conclusion:***

*1. **The share of 0.7%** of the expenses for the execution of the constructions and works shall be due by the investor / owner for which the building permit is issued;*

*2. **The payment deadline** of the share of 0.7% shall be paid at the same time with the payment of the benefits and shall be paid on a monthly basis;*

*3. **The beneficiary of the amounts** shall be the State Inspectorate in Constructions – S.I.C. subordinated to the* Ministry of Public Works, Transport and Housing*;*

*4. **Payment delay** shall be punished by 0.15% per day of delay.*

## 3. THE DEFINITION OF THE FISCAL RECEIVABLE ACCORDING TO THE FISCAL PROCEDURE CODE APPROVED BY G.O. NO. 92/2003

G.O. no. 92/2003 defines in art. 1, the field of application of the Fiscal Procedure Code, namely:

„*(1) This code regulates the rights and obligations of the parties within the fiscal and legal relations concerning the administration of*

*taxes and fees payable to the State and local budgets as provided by the Fiscal Code1**).*

*(2) This Code also applies for the customs rights administration as well as for the administration of the receivables generated by the contributions, fines and other amounts constituting revenues of the general consolidated budget, according to the law, unless otherwise provided by the law.*

*(3) The administration of the taxes, fees, contributions and other amounts owed to the general consolidated budget shall mean the totality of the activities performed by the tax bodies related to:*

*a) tax registration;*

*b) declaration, determination, check and collection of the taxes, fees, contributions and other amounts owed to the general consolidated budget;*

*c) solving of the claims against the tax administration documents*[1].

*(4) This code does not apply for the administration of the receivables payable to the general consolidated budget resulting from contractual legal relationships, except mining royalties, oil royalties and royalties resulting from concession, lease and other efficient use of agricultural land agreement, concluded by the State Property Agency*".

According to the provisions of Law no. 50/1991 and of Law no. 10/1995, the share of 0.1% and respectively 0.7% due by the holders of the building permits are not administered by the competent tax bodies due to the fact that the following activities are not carried out for such amounts:

- tax registration;
- declaration, determination, check and collection of the taxes, fees, contributions and other amounts owed to the general consolidated budget;
- solving of the claims against the tax administration documents.

[1] See in this respect, the comment on platform www.idrept.ro at art. 1 Fiscal Procedure Code, Emilian Duca, *Codul de Procedură Fiscală comentat și adnotat* (Bucharest: Universul Juridic Publishing House, 2015) : "*Para. (3) of art. 1 describes the content of the administration of taxes, duties, contributions and other amounts owed to the general consolidated budget. The operations included in the administration activity are shown distinctly in the following titles of the Fiscal Procedure Code (registration, declaration, collection, verification, challenging)*".

The amounts due by the holders of the building permits are not registered with the beneficiary, they are not required to be declared, are not verified, are not subject to the right of being challenged and are not subject to a notice of assessment, respectively there are no provisions for verifying their accuracy.

Furthermore, for the calculation of penalties for the failure to pay these amounts, the provisions of the special law, respectively of Law no. 50/1991 and Law no. 10/1995 shall be applied and not the provisions of the Fiscal Procedure Code, respectively a fixed share applied throughout all the term, amounting to 0.15% per day, but without exceeding the due amount. We hereby note that for tax receivables, the Fiscal Procedure Code does not limit the accruals up to the amount of the principal tax liability.

Furthermore, these shares of 0.1 % and 0.7% are not defined or provided as obligations by the Tax Code, as provided for by art. 1 para. (1) of the Fiscal Procedure Code, respectively:

*(1) This code regulates the rights and obligations of the parties within the fiscal and legal relations concerning the administration of taxes and fees payable to the State and local budgets as provided by the Fiscal Code.*

Given all the aforementioned, we conclude that the amounts calculated by applying these shares of 0.1 % and 0.7% are not fiscal receivables as defined by art. 21 of the Fiscal Procedure Code:

*(1) Fiscal receivables are patrimonial rights that, according to the law, arise from tax law relations.*

The fact that the collection procedure (by demand for payment, enforceable title and forced execution, as in case of any fiscal receivable[1]) was not triggered for the amounts considered as due, proves that they cannot represent fiscal receivable.

**Conclusion:**

*1. The fiscal procedure code approved by G.O. no. 92/2003 does not have provisions applicable for the share of 0.1% of the value of the*

[1] Seen this respect: Daniel Dascălu, *Tratat de contencios fiscal* (Bucharest: Hamangiu Publishing House, 2014), 838: "*The communication of a demand of payment to the debtor is, unless the law provides otherwise, the first forced execution act made aware to the debtor by the tax body (...), at the same time with the enforceable title, representing the will of the latter expressed to the debtor and/or other persons (e.g. third-party garnishee, for example) to proceed with the forced execution*".

*authorized works and neither for the share of 0.7% of the expenses for the execution of the constructions and of the works;*

*2. The amounts due by means of the application of the shares of 0.1% and 0.7% do not represent fiscal receivables, due to the fact they are not provided as obligations established under the Fiscal Code approved by Law no. 571/2003;*

*3. The related tax liabilities calculated for the non-payment of these amounts by the beneficial owner, the State Inspectorate in Constructions, are limited to the value of the principal debit;*

*. The beneficiary of these amounts cannot initiate the procedure of calculating accessories and of forced execution due to the fact it does not know its value and cannot calculate the accessories, not having the possibility to perform forced execution, as in case of fiscal receivables.*

## 4. THE DEFINITION OF THE FISCAL RECEIVABLE ACCORDING TO THE FISCAL PROCEDURE CODE APPROVED BY LAW NO. 207/2015

New provisions were enforced by the Fiscal Procedure Code approved by Law no. 207/2015, which enable a clear distinction between fiscal receivables and budgetary receivables[1].

Therefore, despite the fact that on February 19th, 2018 the High Court of Cassation and Justice issued a decision for the settlement of certain legal matters, meaning that "*in the interpretation and application of the provisions of art. 40 of Law no. 10/1995, in the form which was in force in 2010, in corroboration with art. 7 of Law no. 329/2009 and position 5 of appendix no. 1 to the same law, as well as with the provisions of art. 21 and art. 22 of Government Ordinance no. 92/2003, republished, as further amended and supplemented, the obligation of paying the amount equivalent to the share of 0.70% of the expenses for the execution of constructions and works provided for by art. 2 of Law no. 10/1995 and for which, according to the law, building permit are*

[1] See in this respect, Dascălu, *Tratat de contencios fiscal*, 170: "*It is required to clarify in advance the relation between the term of "**fiscal receivable**" and the one of "**budgetary receivable**", considering the changes suffered by the Romanian procedural legislation over time, but also the lack of precision of the doctrine in the management of each of them and even the repetitive confusions which usually occurred in their regard*".

*issued, is a tax liability*[1]", we believe that, in connection with the legal provisions in force, this obligation has rather the characteristics of a budgetary receivable.

Therefore, in art. 1 of Law no. 207/2015 the following are defined:

**„Definitions**

According to this code, the terms and expressions below shall have the following meaning: (…..)

*2. **administration of fiscal receivables** – any of the activities performed by the tax bodies in connection with the following:*

a) tax registration of taxpayers / payers and of other subjects of the tax legal relationships;

b) declaration, determination, check and collection of fiscal receivables;

c) the settlement of the challenges against tax administrative bodies;

d) assistance / guidance to taxpayers / payers, upon request or ex officio;

e) the application of the sanctions under the terms of the law;

(…)

7. budgetary receivable – the right to collect any amount which is due to the general consolidated budget, representing the principal budgetary receivable and the accessory budgetary receivable;

8. principal budgetary receivable – the right to collect any amount which is due to the general consolidated budget, other than accessory budgetary receivables;

9. accessory budgetary receivable – the right to collect interests, penalties or other such amounts, under the law, related to certain principal budgetary receivables;

10. fiscal receivable – the right to collect any amount due to the general consolidated budget, representing principal fiscal receivable and accessory fiscal receivable;

11. principal fiscal receivable – the right to charge taxes and social contributions, as well as the right of the taxpayer to be returned the

[1] See in this respect, Minutes no. 8/2018, pronounced by the High Court of Cassation and Justice, the Panel competent to solve law issues, on 19.02.2018, available on site www.scj.ro, site accessed on 22.02.2018.

amounts paid without being due and the amounts the taxpayer is entitled to, under the terms and conditions provided by the law;

12. accessory fiscal receivable – the right to charge interests or penalties related to principal fiscal receivables, as well as the right of the taxpayer to receive interests, under the terms of the law.

Therefore**,** the text above outlines that, in addition to the definition of the fiscal receivable, the definition of the budgetary receivable was also introduced, namely: "*the right to collect any amount which is due to the general consolidated budget, representing the principal budgetary receivable and the accessory budgetary receivable".*

*The same Fiscal Procedure Code of 2015 provides in art. 2 in what concerns the scope and the application, that it regulates the rights and obligations of the parties within the fiscal and legal relations due to the general consolidated budget, regardless the authority managing them, unless the law expressly provides otherwise.*

*Art. 3 of the Fiscal Procedure Code provides that "this code represents the common law procedure for the administration of receivables provided for by art. 2 ("fiscal receivables").*

*Art. 1 and art. 2 of Law no. 227/2015 establishes the scope and the field of application of the Fiscal Code and respectively taxes and compulsory social contributions regulated by the fiscal code, without finding the definition and administration of the shares of* ***0.1%*** *of the value of the authorized works and of* ***0.7%*** *of the expenses for the execution of constructions and works.*

*Under the arguments above, it can be concluded that these obligations established by Law no. 50/1991 and Law no. 10/1995 does not represent fiscal receivables and the provisions of Fiscal Code and Fiscal Procedure Code are not applicable to them.*

*Art. 3 of the Fiscal Procedure Code approved by Law no. 207/2015 provides the following:*

*(1) Unless this code provides otherwise, the provisions of the Civil Code and the Civil Procedure Code, republished shall be applied, up to the extent they can be applied in what concerns the relationships between public authorities and taxpayers / payers.*

*Under the Fiscal Procedure Code approved by Law no. 207/2015, the following can be concluded additionally:*

*1. The obligation to calculate and pay the amounts established by the application of the shares of* ***0.1%*** *of the value of the authorized works*

*and of the share of **0.7%** of the expenses for the execution of the constructions and works is not regulated by the Fiscal Procedure Code;*

*2. The shares of **0.1%** of the value of the authorized works and of the share of **0.7%** of the expenses for the execution of the constructions and works shall not be found in the obligations defined as object of the Fiscal Code approved by Law no. 227/2015;*

*3. Taking into account that the amounts calculated by the application of the share of **0.1%** of the value of the authorized works and of the share of **0.7%** of the expenses for the execution of the constructions and works must be paid to a financial institution of the state budget, they can be deemed as being due to the state budget, but without being under the regulation of the Fiscal Code and the Fiscal Procedure Code.*

## 5. THE EMERGENCE OF THE RECEIVABLE AND THE RIGHT TO ESTABLISH FISCAL RECEIVABLES

*In what concerns the emergence of fiscal receivables and liabilities, the Fiscal Procedure Code, approved by G.O. no. 92/2003, provides the following in art. 23:*

*„(1) Unless the law provides otherwise, fiscal receivable right and the related tax liability emerge when, according to the law, the tax base that generates them is established.*

*(2) According to para. (1) the right of the tax body to establish and determine the due tax liability emerges"*[1].

*In what concerns the prescription, by G.O. no. 92/2003 on the Fiscal Procedure Code, the following are provided in art. 91:*

*(1) The right of the tax body to establish tax liabilities is prescribed within 5 years, unless the law provides otherwise.*

*(2) The deadline for the prescription of the right provided for by para. (1) shall begin to run as of January 1st, of the year following the one when the fiscal receivable emerged according to art. 23, unless the law provides otherwise".*

*1* See in this respect: Dascălu, *Tratat de contencios fiscal,* 49-50: *"The Code not only tells us when a fiscal receivable emerges, but, in the absence of any legal text governing this matter, how, or more precisely, whether it emerges (as fiscal receivable)*".

In what concerns the emergence of the receivables and tax liabilities, Fiscal Procedure Code, approved by Law no. 207/2015, provides the following in art. 21:

*„(1) Unless the law provides otherwise, fiscal receivable right and the related tax liability emerge when, according to the law, the tax base that generates them is established (...)".*

Furthermore, regarding the prescription of the right to establish fiscal receivables, under the same law for the approval of the Fiscal Procedure Code, art. 110 provides the following:

*„(1) The right of the tax body to establish tax liabilities is prescribed within 5 years, unless the law provides otherwise.*

*(2) The deadline for the prescription of the right provided for by para. (1) shall begin to run as of July 1st, of the year following the one for which the receivable is due, unless the law provides otherwise".*

According to the texts of the normative acts presented above, under the Fiscal Procedure Code, the obligation to pay the share of 0.1% and the share of 0.7% emerges on the date of the tax base establishment.

Following the assessment of the provisions of Law no. 50/1991 and Law no. 10/1995, this principle cannot be used for these two shares of 01% and 0.7%, due to the following reasons:

The share of 0.1%:

1. The date of the emergence of the obligation is represented by the date of the notification on the works starting date or, in the absence thereof, the date in question shall be deemed the day following the date of the issuance of the permit. Given that:

- the building permit is issued by the local public authority and SIC does not know the estimated amount of the future construction;

- The State Inspectorate in Constructions does not receive the notification on the start of the works;

**As a consequence, the date of the emergence of this share payment obligation cannot be established by SIC, given that it does not know the date of issuance of the building permit and does not know the base the share of 0.1% is applied to.**

2. SIC cannot calculate appropriately the penalties for the failure to pay the share because it does not know the initial payment deadline of the share of 0.1%.

The share of 0.7%:

*This share applies for the expenses for the execution of the constructions and works and is due for the investor / owner for which the building permit is issued, and the payment deadline for the share of 0.7% shall be paid at the same time with the payment of the benefits on a monthly basis, in which case the SIC* ***cannot establish appropriately the due amount and the deadline*** *given that:*

*- SIC does not know the benefits payment date and the values of these payments;*

*- SIC cannot establish and calculate appropriately the penalties for the failure to pay in due time the share of 0.7%.*

***In what concerns the prescription of these tax liabilities, we believe that the deadline of 5 years provided by the Fiscal Procedure Code cannot be used, due to the fact these liabilities are not tax liabilities, and are not regulated by the Fiscal Code, as we showed in previous items.***

## CONCLUSIONS ON THE QUALITY OF THE PAYMENT AMOUNTS, OF THE INVESTORS / OWNERS FOR THE EXECUTION OF CONSTRUCTIONS, DEFINED BY LAW NO. 10/1955 AND LAW NO. 50/1991

*In order to formulate a tax opinion, the aforementioned conclusions shall be taken into account, namely:*

***1. The share of 0.1%*** *of the value of the authorized works, which could be the value declared upon the obtaining of the building permit or the one established and recorded in the work acceptance protocol shall be due by the holder of the building permit.*

***2. The payment deadline*** *shall be the date notified for the delivery of the notification on the works starting date or, in the absence thereof, the works starting date shall be deemed the day following the date of the issuance of the permit.*

***3. The Beneficiary*** *of these amounts shall be the territorial and county Inspectorate in Constructions, respectively the Inspectorate of Bucharest, which, as of 2001 has been organized as a public institution with legal status subordinated to the Ministry of Regional Development and Public Administration according to G.O. no. 63/2001.*

***4. The delay in payment*** *of the share of 0.1% shall be sanctioned by 0.15% per day of delay,* ***without the due amount being exceeded.***

***5. The share of 0.7%*** *of the expenses for the execution of the constructions and works shall be due by the investor / owner for which the building permit is issued;*

***6. The payment deadline*** *of the share of 0.7% shall be paid at the same time with the payment of the benefits and shall be paid on a monthly basis;*

***7. The beneficiary of the amounts*** *shall be the State Inspectorate in Constructions – S.I.C. subordinated to the Ministry of Public Works, Transport and Housing;*

***8. The delay in payment*** *of the share of 0.7% shall be sanctioned by 0.15% per day of delay,* ***without the due amount being exceeded.***

*9. The fiscal procedure code approved by G.O. no. 92/2003 does not have provisions applicable for the share of 0.1% of the value of the authorized works and neither for the share of 0.7% of the expenses for the execution of the constructions and of the works;*

*10. The amounts due by means of the application of the shares of 0.1% and 0.7% do not represent fiscal receivables, due to the fact they are not provided as obligations established under the Fiscal Code approved by Law no. 571/2003;*

*11. The related tax liabilities calculated for the non-payment of these amounts by the beneficial owner, the State Inspectorate in Constructions are limited to the value of the principal debit;*

*12. The beneficiary of these amounts cannot initiate the procedure of calculating accessories and of forced execution due to the fact it does not know its value and cannot calculate the accessories, not having the possibility to perform forced execution, as in case of fiscal receivables.*

*13. The obligation to calculate and pay the amounts established by the application of the shares of* ***0.1%*** *of the value of the authorized works and of the share of* ***0.7%*** *of the expenses for the execution of the constructions and works is not regulated by the Fiscal Procedure Code;*

*14. The shares of* ***0.1%*** *of the value of the authorized works and of the share of* ***0.7%*** *of theexpenses for the execution of the constructions and works shall not be found in the obligations defined as object of the Fiscal Code approved by Law no. 227/2015;*

*15. The amounts calculated by the application of the share of* ***0.1%*** *of the value of the authorized works and of the share of* ***0.7%*** *of the expenses for the execution of the constructions and works must be paid to*

*a financial institution of the state budget, they can be deemed as being due to the state budget, but without being under the regulation of the Fiscal Code and the Fiscal Procedure Code.*

***The conclusions above lead to the formulation of the following legal and tax opinion:***

*1. The share of 0.1% due under Law no. 50/1991 and the share of 0.7% due under Law no. 10/1995 does not represent tax liabilities, each of them having the capacity of budgetary liability due to the fact they are due by an institution financed from the state budget;*

*2. For the share of 0.1% due under Law no. 50/1991 and share of 0.7% due under Law no. 10/1995, the provisions of the Fiscal Code shall not be applicable, due to the fact they are not defined in the list of the taxes and contributions regulated by the Fiscal Code;*

*3. For the establishment of the prescription of these tax liabilities, we believe that the deadline of 5 years provided by the Fiscal Procedure Code cannot be used, due to the fact these liabilities are not tax liabilities and are not regulated by the Fiscal Code.*

## BIBLIOGRAPHY

**Books**

1. Dascălu, Daniel. *Tratat de contencios fiscal*. Bucharest: Hamangiu Publishing House, 2014.
2. Duca, Emilian. *Codul de Procedură Fiscală comentat și adnotat*. Bucharest: Universul Juridic Publishing House, 2015.
3. Ghica, Alina Nicoleta. *Urbanismul. Autorizaţii de construire, certificate de urbanism şi avize. Practică judiciară*. Bucharest: Hamangiu Publishing House, 2011.

**Case Law**

1. Decision no. 1764 of September 2nd, 2010, pronounced by the Court of Appeal Bucharest, division VIII of the contentious administrative and fiscal;
2. Minutes no. 8/2018, pronounced by the High Court of Cassation and Justice, the Panel competent to solve law issues, on 19.02.2018.

**Legislation**

1. Law no. 50/1991 on the authorization of the execution of construction works;
2. Law no. 10/1995 on quality in constructions;
3. G.O. no. 92/2003 on the Fiscal Procedure Code;
4. Law no. 207/2015 on the Fiscal Procedure Code;
5. Law no. 571/2003 on the Fiscal Code;
6. Law no. 227/2015 on the Fiscal Code.

**Websites**

1. www.idrept.ro;
2. http://www.scj.ro/.

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# BRIEF CONSIDERATIONS ON THE ADMINISTRATIVE UNIFICATION IN ROMANIA AFTER THE GREAT UNION IN 1918

**Daniela IANCU**[1]

***Abstract:***

*Following the achievement of the politic unification in Romania, they needed the legislative unification for the complete union to be assured. The legislative unification needed a wide activity which, in domains like administrative law, lasted quite a lot, considering the differences between the four administrative regimes that had to be united into a new administrative construction. It was achieved in July 1925, by passing the Law for administrative unification.*

***Key words:*** *political union; legislative unification; public administration;administrative regimes.*

## INTRODUCTION

The principle of nationalities that had started to impose upon since the latter half of the 19th century was not apparently taken into account[2] when triggering World War I, considering the war declarations. Only Italy's (1915) and Romania's[3] (1916) war declarations were based on the

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[2]Only in 1916, the states of the Triple Entente considered that "peace is not possible as long as the reparation of the rights and liberties trampled on, the recognition of the principle of nationalities and the free existence of small states are not ensured", and the United States of America appropriated this aim, consecrated in the 14 points presented by the president Wilson to the Congress on 8th January 1918. For more information, see Barbu B. Berceanu, *Istoria constituțională a României în context internațional comentată juridic,* (Bucureşti: Rosetti, 2013), 214.

[3] *„….The war to which all Europe takes part, puts forward the most serious problems concerning the national development and the existence of the states. Romania, driven by the desire to contribute to the early end of the conflict and under the need to safeguard its national interests, has to enter into war together with those that can assure the achievement of the national unity. For these reasons, it (Romania) considers itself at*

principle of nationalities[1]. At the end of the war, though, those states that fought for the right to self-determination, for the right to integration based on the principle of nationalities, can be considered winners.

The first step in the process of national integration of our country was made on 27 March/9th April, when the Country Council voted the union of Bessarabia[2] with the old Kingdom (*Regat*), according to the principle of national self-determination. It followed the resolution of the General Congress of Bucovina for the Union of Bucovina with the Kingdom of Romania on 15/28 November 1918, and then, on 1st December 1918, the Great National Assembly from Alba Iulia decided unanimously the union of Transylvania, Banat, Crișana and Maramureș (*historical regions*)with Romania[3].

In order to accomplish the national union, they adopted the following: Decree-law no. 842/1918[4] on the Union of Bessarabia with the Old Kingdom of Romania; Decree-law no. 3631/1918[5] on the Union of Transylvania and the other Romanians regions from Hungary inhabited by Romanians, with the Kingdom of Romania; Decree-law 3744/1918[6] on the Union of Bucovina with the Kingdom of Romania.

On 29 December 1919, the Romanian Parliament ratified the Union documents from 1918.

The international recognition of the Great Union was approved at the Peace Conference in Paris, opened on 18 January 1919 by a solemn meeting. Even if the principle of equality among states was flagrantly violated by dividing the states participating to the conference into *general-interest states* – i.e. the winning Great Powers – *and limited-*

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*war with Austria-Hungary*" https://www.istorie-pe-scurt.ro/declaratia-de-razboi-a-romaniei-catre-austro-ungaria/

[1] Nicolae Dașcovici, *Principiul naționalităților și Societatea Națiunilor. Încercare de sinteză asupra regulamentului internațional rezultat de pe urma războiului,* (Bucharest: Cartea Românească, 1922), 59.

[2] There were protests from Ucraina, which had territorial claims and, as a consequence, did not recognize the decision of the Country Council regarding the Union with Romania, as well as objections of the Soviet Russia. For details, see coord. Gheorghe Platon, Academia Română, *Istoria Românilor, volumul VII, tom II, De la independență la Marea Unire (1878-1918),* (Bucharest: Enciclopedică, 2003), 497.

[3] Constantin Botoran and Mihai Retegan, *1918 – Făurirea României Mari,* (Bucharest: Vatra Românească, 1993), 88.

[4] Published in the Official Journal no. 8 on 10th April 1918.

[5] Published in the Official Journal no. 212 on 13 December 1918.

[6] Published in the Official Journal no. 217 on 19 December 1918.

*interest states*[1], i.e the small states, and *by awarding unlimited powers to some councils made up exclusively from the representatives of the great powers that were to lead the conference works and to deliberate upon all the matters*[2], by the peace treaties, it was approved the accomplishment of the Romanian state.

## ADMINISTRATIVE REGIMES IN ROMANIA AFTER THE ACHIEVEMENT OF THE GREAT UNION IN 1918

If the achievement of a political unification ended in 1920, the achievement of the legal unification needed a wide activity, the methods used to achieve the legislative unification being the extension of the application of some regulatory documents from the Old Kingdom in the whole country or the drafting of some new regulatory documents to be applied at national level[3].

In fields such as the administrative law, the achievement of the unification lasted quite a lot, due to some objective reasons[4]. Thus, in Romania, after the Great Union, there were four administrative regimes.

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[1] The Romanian delegation protested against this dictatorial policy of the Great Powers: Ion I. C. Brătianu, first-delegate at the Romanian delegation to the Peace Conference, wrote on 2nd September 1919 to Nicolae Mişu, second delegate: *In the delegation at the conference, after or before the excerpt regarding the independence of the Kingdom, that could not be lost by its action alongside the Allies, the following idea has to be introduced: In 1916, France, the Great Britain and Italy would recognize to Romania the right to participate to the peace negotiations on equal position with them. In 1919, the same powers, by the treaty negotiated with Austria, asked Romania to commit itself to respect anything that they, together with America, would consider necessary to impose concerning the right of minorities, the right of transit and to commerce. The contradiction between the two treatments, before and after the war, is too big for the Romanian government to be able to lose its hope to see the recognition of its accomplished rights*. Gh. I. Brătianu, *Acţiunea politică şi militară a României în 1919 în lumina corespondenţei diplomatice a lui Ion I. C. Brătianu, ediţia a doua,* (Bucharest: Cartea Românească, 1940), 152-153.

[2] C. Botoran, I. Calafeteanu, E. Campus and V. Moisuc, *România şi Conferinţa de Pace de la Paris, 1918-1920,* (Cluj-Napoca: Dacia, 1983), 180-181.

[3] Emil Cernea and Emil Molcuț, *Istoria statului și dreptului românesc,* Ediție revăzută și adăugită, (Bucharest: Universul Juridic, 2006), 315-316.

[4] Cristian Bențe, *Legile administrative românești din perioada interbelică* in *REVISTA DE ADMINISTRAŢIE PUBLICĂ ŞI POLITICI SOCIALE* 1 (2009): 13, http://revad.uvvg.ro/files/nr1/Cuprins.pdf.

In Transylvania, Decree no. 3632/11th December 1918 on the organisation of Transylvania and of the other regions occupied by Romanians[1] provided in art. 1 that *temporarily and until the final organisation of the whole Romania*, the management of the public services in the regions provided in Decree-Law no. 33.631/1918 on the union of Transylvania, Banat, Crișana, Satmar and Maramureș with the Old Kingdom of Romania, was in the charge of the *Governing Council emanated from the National Assembly from Alba-Iulia on 18 November/1st December 1918*. The main mission of the Governing Council was the achievement of the election reform project for the managed regions as soon as possible, based on the universal vote and on the agricultural

The management of the Romanian government contained the foreign affairs, the army, the railways, the post offices, the telegraph offices, the telephone offices, the fiduciary circulation, the customs, the public loans and the general safety of the state. The regions unified with the Kingdom of Romania were to be represented in the government by ministers without portfolio and, at their proposal, regarding issues concerning such regions, besides the ministerial departments, special councillors were to be appointed by royal decree.

In Bucovina, Decree-Law no. 3745/18 December 1918 on the administration of Bucovina[2] provided that the regulatory documents adopted until such date remained in force. In the central government, two ministers without portfolio were appointed. One of them was a delegate at Cernăuți and had an administrative service in subordination, containing service secretary offices in the following fields: internal affairs, justice, finance, public instruction, religions, public works, industry, commerce and social care, agriculture, domains and food, public sanitation. At the head of the secretary offices, they appointed chief-secretaries subordinated to a secretary-general who was subordinated in his turn to the delegate minister[3]. The delegate minister at Cernăuți had the right to issue ordinances published in the "Official Journal of Bucovina" (*Monitorul Bucovinei*). The role of the second

[1] Published in the Official Journal no. 212 on 13 December 1918.
[2] Published in the Official Journal no. 217 on 19 December 1918.
[3] Gheorghe Calcan, *Unificarea administrativă a României întregite (1918-1925). Integrarea Basarabiei, Bucovinei și Transilvaniei în structurile administrației românești,* (Cluj-Napoca: Mega, 2016), 100.

minister, a representative of the Bucovina people, was to ensure the coordination of the *central activities and authorities with the local ones*[1].

The decisions adopted by the Council of Ministers of Romania concerning Bucovina, had to be approved by the delegate minister from Cernăuți. They also provided the elaboration and approval of a separate budget for Bucovina, administrated by the delegate minister from Cernăuți[2]. As in the case of Transylvania, the foreign affairs, the army, railways, the post offices, the telegraph offices, the telephone offices, the fiduciary circulation, the customs, the public loans and the general safety of the state came into the administration of the Romanian Government.

In the Bill of the Union of Bessarabia with Romania, they provided the maintenance of the provincial autonomy, having a Country Council (*Sfatul Țării*) with competence in: voting local budgets, controlling the authorities of zemsteva's (*form of local government)* and of towns, appointing of all public servant of local administration. The legislation in force and the local administrative organisation (zemsteva's and towns) were to be kept and could only be modified by the Romanian parliament after appointing and taking part in its works of the representatives of the province. Two representatives of Bessarabia were to be part of the Romanian Council of Ministers, being appointed by the Country Council and, in the future, they were to be elected from the representatives of Bessarabia in the Romanian Parliament. The number of the representatives of Bessarabia in the Romanian Parliament was to be established proportionally with the population and their election was to be made by universal, equal, direct and secret vote.

The royal decree promulgation of the Union of Bessarabia with Romania emphasized the temporary character of the autonomy of Bessarabia. For that matter, on 27 November/10th December 1918, after the enactment of the agricultural law, the Country Council decided the

[1] Flavius Cătălin Sîiulescu, *Integrarea Bucovinei în cadrul României întregite (1918-1940). Aspecte legislative*, 147, http://www.enciclopedia-dacica.ro/?operatie=subiect&locatie=periodice&fisier=buridava, accessed on 25.04.2018.

[2] Sîiulescu, *Integrarea Bucovinei în cadrul României întregite (1918-1940). Aspecte legislative*, 147.

cancellation of the conditions provided in the Bill of Union adopted on 27 March[1].

The administrative regime from the Old Kingdom of Romania was regulated by the Law for the County Councils of 2nd April 1894[2], being a centralised judicial regime.

By the Decree-Law no. 1462 of 4th April 1920, the responsibilities of the regional bodies passed to the central government, the former being dissolved.

The differences between the legal regimes had to be conciliated into a new administrative construction by means of which the union should be achieved. *The politicians, representatives of the national minorities and of the Romanians from Transylvania, Bessarabia, Bucovina and Cadrilater, supported (...) a decentralized administrative structure that would allow the people from different parts of the country to keep the old institutions that made a distinction between their culture and traditions, and those of the neighbouring regions*[3].

## THE ACHIEVEMENT OF THE LEGISLATIVE UNIFICATION IN ADMINISTRATIVE MATTER

The enactment of the Romanian Constitution in 1923 was of utmost importance in achieving the legal unification.

Article 1 provided: *The Kingdom of Romania is a unitary and indivisible national State*, and article 4 stated that *the territory of Romania is divided into counties, and the counties into main villages (commune) from an administrative point of view*. The number, the

[1] Gheorghe Cojocaru, *Itinerarul Basarabiei spre realizarea unității românești (1917-1918)* in *Marea Unire din 1918 în context European*, (Bucharest: Enciclopedică, Academiei Române, 2003), 135-136.

[2]Radu Săgeată, *Evoluția organizării administrativ-teritoriale a României în perioada interbelică (1918-1940)*, 1, https://www.researchgate.net/profile/Sageata_Radu/publication/281857165_EVOLUTIA_ORGANIZARII_ADMINISTRATIV_TERITORIALE_A_ROMANIEI_IN_PERIOADA_INTERBELICA_1918-1940/links/5602878b08ae849b3c0e07f8/EVOLUTIA-ORGANIZARII-ADMINISTRATIV-TERITORIALE-A-ROMANIEI-IN-PERIOADA-INTERBELICA-1918-1940.pdf, accessed on 22.4.2018.

[3] Săgeată, *Evoluția organizării administrativ-teritoriale a României în perioada interbelică (1918-1940)*, 2.

extension and their territorial subdivisions were to be established by laws of administrative organisation.

Chapter V, called *On the county and communal institutions*, stipulated that the laws regulating the organisation and the operation of the county and communal administrative bodies would be governed by the principle of administrative decentralisation.

In article 137, they stipulated that all the codes and laws existing on the territory of the Romanian state were to be subjected to revision so that they achieve the harmonisation with the constitutional provisions and with the legislative unification.

From the day of promulgation of the Constitution, they cancelled those provisions from laws, decrees, regulations and any other acts contrary to those inscribed in constitutional texts.

After the enactment of the Constitution in 1923, the first regulatory document in administrative matter which was applied on the whole territory of the country, was the Regulations of the Public Servants adopted on 19 June 1923[1], but the law which ensured the administrative-territorial organisation of Romania was Law no. 95/1925 for administrative unification.

Although the neoliberal doctrine promoted the administrative decentralisation and the autonomy, the Law on administrative unification was actually the expression of a centralisation policy[2].

Pursuant to article 1 from Law no. 95/1925 on administrative unification, the territory of Romania was divided into counties, and the counties into rural and urban communes, from an administrative point of view. The rural commune was made up of one or more villages, with the headquarters in one of them, and the urban communes were declared as such by law, being divided in their turn into county residences and non-residences.

The counties were divided into circumscriptions called "plăși", and the urban communes into circumscriptions called sectors. In contrast to counties and communes, the "plăși" and the circumscriptions did not

[1] Calcan, *Unificarea administrativă a României întregite (1918-1925). Integrarea Basarabiei, Bucovinei și Transilvaniei în structurile administrației românești,* 65.

[2] Sorin Radu, *Unificarea administrativă a României Mari în gândirea politică a lui Iuliu Maniu*, 17, http://diam.uab.ro/istorie.uab.ro/publicatii/colectia_auash/annales_2_3/04.pdf, accessed on 22.4.2018 ; see also Manuel Guțan, *Istoria administrației publice românești,* ediția a 2-a, revăzută și adăugită, (Bucharest: Hamangiu, 2006), 260.

have legal status, their role being to *facilitate the control, the supervision of enforcement of the laws and the guidance of the administration*[1].

The administration of the local interests was achieved through county and communal councils, made up of elected councillors, by right councillors and, compulsorily for the local councils of the residence towns, women councillors[2].

The head of the county administration was the prefect and the head of the communal administration was the mayor. Their role was to enforce the decisions of the county councils and of the permanent delegations, and of the communal ones, too, as well as the control of the county administration, and of the communal one, too.

The mayor was elected by the communal council in the rural and the urban communes. For municipalities, the role of the communal council was to appoint the councils proposed by the mayor, and the mayor was to be confirmed by the Ministry of Interior.

The guidance, the coordination and the control of the activity of the communes and of the counties were under the competence of the Ministry of Interior, helped by a higher administrative council.

The prefect was also the representative of the central power within the county. In this capacity, he/she had to assist the meetings of the county council and, if he/she could not be present, he /she was replaced by the sub-prefect.

The prefect was also the president of the county delegation, made up of the rapporteurs of the five permanent commissions (the administrative commission, the financial and control one, the public works one, the economic one, the religion and education one, the sanitary and social care one[3]).

Each "plasă" was directed by a "pretor", appointed by ministerial decision and allocated by the prefect by decision approved by the Ministry of Interior. The Pretor was subordinated to the prefect who could delegate to him, by decision, a part of his/her responsibilities. The Pretor was an officer of the judicial police and the chief of police in his "plasă" (*administrative territory*). The Pretor's responsibilities were to guide, supervise and control the communal administration from the

[1] Art. 5 of Law no. 95/1925 on administrative unification.
[2] The presence of women councillors was optional in the other local councils.
[3] Art. 112 of Law no. 95/1925 on administrative unification.

"plasa" dire4cted by him. At the end of each month, the Pretor had to submit to the prefect a detailed report regarding the findings made and to the measures to be taken for the interest of the communal administration.

The law regulated in detail the setting up of the communal and county councils, the election of the mayor and of the permanent communal delegation, the operation of the local and county councils, their responsibilities, also those of the permanent communal and county delegations, the administrative elections, the local finance, the removal and the suspension of the mayor and of the members of the permanent communal delegation, the dissolution of the communal and county councils.

In Title VI – *Final and transitory provisions*, the Law on administrative unification also contained some provisions of legislative harmonisation. For example, pursuant to art. 384, the mayors in operation in Ardeal were considered eligible in the communal and county councils. Art. 385, last para., stipulated that the estate of the "zemstve", coming from any source, passed de jure to the counties, while art. 391 regulated the situations of the Directors of prefectures from the Old Kingdom and Bessarabia, coming from "plasa" administrators, that were to be confirmed as sub-prefects by royal decree after the promulgation of the law.

In article 400 of the law on administrative unification, they stipulated that all the provisions contrary to this law are and remain abolished.

## CONCLUSION

In Romania following the World War I, the achievement of the administrative unification represented a very important issue which generated vivid and wide debates, a very natural thing, considering the differences of regulation existing between the Old Kingdom and the provinces unified with it. Within the process of administrative unification, the enactment of Law no. 95/1925 represented the most important moment, and the process of harmonisation continued to the end of the inter-war period.

## BIBLIOGRAPHY

### Books

1. Berceanu, Barbu B. *Istoria constituțională a României în context internațional comentată juridic.* Bucharest: Rosetti, 2013.
2. Botoran, Constantin and Retegan, Mihai. *1918 – Făurirea României Mari.* Bucharest: Vatra Românească, 1993.
3. Botoran, Constantin, Calafeteanu, Ion, Campus, Eliza and Moisuc, Viorica. *România şi Conferinţa de Pace de la Paris, 1918-1920*. Cluj-Napoca: Dacia, 1983
4. Brătianu, Gheorghe I. *Acţiunea politică şi militară a României în 1919 în lumina corespondenţei diplomatice a lui Ion I. C. Brătianu, ediţia a doua.* Bucharest: Cartea Românească, 1940.
5. Calcan, Gheorghe. *Unificarea administrativă a României întregite (1918-1925). Integrarea Basarabiei, Bucovinei și Transilvaniei în structurile administrației românești.* Cluj-Napoca: Mega, 2016.
6. Cernea, Emil and Molcuț, Emil. *Istoria statului și dreptului românesc,* Ediție revăzută și adăugită. Bucharest:Universul Juridic, 2006.
7. Cojocaru, Gheorghe. *Itinerarul Basarabiei spre realizarea unității românești (1917-1918)* în *Marea Unire din 1918 în context European.* Bucharest: Enciclopedică, Academiei Române, 2003.
8. Dașcovici, Nicolae. *Principiul naționalităților și Societatea Națiunilor. Încercare de sinteză asupra regulamentului internațional rezultat de pe urma războiului.* Bucharest: Cartea Românească, 1922.
9. Guțan, Manuel. *Istoria administrației publice românești,* ediția a 2-a, revăzută și adăugită. Bucharest: Hamangiu, 2006
10. Platon, Gheorghe. coord. Academia Română. *Istoria Românilor, volumul VII, tom II, De la independență la Marea Unire (1878-1918).* Bucharest: Enciclopedică, 2003.

**Articles in an online journal**

1. Bențe, Cristian. "Legile administrative românești din perioada interbelică", *REVISTA DE ADMINISTRAŢIE PUBLICĂ ŞI POLITICI SOCIALE* Nr. 1 (2009): 13-17, http://revad.uvvg.ro/files/nr1/Cuprins.pdf.
2. Radu, Sorin. "Unificarea administrativă a României Mari în gândirea politică a lui Iuliu Maniu",
3. http://diam.uab.ro/istorie.uab.ro/publicatii/colectia_auash/annales_2_3/04.pdf, accessed on 22.4.2018.
4. Săgeată, Radu. "Evoluția organizării administrativ-teritoriale a României în perioada interbelică (1918-1940)", https://www.researchgate.net/profile/Sageata_Radu/publication/281857165_EVOLUTIA_ORGANIZARII_ADMINISTRATIV_-TERITORIALE_A_ROMANIEI_IN_PERIOADA_INTERBELICA_1918-1940/links/5602878b08ae849b3c0e07f8/EVOLUTIA-ORGANIZARII-ADMINISTRATIV-TERITORIALE-A-ROMANIEI-IN-PERIOADA-INTERBELICA-1918-1940.pdf, accessed on 22.4.2018.
5. Sîiulescu, Flavius Cătălin. "Integrarea Bucovinei în cadrul României întregite (1918-1940). Aspecte legislative", http://www.enciclopedia-dacica.ro/?operatie=subiect&locatie=periodice&fisier=buridava, accessed on 25.04.2018.

**Legislation**

1. Decree-law no. 842/1918 on the Union of Bessarabia with the Old Kingdom of Romania.
2. Decree-law no. 3631/1918 on the Union of Transylvania and the other Romanians regions from Hungary inhabited by Romanians, with the Kingdom of Romania.
3. Decree-law 3744/1918 on the Union of Bucovina with the Kingdom of Romania.
4. Law no. 95/1925 on administrative unification.
5. The Constitution from 1923.

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# ADMINISTRATIVE COOPERATION IN EUROPEAN UNION LAW AND POLISH LAW

**Wiktor TRYBKA** [1]

***Abstract:***

*In EU law, the duty of cooperation between the EU administration bodies and the authorities of the European Union Member States results from the Treaty on European Union and the Treaty on the Functioning of the European Union. A principle of sincere cooperation is the basis for cooperation between in public administrations at European level. From this rule, the Court of Justice of the European Union has evoked the obligation of cooperation of national authorities with the EU institutions and authorities of other Member States. The provisions of the EU law forced the Polish legislator to regulate the issue of cooperation between state bodies and authorities of other countries at the national level. European administrative cooperation was regulated in Polish law in the Code of Administrative Procedure. The procedural provisions of administrative law establish a set of standards similar to provisions on international legal assistance in civil or criminal court proceedings. Cooperation doesn't concern all activities of administrative bodies, but only activities carried out in a specific proceeding. It is usually taken on a proposal, which must contain a justification. The transmission of information between public administration bodies is usually electronical.*

***Key words:*** *European Union; Code of Administrative Procedure; public administration; Treaty on European Union; administrative cooperation.*

## INTRODUCTION

European administrative cooperation is a legal institution of the European Union, but also a procedural institution of the Code of Administrative Procedure[2], therefore, it has been standardized not only at the level of European Union law, but also national law. At the level of

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[2] The Code of Administrative Procedure of June 14, 1960, published in the Journal of Laws of 2017, item 1257, as amended

European Union law, legal provisions imposing an obligation of cooperation of public administration bodies of the European Union Member States can be found not only in primary law, but also in numerous regulations, directives, decisions and other secondary EU legislation. The introduction of an institution of administrative cooperation in the EU and national legal order "resulted from the need to facilitate the exchange of information between Union bodies and Member State authorities or mutual assistance to ensure the effective application and implementation of European Union law, including conditions for effective implementation by European Union citizens' rights and freedoms guaranteed by EU law. In view of the widening scope of normalization of European Union law to new areas of social relations, and consequently limiting the executive and executive powers of the European Union Member States, these countries are increasingly implementing European Union law, which requires them to effectively apply this law, which requires both having the right information and obtaining adequate assistance from other Member States of the European Union. The development of the European administrative cooperation institution is directly proportional to the development of European integration"[1].

European cooperation of public administration bodies is conditioned by various causes[2]. These include, firstly, the functioning of various institutional structures in the European Union's Member States, which may result in the non-uniform application of EU administrative law or the European-Union administration of national law[3]. Administrative cooperation helps facilitate the consistent application of EU law by national administrations[4]. Secondly, it aims to "relieve economic operators of double administrative obligations - both in the host country and in the country of origin. The need for cooperation also

[1]A. Wróbel, "Europejska współpraca administracyjna",*System prawa administracyjnego. Prawo procesowe administracyjne*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, , t. 9. (Warszawa 2017): 424.

[2] A. Wróbel, *Europejska współpraca administracyjna...*, 423–443.

[3] A. Wróbel, *Europejska współpraca administracyjna...*, 501–502; S. Biernat, „Zasada efektywności prawa wspólnotowego w orzecznictwie Europejskiego Trybunału Sprawiedliwości", *Studia z prawa Unii Europejskiej*, ed. S. Biernat, (Kraków 2000): 27–75.

[4] Recommendation of the European Commission of 29.06.2009 regarding measures to improve the functioning of the single market [K (2009) 4728].

arises from the need to determine which administrative body of a Member State has jurisdiction to deal with if it is transnational in nature. In addition, in connection with the completion of the internal market and the free movement of goods, persons and services on it, administrative cooperation based on mutual warning against threats is to ensure consumer safety"[1]. EU Member States are responsible for organizing and functioning of public administration bodies, and EU law provides examples of such forms of cooperation[2]. „The bodies that are obligated to cooperate are both the EU administration bodies and the administrations of the Member States. In relation to the latter, as part of the procedural freedom, EU law does not, as a rule, formulate specific procedural norms. However, the binding obligation to effectively enforce EU law obliges national authorities to achieve a certain result"[3].

**Administrative cooperation on the primary and secondary law of the European Union**

In EU law, the duty of cooperation between EU administration bodies and EU Member State authorities is a Treaty obligation regulated in art. 4 par. 3 of the Treaty on European Union[4]. According to art. 6 of the Treaty on the Functioning of the European Union[5] administrative cooperation is a sphere of coordinating, supporting and complementary competences. Administrative cooperation at the level of the European Union is implemented not only in connection with the establishment of primary and secondary law of the European Union, but also when it comes to the so-called direct and indirect implementation of this right[6].

[1] S. Dudzik and I. Kawka, „Zasada lojalnej współpracy i efektywności prawa UE", *System Prawa Administracyjnego*, t. 3, *Europeizacja prawa administracyjnego*, red. R. Hauser, Z. Niewiadomski, A. Wróbel, (Warszawa 2014): 502; P. Craig, *EU Administrative Law*, (Oxford, 2006), 51.

[2] N. Półtorak, „Wpływ prawa UE na ustrój i funkcjonowanie administracji krajowej", *System Prawa Administracyjnego*, *Europeizacja prawa administracyjnego*, *t. 3.* (Warszawa 2014): 471–476.

[3] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, (Tybinga, 2004), 72-74.

[4] OJ EU L 2004, Nr 90 as amended.

[5] OJ EU L 2004, Nr 90 as amended.

[6] E. Chiti, "The administrative implementation of European Union Law: a taxonomy and its implications",*Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (USA H. -C.H. Hofmann, A.H. Turk, 2009): 15

The jurisprudence of the Court of Justice of the European Union has established the view that administrative cooperation of competent public administration bodies of the European Union member states is their treaty obligation, having their powers in art. 4 par. 3 of the Treaty on the Functioning of the European Union[1]. However, it should be noted that while in the case of the requesting authority asking for information or assistance is not generally required by clear EU law (which does not mean that it is not their legal obligation), the cooperating (called upon) Member State is obliged to respond to the request[2].

Each Member State of the European Union is responsible for organizing administrative cooperation. This obligation results directly from art. 197 of the Treaty on the Functioning of the European Union. The provision of art. 197 of the Treaty on the Functioning of the European Union states that the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, is recognized as a matter of common interest. The Union may support Member States' efforts to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and civil servants and supporting training schemes. No Member State is required to use this support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures necessary, excluding any harmonization of the laws and regulations of the Member States. This article shall not affect the obligations of Member States to implement Union law or the prerogatives and duties of the Commission. Nor shall it affect the other provisions of the Treaties providing for administrative cooperation between the Member States and between them and the European Union. „The scope of administrative cooperation in the treaty law is very wide and diverse in terms of instruments that can be used to support the efforts of Member States relating to the effective implementation of European Union law (in Article 197 paragraph 2 of the Treaty on the Functioning of the European Union, for example on facilitating the exchange of information or officials and supporting training programs). Article 197 of the Treaty on the Functioning of the European Union presents a framework for

[1] Judgment of 25 February 2003 in Case C-326/00, IKA.

[2] Judgment of October 22, 2013 in Case C-276/12 Jiří Sabou vs. Finsční ředitelství pro hlavní město Prahu.

administrative cooperation for the effective implementation of Union law by Member States. As current activities carried out without a clear legal basis (training, exchange of officials, flow of documents and experience) indicate, any kind of cooperation between the administrative authorities of the Member States (also between countries) and European institutions has brought tangible benefits. The introduction of a legal framework for the above-mentioned actions on matters of mutual interest to both the Member States and the European Union in the field of public administration will certainly provide a platform for exchanging experience and greater efficiency in this field"[1].

In addition, administrative cooperation finds justification in ensuring the effective implementation of the freedoms of the European Union's internal market, for example in accordance with paragraph 105 of Directive 2006/123 / EC of the European Parliament and of the Council of December 12, 2006 (Journal of Laws EU L, No. 376) on services in the internal market, administrative cooperation is essential to ensure the proper functioning of the internal market for services.

Lack of cooperation between Member States results in a proliferation of rules applicable to service providers or duplication of control of cross-border activities and may be used by rogue traders to evade surveillance or to circumvent applicable national provisions in the field of services. It is therefore essential to impose clear legal obligations on Member States for effective cooperation.

**Administrative cooperation under ReNEUAL (the Research Network on EU Administrative Law)**

The model of the Code of Administrative Procedure of the European Union norms the proceedings on administrative cooperation. The Code provides for two separate categories of cooperation. Chapter VI, entitled 'Administrative information management', describes the rules for the exchange of information between administrations only ex officio, thus without the need to submit any request for legal aid. The transmission of information between public administration bodies based on the regulations contained in Chapter VI of the European Union

[1] A. Wilk-Ilewicz, „Art. 197", *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom II. Art. 90-222*, ed. K. Kowalik-Bańczyk, M. Szwarc-Kuczer, A. Wróbel, (Warszawa, 2012): 856.

administrative procedure codec takes place automatically and takes place using appropriate IT platforms[1]. The provisions of Chapter VI of the Code of Administrative Procedure of the European Union refer mainly to those public administration bodies of the European Union, which operate under the so-called administrative network. Cooperation here consists in the introduction of relevant information to the ICT structures. This system ensures the right subjects not only to quickly exchange data, but also to exercise the right to hear, correct erroneous information and obtain necessary instructions from the authorities[2]. The elementary principle of information exchange between public administration bodies of the European Union member states is the transparency of disclosed information, its reproducibility and proper quality. It is also necessary to ensure protection of the data transmitted, and in particular personal data of participants in the proceedings, regarding legal assistance

Chapter V of the Code of Administrative Procedure of the European Union is entitled 'Mutual assistance'. Cooperation as part of mutual assistance takes place between the administrations of the Member States and between these bodies and the administration bodies of the European Union. The launching of the mutual assistance procedure depends on the fulfillment of a total of two conditions. First of all, the authority requesting legal aid can not itself perform the procedural act in the proceedings, and secondly the authority granting assistance (authority from another Member State or the European Union body) can take the actions necessary to perform the aforementioned act[3]. Assistance may take various forms: interrogation of witnesses, exchange of documents, and delivery of pleadings.

"The provisions of the Code of Administrative Procedure of the European Union do not prejudge the language in which cooperation should take place, leaving this matter to the agreement of the

[1]cf.:http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20VI%20%20information%20management_online%20publication_individualized_final_2014–09–03.pdf, s. 236.
[2]cf.:http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20VI%20%20information%20management_online%20publication_individualized_final_2014–09–03.pdf, s. 243.
[3] M. Wierzbowski, and H.C.H. Hofmann, J.-P. Schneider, J. Ziller, J.-B. Auby, P. Craig, D. Curtin, G. della Cananea, D.-u. Galetta, J. Mendes, O. Mir, U. Stelkens (ed.), *ReNUAL. Model kodeksu postępowania administracyjnego Unii Europejskiej*, (Warszawa 2015), 201.

communicating bodies. If, however, such a determination does not take place, then in the relations between the administrations of the Member States, the principle of using one of the official languages of the cooperating authority shall apply. This body will provide an answer in one of its official languages and, if necessary, with a translation. Conditions which fulfill the necessity of translating correspondence are not specified; this was left to the assessment of the cooperating body. It can be assumed that this will happen, in particular in cases of urgency, or cases so complicated in legal or factual terms that the translation of the response by the requesting authority could encounter significant obstacles. In the sphere of cooperation established between the administration body of a Member State and the EU administration body (in the absence of different individual arrangements), one of the official languages of the state of the requesting authority shall apply"[1].

The refusal to provide mutual assistance or to provide information by the cooperating authority should have clear grounds in European Union law. Relatively broad possibilities of refusing to respond to the proposal are provided for in the European Union's Code of Administrative Procedure. According to art. V-4 cooperating authority may refuse to execute the application if: 1) the application does not meet the formal requirements referred to in art. V-3, para. 1; 2) execution of the request would lead to the disclosure of a trade, industrial or professional secret, or such information, the disclosure of which would be contrary to public policy or national interest; 3) one (the requesting authority) can reasonably be expected to perform the task oneself; 4) implementation of the request would constitute a disproportionate administrative burden for the requested authority; 5) the law of the cooperating authority does not allow the competent authority to carry out such investigations whether to collect or use such information for its own needs, and the refusal complies with EU law[2].

[1] J. Wegner-Kowalska, „Europejska współpraca administracyjna w projekcie reformy kodeksu postępowania administracyjnego", *Europejski Przegląd Sądowy*, no. 6 (2016): 10.

[2] A. Wróbel, „Europejska współpraca administracyjna",*System prawa administracyjnego*. *Prawo procesowe administracyjne*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, t. 9 (Warszawa 2017): 424.

**Justification for introducing administrative cooperation to the procedural law provisions of the administrative law**

The necessity of cooperation on various levels, defined in the provisions of primary and secondary law of the European Union, as part of administrative procedures, forced introduction of cross-border cooperation mechanisms to the Code of Administrative Procedure. Introduced by the Act of 7 April 2017 amending the Code of Administrative Procedure and some other acts1 of Section VIIIa of the Administrative Procedure Code regarding European administrative cooperation (Articles 260a-220g) is aimed at organizing the rules of cooperation between national public administration bodies and administrative bodies of the European Union countries and the authorities of the EU countries and EU institutions.

In the justification to the government bill of 7 April 2017 amending the act - Code of Administrative Procedure and some other acts, it was pointed out that "the obligation of cooperation between administrative bodies may take the form of vertical (vertical) relations - administrative bodies of the European Union - public administration bodies of states Member States, and a horizontal (horizontal) relationship between the competent administrations of specific Member States. The institution of cooperation, both in a vertical and horizontal relationship, has been regulated, among others in Italy, Germany, Portugal, Spain or Hungary. For effective administrative cooperation, it is necessary to establish a specific reference point in the Polish administrative procedure, which will organize the principles of cooperation of the authorities and give it a specific normative content. The provisions on cooperation under administrative procedures complement procedural regulations that have not yet provided for, under the Administrative Procedure Code, mechanisms for cross-border cooperation. The subject of "administrative cooperation" is therefore the activities of the administrative body carried out as part of proceedings subject to the Code of Administrative Procedure, primarily in the context of proceedings in individual cases decided by administrative decision and implicitly. These provisions establish a set of standards similar to provisions on international legal assistance in civil or criminal court proceedings. On the basis of national provisions, cooperation does not concern all activities of administrative bodies, but only activities carried out in a

specific proceeding. In particular, the provisions in this area will not often include informal exchanges of information and positions on general issues (such as information on legal provisions) or on policies in a given field (eg on the direction of administrative activities or administrative practices carried out). The regulation related to the procedure will refer to the EU law norms, which contain specific solutions regarding the cooperation of EU administration bodies and EU Member State authorities. European administrative cooperation would come to fruition in cases and to the extent indicated in the provisions of EU law. Codex regulation, on the other hand, would have a subsidiary and framework character. Public administration bodies are obliged to provide the necessary assistance, both in the aforementioned horizontal relationship as well as in the context of vertical cooperation. Assistance and requesting it will only be permitted if EU law so provides and in accordance with the provisions of EU law. The obligation to provide assistance, including, for example, performing procedural actions and providing information on factual and legal circumstances, will be implemented both from the office and at the request of a competent authority of a Member State. As a rule, the provision of assistance will involve the transfer of data concerning the parties to the proceedings or other persons"[1].

**European administrative cooperation in Polish procedural administrative law**

The subject of administrative cooperation are the administrative body's activities performed within the scope of proceedings subject to the scope of the Code of Administrative Procedure, primarily in the context of proceedings in individual cases decided by administrative decision and settled implicitly. The provisions of the Code of Administrative Procedure set out a set of standards similar to provisions on international legal assistance in civil or criminal court proceedings. The actions of the bodies taken outside the administrative procedure remain outside of the scope of normalization of Section VIIIa of the Code of Administrative Procedure. In particular, regulations in this area do not include often

[1] Justification of the government bill amending the Code of Administrative Procedure and some other acts, VIII term, parliamentary printed matter. nr 1183.

informally exchanged information and positions on general issues (such as information on legal regulations) or on policy in a given field (eg as to the directions of administrative or administrative practices). The subject of European administrative cooperation is governed by Art. 260a § 2 of the Code of Administrative Procedure, which states that the public administration body provides assistance ex officio or on request. This assistance includes, in particular, providing information about factual and legal circumstances as well as performing legal actions as part of legal assistance. The introduction of the phrase "in particular" means that the body may provide assistance in a different form than the legislator indicates. Thus, the Code of Administrative Procedure does not introduce an exhaustive list of forms of assistance under European administrative cooperation. "European administrative cooperation refers only to the proceedings regulated by the code of administrative procedure: general administrative proceedings, proceedings in disputes over jurisdiction, proceedings in the field of issuing certificates and proceedings in complaints and motions. The provisions on European administrative cooperation will therefore not apply to: applications for assistance addressed to national public administration authorities in connection with proceedings conducted by organs of other European Union Member States or administration bodies that do not correspond in essence to proceedings regulated by the Code of Administrative Procedure; applications for assistance directed by national public administration bodies to the authorities of other EU Member States or its administration authorities in connection with proceedings other than those regulated in the code of administrative procedure. Therefore, European administrative cooperation does not include cooperation in connection with court proceedings and other proceedings that do not aim to issue an administrative act or undertake a substantive and technical action corresponding in substance to a certificate or notification of the manner of handling a complaint or application. European administrative cooperation covers only procedural steps that may be taken during proceedings regulated by the provisions of the Code of Administrative Procedure. or other applicable procedural provisions in a given area"[1]. Assistance referred to in art. 260 § 2 of the codex of administrative proceedings, in particular concerns, firstly, disclosure of facts held by the

[1] S. Gajewski, *Kodeks postępowania administracyjnego. Nowe instytucje. Komentarz do rozdziałów 5a, 8a, 14 oraz działów IVa i VIIIa KPA*, (Warszawa 2017), 133.

authority, and thus indication of facts relevant to the case, which are known to the authority, and second, disclosure of information held by the authority on legal circumstances, e.g. about the imposition of an administrative fine, deprivation of the right to practice, acquired rights, and third, the performance of legal actions in the course of legal assistance, eg hearing a witness, conducting an inspection[1].

## CONCLUSIONS

Undoubtedly, the regulation of European administrative cooperation in the provisions of the procedural administrative law will not only contribute to the deepening of cooperation between authorities, but will also have a positive impact on the level of administrative efficiency. Regulating the exchange of information between public authorities of different countries is not a new solution. The regulations adopted in the Polish Code of Administrative Procedure were to a large extent modeled on the regulations of other Member States, and above all Germany. Currently, the subject of cooperation between bodies within the European Union is very diverse, which results from the fact that EU law itself is multifaceted. This nature of European Union law did not give the legislator a choice. He was obliged to adapt the current Code of Administrative Procedure to the supranational reality that surrounds us.

The legislator did not define in the p.p.a. concepts of administrative cooperation. Using the language interpretation of the provision of art. 260a of the Code of Administrative Procedure and taking into account the ratio legis of the amendment, one should opt for a broad understanding of this concept. Thus, "administrative cooperation" on the basis of procedural law provisions of administrative law includes both mutual assistance and the exchange and processing of information. The procedural provisions adopt a wide range of entities affected by European administrative cooperation, namely: Polish public authorities, EU bodies and institutions and European Free Trade Association (EFTA) Member States.

[1] B. Adamiak, „Art. 260a", B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, (Legalis 2017).

## BIBLIOGRAPHY

**Books**

1. Adamiak, B., and Borkowski, J.. *Kodeks postępowania administracyjnego. Komentarz*, Legalis , 2017
2. Craig, P.. *EU Administrative Law*, Oxford 2006Gajewski S., *Kodeks postępowania administracyjnego. Nowe instytucje. Komentarz do rozdziałów 5a, 8a, 14 oraz działów IVa i VIIIa KPA*, Warszawa, 2017
3. Kowalik-Bańczyk, K. And Szwarc-Kuczer, M., Wróbel, A.. *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom II. Art. 90-222*, Warszawa, 2012
4. Wegner-Kowalska, J.. *Europejska współpraca administracyjna w projekcie reformy kodeksu postępowania administracyjnego*, Europejski Przegląd Sądowy, 2016
5. Wierzbowski, M., and Hofmann, H.C.H., Schneider, J.-P., Ziller, J., Auby, J.-B., Craig, P., Curtin, D., G., della Cananea, D.-u. Galetta, Mendes ,J. O. Mir, Stelkens, U. (ed.), ReNUAL. *Model kodeksu postępowania administracyjnego Unii Europejskiej*, Warszawa, 2015
6. Sydow, G.. *Verwaltungskooperation in der Europäischen Union*, Tybinga, 2004

**Articles in a print journal**

1. Biernat, S.. „Zasada efektywności prawa wspólnotowego w orzecznictwie Europejskiego Trybunału Sprawiedliwości". *Studia z prawa Unii Europejskiej*, (Kraków 2000): 27–75.
2. Chiti, E. "The administrative implementation of European Union Law: a taxonomy and its implications". *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, (2009): 15
3. Dudzik, S. and Kawka, I., „Zasada lojalnej współpracy i efektywności prawa UE". *System Prawa Administracyjnego,* t. 3, (Warszawa 2014)

4. Półtorak, N. „Wpływ prawa UE na ustrój i funkcjonowanie administracji krajowej". *System Prawa Administracyjnego,. Europeizacja prawa administracyjnego*, t. 3, (Warszawa 2014)
5. Wróbel, A., „Europejska współpraca administracyjna", *System prawa administracyjnego. Prawo procesowe administracyjne*, t. 9, (Warszawa 2017)

**Case Law**

1. Judgment of 25 February 2003 in Case C-326/00, IKA.
2. Judgment of October 22, 2013 in Case C-276/12 Jiří Sabou vs. Finsční ředitelství pro hlavní město Prahu.

**Legislation**

1. The Code of Administrative Procedure of June 14, 1960, published in the Journal of Laws of 2017, item 1257, as amended.
2. Recommendation of the European Commission of 29.06.2009 regarding measures to improve the functioning of the single market [K (2009) 4728].

**Websites**

1. cf.:http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/Book%20VI%20-%20information%20management_online%20publication_individualized_final_2014–09–03.pdf

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# SOLUTIONS THAT MAY BE GIVEN BY THE PRELIMINARY CHAMBER JUDGE

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***Abstract:***

*The Preliminary Chamber aims to resolve the issues related to the jurisdiction and lawfulness of the courts' referral, as well as the lawfulness of the administration of evidence and the execution of acts by the criminal prosecution bodies, ensuring that the case is solved in a speedy manner.*[2] *The criminal trial knows the a preliminary chamber, usually located after the criminal investigation phase and before the trial phase.*

*Beyond the substantive changes, the preliminary chamber procedure is placed historically in the succession of the institution of the indictment chamber provided by art. 279 C.C.P. 1936, which had the power to order the referral of the defendant to the Court of Jurisdiction when there is evidence and solid evidence against the defendant.*[3]

*At the moment, the preliminary chamber procedure has a different philosophy than the institution of the preparatory meeting provided in Art. 269-279 C.C.P. which was in force between 1953 and 1957 and repealed by Decree no. 473 of 20th September 1957, in which an analysis was made of both the merits of the referral and of the lawfulness of the criminal investigation or its completeness. This procedure was non-public, but the prosecutor and, exceptionally, the accused could attend this if the court considers it necessary.*

*As a result, the prosecution of the accused falls within the jurisdiction of the judge who participates in the proceedings of the preparatory hearing and, at the preparatory hearing, the court could order the return of the case for completion or restoration of the criminal prosecution if it was not complete and the provisions procedural steps to ensure that the truth is established or that the case is brought to an end and that the criminal proceedings be brought to an end if it were aware of the existence of one of the causes of impediment to the commencement or prosecution.*[4]

***Key words:*** *Preliminary Chamber; solutions; restitution of the case; commencement of judgments; nullity*

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[2]Mihail Udroiu, s.a., *Codul de procedură penală. Comentariu pe articol* (Bucharest: C.H.Beck, 2015), 196.

[3]Mihail Udroiu, *Sinteze şi grile, Procedura penală.Partea specială* (Bucharest: C.H.Beck, 2016), 147.

[4]Mihail Udroiu, *Sinteze şi grile,* 147.

## INTRODUCTION

The Preliminary Chamber judge is not a training judge as provided for in the Romanian inter-war criminal law or in the French criminal proceedings, and has no competence in collecting evidence, discovering the offender or its participants, or analyzing the merits of the accusation or in bringing the defendants to justice.

The analysis of the comparative law reveals that although the source of inspiration for the preliminary chamber stage is found in the German and Italian Criminal Code of Conduct[1], respectively, the national rules of the preliminary chamber resulting from the modification of the NCPP through LPANCPP show little similarity with the institution of the preliminary chamber by art. 199-204 of the Code of German Penal Procedure[2], respectively with the institution of the preliminary hearing (*preliminary udienza*) provided by art. 418-425 of the Italian Code of Criminal Procedure[3].

**The procedure of the preliminary chamber is a new phase of the criminal trial[4]**(and not a stage of the trial phase) in which the

[1]The Commission for the elaboration of the new Code established within the Ministry of Justice has been endorsed by the IRZ(German Foundation for International Legal Cooperation) experts and professors.

[2]*Under the German criminal law procedure* the proceedings before the judge after the indictment is drawn up and before the commencement of the trial is non-public but contradictory with the prosecutor's participation and the census of the defendant; this preliminary procedure leads either to a solution to the commencement of the trial or to a solution to close the case; the judge does not confine himself to verifying the legality of criminal investigations or evidence administered during the criminal prosecution, but can also check the appearance of the accusation (if there are sufficient grounds for suspecting that the person sued has committed the offense he is accused of), can give evidence, can hear the defendant.

[3]*In the Italian criminal procedural law* the preliminary hearing procedure before the judge is non-public, but contradictory with the prosecutor's participation and the summoning of the defendant and injured person; the preliminary hearing shall not be limited to verifying the legality of criminal acts or evidence administered during the criminal prosecution, the judge may also check whether the accusation is well founded, administer evidence, hear the defendant or analyze the complete character of the prosecution and order completion of the criminal prosecution.

[4]It is well established in the doctrine that the procedural stage comprises a set of procedural and procedural acts and measures, carried out in the order and in the forms

preliminary chamber judge carries out a precisely determined objective, namely the lawfulness of the administration of the evidence, the court's indictment and the acts of the criminal prosecution bodies, thus *preparing the next stage of the criminal trial for the purpose of achieving the purpose of the criminal trial*; the beginning of the judgment phase is the consequence of the judge's preliminary ruling; in the same regard, the Constitutional Court stated in Decision no. 641/2014 the following: „Thus, in the light of the procedural attributions entrusted to the Preliminary Chamber Judge, in the context of the separation of judicial functions according to the abovementioned Law, the Court concludes that it has the function of verifying the legality of the referral or non-adjudication, ***in the legislator's view, this new procedural institution does not belong to either criminal prosecution or judgment, being equivalent to a new phase of the criminal process.***

The procedure of the preliminary chamber was entrusted, according to art. 54 of the NCPP, to a judge - the preliminary chamber judge - whose activity is circumscribed to the same material, personal and territorial jurisdiction of the court of which he is a member, conferring on him a new procedural stage a jurisdictional character. However, it is clear from the regulation of the duties which the office of the Preliminary Chamber requires, that the Court observes that „*its activity does not concern the merits of the case, the procedural act of*

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prescribed by law, by the judicial authorities and the parties to the trial, fulfilling a limited objective in achieving the purpose of the criminal proceeding. „The objective of a procedural phase is the preparation of the next procedural phase, until the final stage is reached in the accomplishment of the purpose of the criminal trial" (Grigore Theodoru, *Criminal Procedure Treaty*, Issue 2 (Bucharest: Hamangiu Publishing House, 2012), 544). For the purposes of the procedural stage of the preliminary chamber procedure is also Decision no. 18/2014 of the High Court of Cassation and Justice, by which the Supreme Court of Appeal was notified in the interest of the law (file no. 6/2014), stating the following: „In such a procedural circumstance, the suspension at the beginning of the court the exercise of the appeals procedure leads to *the extension of the procedural stage of the preliminary chamber* until the time of the settlement of the contestation stipulated in art. 347 of the NCCP and the final remaining of the conviction on the appeal. Given that the case is in the preliminary stage of the preliminary hearing until the appeal is settled, the procedural provisions applicable in the matter of preventive measures up to the moment of resolving this appeal are the provisions of art. 348 of the same Code on Preventive Measures in the Preliminary Chamber Procedure, the provisions of Art. 207 on the verification of preventive measures in the preliminary procedure and the provisions of Art. 205 on the appeal against the decision ordering preventive measures in the proceedings before the Preliminary Chamber".

*which it is exercised, not affirming and not posing in the positive or negative terms the essential elements of the report conflict: action, person and guilt*".

## FUNCTIONAL COMPETENCE

By definition, the preliminary chamber judge has the following powers:verify the legality of the referral ordered by the prosecutor; verifies the lawfulness of the administration of evidence and the making of procedural acts by the criminal prosecution bodies; resolves the complaints against the non-filing[1]or non-filing solutions[2]solves other express requests stipulated by the law[3].

The Preliminary Chamber Judge may also order the measure of provisional prescription for medical treatment[4], precautionary measures[5], and also have intrinsic attributions to the conduct of a criminal proceeding.[6]

The analysis of the legality of the concluding sentences of the computer search, we consider that it falls within the competence of the preliminary chamber judge.[7]

Taking into account the necessity to ensure the counter-evidence and equality of arms, if the preliminary chamber judge found that the notification was irregular, excluded a sample or a part of the administered evidence, it found the incidence of relative or absolute nullity regarding one / some of procedural / procedural acts in the course of the criminal investigation, after communicating the Ministry's response at the expiry of the 5-day time limit in which the Prosecutor's Office had the opportunity to express a procedural position, the Preliminary Chamber judge **will set a term in the council chamber to which the parties will be cited**and injured party and the prosecutor will

[1]Art. 318 C.p.p. was declared unconstitutional by CCR Decision no. 23 of 20.01.2016 (Official Monitor No. 240 of 31.01.2016).
[2]See Art. 340-341 C.C.P.
[3]Mentaining preventive measures; Mihail Udroiu, s.a., *Codul de procedură penală,* 197.
[4]Art. 245 para.1 C.C.P.
[5]Art. 249 C.C.P.
[6]See the atributions of Rights and Freedoms Judge, Nicolae Volonciu, s.a., *Noul Cod de procedura penala comentat* (Bucuresti: Hamangiu, 2014), 131.
[7]M. Udroiu ş.a., *Codul de procedură penală. Comentariu pe articol,* 490.

be advised to formulate oral conclusions on the outcome of the preliminary hearing (for example, the defendant can argue that the prosecutor has not remedied the irregularities of the referral or that they have not been completed within the term legally imperative).[1]

In the procedure provided by art. 346 The NCCP is the subject of the debate, which forms the solution to the preliminary chamber stage, and it is not possible to invoke new requests and exceptions regarding the legality and loyalty of the prosecution. Therefore, if the parties or procedural subjects understand to formulate at the court hearing provided by Art. 346 New Claims and Exceptions, we consider that these must be rejected as late. The prosecutor's office is obligatory.

The failure to present the parties and the injured person legally cited does not have the effect of postponing the case or impossibility to settle the case; where the presence of inculcation is mandatory in the cases provided by art. 364 of the NCCP, the Preliminary Chamber judge will order the bringing within the deadline.

If the prosecutor communicated the answer within 5 days, the judge of the preliminary chamber will proceed with his examination in relation to the manner in which the Public Ministry understood to remedy the irregularities of the notice of appeal, without resuming in the debates the solutions related to the nullity procedural or procedural acts or evidence excluded[2].

The Preliminary Chamber Judge shall pronounce by **a closing date in the council chamber**; the NCCP does not stipulate a time limit within which the opening of a preliminary chamber must be motivated.

**The minute is mandatory.**

The Preliminary Chamber judge may have one of the following **two remedies**:

1. **Starting the trial** in the following situations:

a) where neither the injured party or person nor the judge hearing the application has **made any requests or exceptions** within the period prescribed by the judge;

b) where the Preliminary Chamber judge has **rejected all the claims and exceptions made** by establishing the lawfulness of the referral, the taking of evidence and the conduct of criminal proceedings;

[1]Nicolae Volonciu, sa., *Noul Cod de procedura penala comentat* , 894.
[2]Idem.,p.895.

c) if the prosecutor has remedied the irregularity of the notice of initiation found by the preliminary chamber judge, he has stated that he maintains the decision to refer to the court and the subject and limits of the trial (the deed and the person for whom the criminal charge was filed);

d) if the subject and the limits of the court can be established and the prosecutor maintains the solution to the lawsuit [for example, in the case where part of the evidence has been excluded or some procedural or procedural acts were annulled, respectively if the irregularity of the act (even if not corrected) does not affect the possibility of determining the subject and the limits of the judgment (for example, when the unlawful act of the referral refers to the prosecutor's failure to state the amount of the court costs related to the prosecution or the indictment)].

2. **Return the case to the Prosecutor's Office***in the following situations*[1]:

a) the Preliminary Chamber judge found that **the indictment was irregularly drawn, the irregularity was not remedied by the prosecutor within the 5-day procedural time-limit** (either not remedied at all or only partially remedied, or the prosecutor did not offer any response) **and the irregularity draws the impossibility of establishing the object or limits of the judgment**;

b) the Preliminary Chamber judge found that the indictment was irregular, the prosecutor responded within 5 days to cover the irregularity of the referral, but the judge, following a reassessment, **finds that in reality not all the irregularities were found or could not continue to be the subject or limits of the judgment;**

c) the Preliminary Chamber judge **excluded all evidence** administered during the criminal prosecution or **found the nullity (absolute or relative) of the entire prosecution**;

d) **the prosecutor requested the restitution** of the case in the case where part of the evidence was excluded or some procedural / procedural acts were annulled;

e) **the prosecutor did not inform the judge** of the preliminary chamber whether he maintains the injunction within the 5-day term stipulated by the law if part of the evidence was excluded or some procedural or procedural acts were canceled.

[1]Mihail Udroiu, *Sinteze şi grile, Procedura penală.Partea specială*, 172.

The impossibility of establishing the subject or limits of the judgment implies that the action and / or the person for whom the referral has been ordered can not be determined by using logical or systematic arguments.

**The resumption of criminal prosecution** is not ordered by the conclusion of the preliminary chamber judge, but by the **order of the prosecutor who oversees or conducts the criminal investigation.**

When the resignation was ordered by the preliminary chamber judge following the finding of the irregularity of the notice of appeal and the impossibility of determining the subject and the limits of the judgment, it may be necessary to carry out additional criminal prosecution measures in addition to remedying the irregularity of the notification act. In this case, *the resumption of the case is ordered by the head of the prosecutor's office or the hierarchically superior prosecutor provided by the law, and not by the order of the prosecutor supervising or conducting the criminal investigation.* The order of resumption of criminal prosecution shall also mention the acts to be performed.

The two above-mentioned judgments of the preliminary chamber judge refer to the entire case, the return of the case to the prosecutor's office or the commencement of the trial can not be ordered only with respect to certain offenses or with respect to some of the defendants[1].

The Preliminary Chamber judge does not have to mention in the order of the enforced court the commencement of the trial and the substantive term of trial, since the trial is still in the preliminary chamber stage, the stage of the trial debuting only after the final ruling on the commencement of the trial. Therefore, it is only after the final decision on the conclusion of the preliminary chamber judge has been reached, that the time-limit for the trial at first instance can be determined.

## CONCLUSIONS

The Preliminary Chamber judge does not have to mention in the order of the enforced court the commencement of the trial and the substantive term of trial, since the trial is still in the preliminary chamber stage, the stage of the trial debuting only after the final ruling on the commencement of the trial. Therefore, it is only after the final decision

[1]Ibidem.

on the conclusion of the preliminary chamber judge has been reached, that the time-limit for the trial at first instance can be determined.

## BIBLIOGRAPHY

### Books

1. Udroiu, Mihail. *Codul de procedură penală. Comentariu pe articole*. Bucharest: C.H.Beck, 2015.
2. Udroiu, Mihail. *Sinteze şi grile, Procedura penală.Partea specială*. Bucharest: C.H.Beck, 2016.
3. Volonciu, Nicolae. *Noul Cod de procedura penala comentat.* Bucuresti: Hamangiu, 2014.

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# ADMINISTRATIVE CONTENTIOUS. SOME JURISPRUDENTIAL LANDMARKS REGARDING THE PRIOR COMPLAINT

**Cristina TITIRIŞCĂ**[1]

***Abstract:***

*According to Law no. 554/2004 on the administrative contentious, as subsequently amended and supplemented, the procedure for settling claims in administrative litigation starts with a preliminary procedure, under which a person injured in a right or a legitimate interest by a unilateral administrative act requests the issuing public authority or the higher authority, if any, to revoke the act in whole or in part. The present paper does not aim to deal with this issue exhaustively, but to present some details resulting from the practice of the courts and of the Constitutional Court.*

***Key words:*** *administrative litigation; prior complaint; procedure; admissibility; case-law*

## INTRODUCTION

By revising the Constitution and Romania, in 2003, important changes were made to the administrative contentious. Thus, on the one hand, with reference to the scope of the right of the person injured by a public authority, it has been extended to the legitimate interest[2] and, on the other hand, a new paragraph was introduced in reference to the

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[2] See the provisions of art. 52 par. (1) of the Basic Law, according to which: „Any person aggrieved in his/her legitimate rights or *interests* by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or *legitimate interest*, the annulment of the act and reparation for the damage" [emphasis added-C.T.].

judicial courts, which refers to the judicial control of the administrative acts of the public authorities, through administrative contentious[1].

Under these circumstances, it became necessary to amend the normative framework on the administrative contentious, so that it reflected the new realities, in accordance with the constitutional provisions. As such, the Parliament passed the Law no. 554/2004 on the administrative contentious, which repealed the previous, pre-constitutional regulation. Thus, the prior (preliminary) administrative procedure was also regulated, "in order to offer the interested persons the opportunity to resolve their complaints in a shorter and more operative manner, the notified administrative body being able to return to the previously admitted act and to issue another one accepted by the plaintiff"[2], a procedure closely linked to the European good governance concept, which requires the issuing authority or the hierarchical superior authority, as the case may be, to ensure that the prior procedure is "a chance given to the public authority to revoke its act and not to be compelled to participate in a legal process that will thus be avoided, as well as to the injured person, who will be able to protect his/her right or legitimate interest by administrative means, avoiding the referral to the court"[3].

## 1. LEGAL FRAMEWORK

The concept of "prior complaint", with reference to the administrative contentious, is not enshrined within constitutional terms. Moreover, by art. 73 par. (3) letter k) of the Basic Law, the constitutional

[1]See the provisions of art. 126 par. (6) of the Basic Law, according to which: „The judicial control of administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts. The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional".

[2]Dana Apostol Tofan, "Modificările esenţiale aduse instituţiei contenciosului administrativ prin noua lege cadru în materie (I)," *Curierul Judiciar*, 3 (2005): 90-103 *apud* Gabriela Bogasiu, *Legea contenciosului administrativ comentată şi adnotată* (Bucharest: Universul Juridic, 2015) 231.

[3]Verginia Vedinaş, "Unele consideraţii teoretice şi implicaţii practice privind noua Lege a contenciosului administrativ nr. 554/2004," *Dreptul* 5 (2005): 9-33, *apud* Bogasiu, *Legea contenciosului*, 231.

lawmaker has left to the ordinary legislator the regulation of the institution of the administrative contentious and, implicitly, of the prior complaint.

At an infra-constitutional level, the framework regulation is given by provisions of art. 2 par. (1) letter j), as well as by art. 7 of the Law no. 554/2004[1], as subsequently amended and supplemented. Thus, the prior complaint is defined as the "request by which the issuing public authority or the superior hierarchically authority, as the case may be, is asked to reconsider an administrative individual or normative act, in the sense of its revocation or amendment", and art. 7 of the above-mentioned normative act aims at detailing the procedure for the preliminary complaint[2].

[1] Published in *The Official Gazette of Romania*, Part I, 1154 (2004).

[2] According to art. 7 of the Law no.554/2004: „ (1) Before appealing to the competent administrative court, a person who considers himself or herself to be injured in a right of his own or in a legitimate interest by means of an individual administrative act shall request the issuing public authority or the hierarchically superior authority, if any, within 30 days from the date of communication of the act, the revocation of the act, in whole or in part, thereof. ($1^1$) In the case of the administrative normative act, the preliminary complaint can be formulated at any time. (2) The provisions of paragraph (1) are also applicable if the special law provides for an administrative-judicial procedure and the party has not opted for it. (3) It is also entitled to lodge a prior complaint the person injured in a right of his own or in a legitimate interest, by an administrative act of an individual nature addressed to another subject of law, from the time he/she became aware of its existence, by any means possible, within the 6-month period provided for in paragraph (7). (4) The preliminary complaint, lodged according to the provisions of par. (1), shall be settled within the term stipulated in art. 2 par. (1) letter g). (5) In the case of actions lodged by the prefect, the People's Advocate, the Public Ministry, the National Civil Servants' Agency or those concerning the claims of persons injured by ordinances or provisions of ordinances, as well as in the cases provided by art. 2 par. (2) and art. 4, no prior complaint is required. (6) The prior complaint in actions involving administrative contracts has the meaning of conciliation in commercial litigation, the provisions of the Code of Civil Procedure being applicable accordingly. In this case, the complaint must be lodged within the 6-month period provided for in paragraph (7), which shall begin to run: a) from the date of the conclusion of the contract, in case of disputes related to its conclusion; b) from the date of the amendment of the contract or, as the case may be, from the date of the refusal of the request for modification made by one of the parties, in case of litigations related to the amendment of the contract; c) from the date of the breach of contractual obligations, in case of litigations related to the performance of the contract; d) from the expiration of the term of the contract or, as the case may be, from the date of the occurrence of any other cause leading to the termination of the contractual obligations, in case of disputes related to the termination of the contract; e) from the date when the contractual clause is

## 2. ELEMENTS FROM THE CASE-LAW OF THE CONSTITUTIONAL COURT

The question of the constitutionality of the administrative procedure has been repeatedly subject to constitutional review, in particular by reference to the provisions of art. 21 of the Constitution on free access to justice, in its component regarding the special administrative jurisdictions, which are optional and free of charge. The Constitutional Court's decision was to reject the alleged unconstitutionality of the texts as unfounded, given that "the constitutional text referring to the optional nature of the special administrative jurisdictions is not applicable to the criticized provisions, which establish the obligation of the injured person to complain to the issuer administrative organ prior to the lodging before the courts of a request to annul the act deemed as illegal. The invoked constitutional provision abolished the prerequisite only for the judicial administrative procedure. No constitutional provision prohibits the introduction by law of a preliminary administrative procedure, without a jurisdictional nature, such as [...] the procedure of the graceful or hierarchical administrative appeal"[1].

At the same time, the Constitutional Court held that, by imposing exceptions to the obligation of the preliminary procedure, the principle of equality of rights provided by art. 16 of the Constitution is not breached. Thus, " in accordance with the provisions of art. 126 par. (2) of the Basic Law, the legislator may issue procedural rules, as long as they do not obscure the constitutional texts or principles. However, it cannot be argued that the criticized text of the law establishes a discriminatory regime between persons injured by a unilateral administrative act and those injured by ordinances or provisions of ordinances, as to what

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deemed as interpretable, in case of litigations related to the interpretation of the contract. (7) The preliminary complaint in case of unilateral administrative acts may also be introduced, for good reasons, beyond the deadline stipulated in par. (1), but not later than 6 months from the date of issue of the act. The 6- month term is a prescription term".

[1] See, for example, Decision of the Constitutional Court no.188/2004, published in *The Official Gazette of Romania*, Part I, 498 (2004), Decision of the Constitutional Court no.272/2004, published in *The Official Gazette of Romania*, Part I, 723 (2004) or Decision of the Constitutional Court no.18/2005, published in *The Official Gazette of Romania*, Part I, 255 (2005).

concerns whether or not to proceed with the prior administrative procedure. By Decision no. 1 of February 8th, 1994, published in the Official Gazette of Romania, Part I, no.69 of March 16th, 1994, the Plenum of the Constitutional Court held that the principle of equality before the law presupposes the equal treatment for situations which, in terms of the aim pursued, are not different. Therefore, it does not exclude, but, on the contrary, assumes different solutions for different situations"[1].

Also in 2007, examining the criticism of unconstitutionality of the provisions of art. 7 par. (1) of Law no.554/2004, the Constitutional Court found that the allegations of unconstitutionality on the violation of the principle of free access to justice are justified, since they do not distinguish between the quality of a person aggrieved by a unilateral administrative act of an individual nature, respectively whether he/she is the addressee itself or is a third party to it and, without operating a distinction in this regard, the text of the law envisages the same 6 months term from the issuance of the act in which the administrative act may be appealed. "However, the unilateral administrative act of an individual character is not opposable to third parties since it is not subject to any form of advertising, so that they do not have the real possibility to know of the existence from the date of its issuance. This act is only notified to the addressee through communication. That being so, third parties - persons injured in their right or legitimate interest - find themselves in the objective impossibility of knowing the existence of an administrative act addressed to another subject of law. Since the provisions of art. 7 par. (7) of the Law no.554/2004 on the administrative contentious condition the fulfilment of the mandatory preliminary procedure by the preliminary complaint filed by the injured party, other than the addressee of the contested administrative act, within a maximum term of 6 months from the time of the issuing of the act, it is obvious that the access to court of these categories of people is virtually blocked. The court will reject the application as lodged out of time, where the applicant became aware of the existence of the act after the prescription of the six-month period from the date of issue. However, according to art.21 of the Constitution,

[1] See, Cătălin-Silviu Săraru, *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curţii Constituţionale 2004-2014* (Bucharest: C.H. Beck, 2015), 148, respectively the Decision of the Constitutional Court no. 1186/2007, published in *The Official Gazette of Romania*, Part I, .62 (2008).

*«Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests»*. It is true that, according to art. 126 par. (2) of the Constitution, the legislator has the power to determine the procedure of the trial and, in view of particular circumstances, special rules may be adopted, but the above mentioned constitutional rule does not justify for the regulation of certain legal provisions to have the effect of a violating of a right"[1].

## 3. ISSUES FROM JUDICIAL CASE-LAW

Starting from the legal elements relating to the procedure of the prior complaint, the practice of the courts has made some nuances. Thus, with reference to *the subject matter of the prior complaint*, the High Court of Cassation and Justice has stated that it must specifically target the injured person's claims and that this legal requirement cannot be considered to be fulfilled if the action relates to a different claim than the one addressed to the public authority[2].

At the same time, in another case[3], it was shown that, according to art. 2 letter c) of Law no. 554/2004, which defines the administrative act for the purposes of the administrative contentious, contracts concluded by public authorities whose purpose refer to the enhancement of public property, to works of public interest, to the provision of public services and to public procurement shall be regarded as administrative acts, within the meaning of the law. In the present case, the court found that there was a direct conciliation procedure between the parties, with a record of this being done, but without complying with the provisions of art. 7 of the Law no. 554/2004. Thus, the court found that the lawsuit was not lodged in compliance with the mandatory terms provided by the administrative contentious law. Since the prior administrative procedure is regulated as a condition for the exercise of the right of action in the administrative contentious, the failure of which, within the terms and conditions laid down by law, is to render the action as inadmissible, the

[1] Decision of the Constitutional Court no. 797/2007, published in *The Official Gazette of Romania*, Part I, 707 (2007).
[2] High Court of Cassation and Justice – The Administrative and Tax Litigation Chamber, Decision no.2146/2016, in www.scj.ro, [last accessed on March 23rd, 2018].
[3] Galați Tribunal, Decision no. 1542 of 13 May 2013, in portal.just.ro [last accessed on March 23rd, 2018].

court, finding that there was no prior complaint, accepted the plea raised and dismissed the action as inadmissible.

Numerous cases concern expressly regulated situations where the prior procedure is not necessary. These refer to[1]:

- actions lodged by the prefect, the People's Advocate, the Public Ministry, the National Agency of Civil Servants;
- actions relating to the claims of persons injured by ordinances or provisions of ordinances;
- actions relating to unjustified refusal to resolve a claim relating to a right or a legitimate interest or, as the case may be, to not to respond to the applicant within the legal time limit;
- the case of invoking the objection of illegality of individual unilateral administrative acts;
- an action for the annulment of an administrative act that has been appealed before a special administrative jurisdiction, but the injured person has dropped the lawsuit before the trial is completed;
- the action for the annulment of administrative-judicial acts;
- the action for the annulment of irrevocable administrative acts promoted by the issuer of the act;
- cases covered by special regulations.

Without wishing to exhaust the matter at hand, we want to note some examples that we consider relevant to the last situation. As such, for example, we mention that, according to art. 213 par. (13) of the Fiscal Procedure Code[2], by way of derogation from the provisions of art. 7 of Law no. 554/2004 on the administrative contentious, as subsequently amended and supplemented, against the decision ordering the establishment of the precautionary measures[3], the interested party may appeal, within 30 days of communication, to the competent

[1] See, Anton Trăilescu and Alin Trăilescu, *Legea contenciosului administrativ. Comentarii şi explicaţii* (Bucharest: C.H.Beck, 2017), 172 and the following.

[2] Law no. 207/2015, published in *The Official Gazette of Romania*, Part I, 547 (2015).

[3] According to art. 213 par. (4) of the Fiscal Procedure Code: „ The precautionary measures shall be ordered by a decision issued by the competent fiscal body. In the decision, the tax authority states to the debtor that by establishing a guarantee at the level of the established or estimated amount, as the case may be, the precautionary measures will be lifted ".

administrative litigation court, without having to proceed with the preliminary procedure[1].

Also, in tax matters, it was found that the court of law wrongly applied the law, and the imputation provisions could be challenged directly in the administrative contentious court, without the necessity to carry out the preliminary procedure of the administrative appeal. Thus, it was noted that, according to art. 85 par. (1)-(2) of the Law no.188/1999 on the Civil Servants' Statute[2], the repair of the damage brought to the public authority or institution, where the civil servant is civil liable for the guilty damage of the public property of the public authority or institution where he/she works or for failure to return, within the statutory period, the undue amounts given to him/her, is to be ordered by the issuing by the manager of the authority or institution of an order or a provision of imputation, within 30 days after the acknowledgment of the damage, or, where appropriate, by a commitment to pay, and, if it is undertaken for the damages paid by the public authority or institution as a principal to third parties under a final and irrevocable court order, it is based on the latter. At the same time, it is expressly stipulated that against the order or the provision of imputation, the civil servant concerned may address himself to administrative contentious court. This text is a special provision in relation to the procedural rules laid down in Law no. 554/2004, so that its interpretation is made by applying the rule of law according to which *exceptio est strictissimae interpretationis*. The mentioned text allows officials, unhappy with the disposition for imputation, to attack it directly before the court, without the need for a prior administrative complaint. In conclusion, it is wrong to reject the petition for legal action as inadmissible for lack of prior procedure[3].

[1] Piteşti Court of Appeal - The Second Civil, Administrative and Tax Litigation Chamber, Decision no.1455/R-CONT/04 December 2017, in portal.just.ro [last accessed on March 23rd, 2018].

[2] Republished in *The Official Gazette of Romania*, Part I, 365 (2007), as subsequently amended and supplemented.

[3] Piteşti Court of Appeal - The Second Civil, Administrative and Tax Litigation Chamber, Decision no.973/R-CONT/19 September 2017, in portal.just.ro [last accessed on March 23rd, 2018].

## CONCLUSION

The regulation of the administrative contentious by Law no. 554/2004 brought beneficial changes to the earlier legal framework, one of the most important being the delineation of the preliminary procedure in administrative litigation. However, the procedure is further developed in judicial practice, whether we are talking about common law courts or the Constitutional Court, by the judge called upon to apply the legal provisions to specific cases.

## BIBLIOGRAPHY

**Books**

1. Bogasiu, Gabriela. *Legea contenciosului administrativ comentată şi adnotată, 3rd Edition, revised and added*. Bucharest: Universul Juridic, 2015.
2. Săraru, Cătălin-Silviu. *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curţii Constituţionale 2004-2014*. Bucharest: C.H. Beck, 2015.
3. Trăilescu, Anton, and Alin Trăilescu. *Legea contenciosului administrativ. Comentarii şi explicaţii, ediţia a 3-a*. Bucharest: C.H.Beck, 2017.

**Articles in a print journal**

1. Apostol Tofan, Dana. "Modificările esenţiale aduse instituţiei contenciosului administrativ prin noua lege cadru în materie (I)." *Curierul Judiciar* 3 (2005): 90-103.
2. Vedinaş, Verginia. "Unele consideraţii teoretice şi implicaţii practice privind noua Lege a contenciosului administrativ nr. 554/2004." *Dreptul* 5 (2005): 9-33.

**Case Law**

1. Decision of the Constitutional Court no.188/2004, published in *The Official Gazette of Romania*, Part I, 498 (2004).
2. Decision of the Constitutional Court no.272/2004, published in *The Official Gazette of Romania*, Part I, 723 (2004).
3. Decision of the Constitutional Court no.18/2005, published in *The Official Gazette of Romania*, Part I, 255 (2005).

4. Decision of the Constitutional Court no. 797/2007, published in *The Official Gazette of Romania*, Part I, 707 (2007).
5. Decision of the Constitutional Court no. 1186/2007, published in *The Official Gazette of Romania*, Part I, 62 (2008).
6. High Court of Cassation and Justice – The Administrative and Tax Litigation Chamber, Decision no.2146/2016.
7. Piteşti Court of Appeal - The Second Civil, Administrative and Tax Litigation Chamber, Decision no.973/R-CONT/19 September 2017.
8. Piteşti Court of Appeal - The Second Civil, Administrative and Tax Litigation Chamber, Decision no.1455/R-CONT/04 December 2017.

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# THE ORGANIZATION OF THE FAMILY COUNCIL

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***Abstract:***

*The current paper approaches the legal issues related to the structure of the family council, as well as its organization or modification.*

*First of all, it must be mentioned that though the legislator has inserted this new legal institution in its attempt to make the protection of persons more efficient, though the organization of the family council is not mandatory. This situation results from the provisions of Art 108 of the Civil Code, as well as from Art 124 of the same document.*

*Both legal texts state about the fact that this consultative organ supervising the activity of the guardian can be organized by the guardianship court. The statement of the legal norms cannot induce the idea of a facultative feature of the family council, the more so as Art 108 Para 2 of the Civil Code states that in the absence of a family council, its attributions shall be performed by the guardianship court. Moreover, unlike other legislations*[2]*, the Romanian Civil Code states that the guardianship court shall have the ability to organize a family council only upon the request of interested parties.*

***Key words:*** *family council; guardianship court; protected person; membership; legislation*

## INTRODUCTION

We consider that the option of the legislator to state the family council only as consultative organ is uninspired, moreover given that the French system or other systems with French influence see the organization of the council as mandatory and its role within the guardianship as wider[3].

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[2] See Art 224 of the Quebecoise Civil Code, according to which the tribunal may, ex officio, appoint or replace a guardian or a guardianship council.

[3] In this meaning, the French doctrine states about the family council as being the central organ of the guardianship, having a major role in its establishment until its cessation. Yvaine Buffelan-Lanore, *Droit civil. Première année*, 12th Edition. (Paris: Armand Colin, 2001), 244.

Also, beyond the consultative feature of the family council, the legislator states that it cannot be organized within all forms of protection for minors, as mentioned by Art 124 Para 2 of the Civil Code. According to this norm, the family council shall not be established for the parental protection, for putting into foster care or for any other protective measures stated by the law[1].

## 1.THE MEMBERS OF THE FAMILY COUNCIL

According to the provisions of the new Civil Code, mainly Art 125 having the side title "Members of the family council", "the guardianship court shall appoint a family council consisting of three relatives or in-laws, considering the relativity or the personal relations with the minor's family. In the absence of relatives or in-laws, there may be appointed other persons who were in friendship with the minor's parents, or persons expressing interest for the minor's situation".

The law refers to the persons who may be in a strong relation with the minor and his family, based first of all on relativity, but also on another type of affective relations fit to generate their interest for the proper development of the person under protection[2].

A similar regulation is found in Art 222 of the Quebecoise Civil Code which states that the number of the family council's members is of 3, and exceptionally the court may decide that its attributions to be performed by a single person. In the French legal system, the number of the members shall vary from 4 to 5, considering the subrogated guardian, of which the Romanian legislation makes no reference.

The fact that these two systems of law have represented the main source of inspiration for our new Civil Code is also reflected in the fact that the family council's members are being chosen from the same categories of persons, namely those who from different considerations

[1] The doctrine has stated that the institution with the same name stated by Law No 217/2003 on the prevention and combat of domestic violence shall not be mistaken with the institution stated by the Civil Code; Carmen-Tamara Ungureanu, *Drept civil. Partea generală. Persoanele*. 2nd Edition. (Bucharest: Hamangiu, 2013), 354.

[2] It must be mentioned that Art 357 of the former Civil Code stated that the blood relatives are preferred before the in-laws of the same degree, and between two relatives of the same degree shall be preferred the eldest one.

express interest for the proper performance of the guardianship and tutelage[1].

Beyond the persons summoned to be part of the family council and their proximity to the person under protection, though the Civil Code does not state it, an important criterion taken into consideration in the old regulation and in the French legal system is that the domicile of the interested persons be the same place where the guardianship is being opened[2], precisely for the efficiency of the guardian's supervision.

Other criteria which can be taken into consideration by the court in deciding the membership of the family council are related to the proximity of the kinship, ages and skills of the interested parties, these being expressly stated by the French Civil Code, but for sure this is not a limitative enlisting.

Art 125 of the Civil Code refers to certain categories of persons, who even though could be fitted in the above mentioned category, cannot be part of the family council. The reasoning of this interdiction is easily understandable because the council is appointed to supervise the guardian fulfilling the attributions according to the law[3]; while Para 2 of the same article states that the spouses shall not be members of the same family council.

We believe that the explanation for this second interdiction could arise from the fact that the family relations between the spouses may, at some point, be tensed, to such an extent that the two cannot reconcile as to rationally decide without prejudicing the interests of the protected person.

By reference to the members of the family council, the legislator has considered as appropriate that the three members of this council to be replaced by two substitute members, if for certain objective reasons they cannot be present when the council is summoned. Such reasons may be represented by the health condition of that time or by the fact that the member is not in the place of convening the council because of circumstances which he could not have foreseen or prevented.

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[1] Art 408 of the French Civil Code and Art 226 of the Quebecoise code.

[2] From the analysis of Art 359-360 of the Civil Code of 1864 and Art 408 of the French Civil Code it results that are preferred as family council's members the persons who domiciled where the guardianship was opened. See also Constantin Hamangiu, Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român*, 1st Volume. (Bucharest: All Beck, 2002), 400.

[3] Such interdiction is stated both by the Quebecoise Code and the French one.

It is important to mention that the actual Civil Code is not in accordance with the doctrine subsequent[1] to the former code, according to which the family council is not a permanent organ, but it has a variable componence. From our perspective, Art 125 cannot be interpreted in this meaning for as long as the number of the council's members is fixed to 3 and 2 substitutes. The simple existence of these substitutes for the council members it is not enough for the statement that the entity in debate has a variable structure for as long as the modification represents an exception.

## 2.THE APPOINTMENT OF THE FAMILY COUNCIL

The establishment of the family council shall be made in accordance with Art 128 of the Civil Code which states that the legislator shall appoint the persons having the ability to initiate the procedure for the establishment, the place for meeting, the competent court as well as other procedural elements.

The guardianship court to which the legislator provides the necessary ability to establish the family council may be notified ex officio or based upon a request submitted by the persons mentioned by the law. The legal text states that are active procedural parts the minor with limited capacity of exercise, the guardian appointed or any other person aware of the minor's situation.

Our Civil Code gives the minor who has turned the age of 14 the possibility to notify the guardianship court, but for the French civil law this age is not considered as sufficient to presume that the minor would have discernment for the requirement to establish the family council, allowing it for the minor who has turned the age of 16.

Moreover, the legislator mentioned the appointed guardian, which is absolutely natural given that the latter one represents the second organ performing the guardianship.

Given the importance of the family council within the guardianship, it is natural for the legislator to open the way for the guardianship court to an ex officio notification.

Procedurally speaking, Art 128 states that the guardianship court shall summon at the minor's domicile all persons fulfilling the conditions to be members in the family council.

[1] Hamangiu, Rosetti-Bălănescu and Băicoianu, *Tratat de drept civil român*, 401.

The provision according to which the decision in this area shall be taken after the summoning of the potential members at the minor's domicile aims the establishment of an intimate framework allowing deep debates without the pressure of a court room, so that the structure of the family council be established in accordance with the fact that the meetings of the council are held at the minor's domicile.

In order to rule upon the structure of the family council, the guardianship court is compelled based on Art 128 Para 3 to hear the minor aged 10, taking into account his opinion, as it considers it to be relevant depending on his psycho-intellectual development. Even the legal text refers to Art 264 f the Civil Code stating the procedure for hearing the minor, in cases concerning him and the judicial relevance of his sayings.

The minor's opinion regarding this matter is pertinent and conclusive for taking a decision in the area of the family council's structure, because the guardianship shall be performed in the sole benefit of the protected person, reason for which the minor is summoned to express his opinion which shall be taken into account with priority to the extent to which it is ascertained that the minor is aware of his actions.

Also, Art 128 Para 2 of the Civil Code is also important during the procedure for the appointment of the family council's members, because this legal provision states that the persons appointed by the guardianship court to express their consent in this regard. Thus, as it is noted by the doctrine, the quality as family council's member is optional for as long as the appointment occurs with the consent of the appointed persons[1].

It is important to note that the court summoned to decide the structure of the family council has a sovereign power of appreciation, depending on the specific circumstances of the case upon the persons to be part of this consultative organ. Thus, the main criterion in the establishment of the family council's members is the compliance with the interests of the protected person.

Though the absence of a guardianship court makes impossible the existence of jurisprudence in this area, the judicial decisions issued under the auspices of the former Civil Code may be taken into consideration in the present times.

[1] Ovidiu Ungureanu and Cornelia Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil*. 3rd Edition. (Bucharest: Hamangiu, 2015) 369.

In accordance with the freedom of appreciation of the courts is also the older jurisprudence according to which "the rules regarding the structure of the family council are not prescribed under the sanction of nullity and even if there are inconsistencies, they are being inserted by the legislator with the purpose of protecting the minor's interests". In other words, the non-compliance with the legal provisions stating the structure of the family council shall generate the nullity of it, only if there was a specific violation of the protected person's interest.

By characterizing the task as member of the family council it has been emphasized the fact that it is personal and free, therefore it shall not be passed as inheritance in case of death of its author, who had this quality. About the absence of the remuneration for the activity performed by the family council's members, it is expressly stated by the Quebecoise Civil Code[1].

The essentially free nature of this task differentiates the members of the family council from the guardian who can be paid under the exceptional circumstances provided for in Art 123 Para 2 of the Civil Code, which states that: "The guardian may be entitled, during the exercise of the guardianship duties, to a remuneration the amount of which shall be determined by the guardianship court with the approval of the family council, taking into account the work done in the administration of the property and the material state of the minor and the guardian, but not more than 10% of the proceeds of the child's goods".

## CONCLUSIONS

In conclusion, although the importance of the family council is obvious in the exercise of guardianship, the supervision performed upon the guardian, the legislator preferred to opt out when the factual circumstances indicate that the minor's interests are prejudiced by the work done by the council.

[1] See in this regard Art 232 of the Quebecoise Civil Code stating that this asigment is personal and free of charge.

## BIBLIOGRAPHY

### Books

1. Buffelan-Lanore, Yvaine. *Droit civil. Première année*, 12th Edition. Paris: Armand Colin, 2001.
2. Hamangiu, Constantin, Ioan Rosetti-Bălănescu and Alexandru Băicoianu. *Tratat de drept civil român*, 1st Volume. Bucharest: All Beck, 2002.
3. Ungureanu, Carmen-Tamara. *Drept civil. Partea generală. Persoanele*. 2nd Edition. Bucharest: Hamangiu, 2013.
4. Ungureanu, Ovidiu, and Cornelia Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil*. 3rd Edition. Bucharest: Hamangiu, 2015.

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# LEGAL NATURE OF THE CONSTRAINT

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***Abstract:***

*Responsibility, as one of the fundamental principles of law, implies „the task of liability" as a function for the purposes of acceptance of a derogatory behavior.*

*Although the concept of responsibility has been claimed by morality, the science of law has adopted the traits of this concept in a creative way, by adapting it to the specifics of its object of research.*

*The science of law has developed „the task of liability", by creating the concept of constraint, which highlights a certain behavior*

***Key words:*** *state of law; state power; legal constraint; legal liability; government authority*

## INTRODUCTION

In the legal doctrine, the state does not know a unanimously accepted definition, it being defined as: political organization on a certain territory, made up of all state organs; a way of organizing the political power in the form of the state power in order to fulfill the will of the holder of this power, that is the people, whether the exercise of it is carried out directly by the people or indirectly, through its representative bodies; the main political institution of the society exercising the sovereign power ensuring the organization and the management of the society through the prerogative it has to elaborate and apply the right, which observance can be guaranteed by the force of constraint.[2]

The state of law is not just a formal legality which assures regularity and consistency in establishing and implementing the democratic order in the country, but justice based on the recognition and full acceptance of the human personality. The principle of the state of

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[2]Gheorghe Costachi and Petru Hlipca, "Organization and operation of power of the state of law," *Journal of Philosophy, Sociology and Political Sciences*, 3 (2013): 375.

law, enshrined in the preamble to the Constitution, addresses the Constitution in its integrity. This principle substantiates the need for adequate protection against arbitrariness by the public authorities.[1]

The constitutional valence of the principle of state of law implies supreme values, that implies the „power" of the law, the subordination of the state to the law, the legal option of „the law" to oversee and exercise a control of politics, as well as the suppression of any abusive aspirations of state entities. The effects of the state of law generate a series of guarantees: correlation of laws, observance of human rights and fundamental freedoms, ensuring good investment stability, and consequently respect for judicial guarantees.

These guarantees also produce judicial control of the acts issued by state authorities, respect for the security of the legal relationship, the establishment of political pluralism, as well as the freedom of opinion and expression, freedom of association.

In order to comply with these guarantees and for the good functioning of the state of law, an order ambiance is required, within which the exploitation of these freedoms and range of „rights" of an individual / person are not absolute, being in correlation and interdependence with the freedoms and the range of „rights" of other individuals / persons or communities.

## THE CONTENT OF THE PAPER

During the course of the period of development of the human society, a certain power of administration and management of the social community was stressed. Regardless of the type and the quality of the power for exercising it, it was necessary to apply the method of convincing and constraint.

In the legal doctrine, the existence of a distinction between power and authority is envisaged, consisting in the fact that the exercise of power leads to force, violence and constraint, while authority manifests itself rather as value above the interests of individuals, decision-makers or governors. The authority belongs to an institution (president, judge, general, parent, etc.) which requires respect, compliance of individuals without resorting to force, influence, and persuasions. The Authority is

[1] Alexandru Tanase et al., *Compendium of the jurisprudence of the Constitutional Court of the Republic of Moldova* (Romania, 2017), 9.

present in any group, community or corporation with hierarchical internal organization; the more it is present in political society, in the world of political agents. The functioning of the authority in the state of law implies the submission, compliance of the members of society with the requirements of the norms of law. In this case, the relations of domination - obedience, command - listening, decision - execution do not imply for the citizens the violation of their own freedoms or their quality of active participants in decision-making or expressing opinions on the content of draft laws[1].

Considering that the method of persuasion, in narrow sense, represents the psychic phenomenon and an element of human consciousness, certain means influence the person's conduct.

Equally an instrument in influencing the behavior of a person or social group is the constraint.

In substance - constraint is the objective aimed at the safety of the person, of the community as a social group, of acts or deeds that disregard the norms of cohabitation in a certain social environment.

However, the achievement of these tasks in democracy must respect the values of the state of law, democracy itself and respect for the rights of the person. Therefore, the means to achieve these objectives shall be done in line with the legal, appropriate and effective character, achieved in the right term, being in compatibility connection with the process of modernization and technologization of the social community, in particular, and of the state - in general.

These procedural acts, *inter alia*, have the objective of protecting against certain criminal phenomena such as the one of corruption.

For these reasons, it must be stated that the protection of the rights and interests of a person is not an absolute action without a limitation, being impossible to them to be exercised in *absurdum*, but can be subject to restrictions that are justified by reference to the aim pursued. As an example: the right to justice, viewed in the light of Article 6 of the ECHR, is a guaranteed, but not an absolute right, being restricted by the observance of a number of formal and substantive conditions of the act of referring the court.

In this regard, we will be in the presence of a behavior that highlights two interdependent conditions:

[1] Martian Iovan, *Power, Authority, and Counterfeiting of Power Abuse* (Chisinau: Scientific Annals, IV$^{th}$ edition, 2003), 85.

- *the freedom of the person* – which consists in the possibility that each member of the social group or of the society as a whole has or ought to have, oriented to act in accordance with its interests, without being subjected to a physical [which is the pressure that a force which cannot be resisted is exercised on the physical energy of a person, so that a crime or a criminal offense is committed] or psychic [being the action directed towards the person's psyche, towards the person's internal forum, having a non-physical character, the psychic constraint having a psychological composition of manipulation, psychic conditioning] constraint.
- *the ability of the person to decide* – being the option and willingness of the individual to choose between several solutions and willingness to act, highlighting also a person's responsibility for his behavior.

Thus responsibility is thus presented as a conscious attitude, which is assumed by the person towards his own actions in relation to the rules in the community. On the other hand, this attitude is the commitment of the person to achieve the goals that are set in the community, and consequently the identification of the individual and his own values with the interests and values of the collectivity as a social community.

Therefore, the violation or disregard of the values set in the community leads to the accountability of the person, so there are differences between these two elements: responsibility and accountability.

As indicated *above*, the influence of the person's behavior is also achieved by the effect of constraint - being the form that causes the person to act in a certain way.

Regarding the functionality of the state of law, we can say that the observance of the requirements of the state of law implies that the state itself at one point bears the coat of constraint orders.

The state of law thus becomes a constraint order, an order that justified the police state, a theory that has produced important changes in the traditional legal thinking, capturing the attention of the theorists of law. The criticisms come from several directions, of which we can recall, on the one hand, the critique of the state's identification with the law, the critique of the application to the juridical order of a formal mathematical logic or, on the one hand, a critique of the concept of purity of the object of the science of law. Thus, the one that led to the establishment of a state

of law is the identification of the state with the law, the theory characterized by objectivism, resulting from the very importance the author attaches to the legal norm and the constructivism elaborated on the basis of a concept of prioritization in the legal system based on the constitutional norm.[1]

Since the state of law constituted the culmination of the constitutionalization, having as an essential feature the subordination of all to the law, including the state (through its institutions), impose certain duties of the state:

- compliance with the law by the one who has edited it - being obligations stemming from the principle of the preeminence of the right;
- respect for the foreseeable and clear nature of the laws that dictate them;
- the implementation of justice only on the basis of law, so that the establishment and guaranteeing of the rights of the person is achieved at the level of the international standards.

The state of law has generated the power to be structured and subject to the law, being carried out a competition exercise between:

- the values of the state of law and the values of the person,
- the needs of the state and the needs of the person,
- including the existence of mechanisms made available to the person to ask the state to verify the quality of the law - by exercising the constitutionality control of the laws.

The Constitutional Court of the Republic of Moldova, by the decision number 2 of 09.02.2016 interpreting Article 135 of the Constitution[2] *[(1) The Constitutional Court: a) exercises, upon appeal, the review of constitutionality over laws and decisions of the Parliament, decrees of the President, decisions and ordinances of the Government, as well as over international treaties to which the Republic of Moldova is a party; b) gives the interpretation of the Constitution;[...]g) solves the pleas of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice;[...].(2) The Constitutional Court carries out its activity on the initiative brought forward by the subjects provided for by the Law*

[1]Vanghelie Mariana-Mihaela, *Administrative Constraint and State of law* - Summary - Doctoral Thesis (Bucharest: 2015), 5.
[2]*Constitution of the Republic of Moldova*, adopted at 29.07.1994.

*on the Constitutional Court"]*, held *inter alia*, that, starting from the subsidiary nature of ECHR mechanisms, Member States have the obligation to extend national human rights protection mechanisms in line with the commitments deriving from the ECtHR's streamlining process undertaken at the Conferences from Interlaken (February 18 - 19, 2010), Izmir (April 26 - 27, 2011) and Brighton (April 19 - 20, 2012).

The exception of unconstitutionality is a means of defense by which the party called before a court invokes the unconstitutionality of a legal norm. The exception of unconstitutionality, with its peculiarities, represents a means of indirect access of persons to the constitutional litigation court through the court[1].

In the same context, the Constitutional Court in the *aforementioned* decision (point 79-80) found that „the concrete constitutionality control of exceptional status is the only instrument by means of which the citizen has the possibility to act in order to defend himself against the legislator himself, if, by law, its constitutional rights are violated"; „the right of citizens to have access to the constitutional court by way of the unconstitutionality exception is an aspect of the right to a fair trial. This indirect way, which allows to the citizens the access to constitutional justice, also gives the Constitutional Court as a guarantor of the supremacy of the Constitution, to exercise the control over the legislative power with regard to respect the fundamental rights and freedoms catalog".

Another instrument defining the state of law, by which the person in order to respect his rights and interests, has the mechanism to check the functionality of the state institutions through the judicial control of the administrative acts issued by the state authority.

This exercise of the procedure is carried out by the notification of the court of common law, subject to following certain conditions of form and content of the act of referral (the request for summons) and the procedures to be accomplished (court procedures, compliance with rules of evidence, etc.).

[1]Decision number 2 of 09.02.2016 of the Constitutional Court for the interpretation of Article 135 paragraph (1) letters (a) and (g) of the Constitution of the Republic of Moldova (exception of unconstitutionality), point 53-54, *The Official Gazette* 55-58/9, Chisinau (2016).

Constraint, therefore, does not produce negative effects through its „existence", but by the functions it exercises ordains and creates a balance between the state and the person, viewed as a distinct subject of law.

Thus, even if the constraint places certain borders on the exercise of the rights and interests of the individual, mutually, the citizen, with all the rights at his disposal, can influence the state's activity by imposing certain rules of good functioning.

## CONCLUSIONS

Taking into account the principles of the state of law, which is organized and functions within the limits of the desired parameters, the legal nature of the constraint is governed by the same valence of legality and the preeminence of law. However, the compliance with these requirements would be inconceivable in the absence of separation of powers in the state and in the absence of an independent justice.

## BIBLIOGRAPHY

**Books**

1. Tanase, Alexandru. Rodica Secrieru. Lilia Rusu. Maria Strulea and Natalia Vilcu-Bajurean. *Compendium of the jurisprudence of the Constitutional Court of the Republic of Moldova*. Romania, 2017.
2. Vanghelie, Mariana-Mihaela. *Administrative Constraint and State of law* - Summary - Doctoral Thesis. Bucharest, 2015.
3. Voicu, Costica. *General Theory of law.* Bucharest, 2002.

**Articles in a print journal**

1. Costachi, Gheorghe and Petru Hlipca. "Organization and Functioning of Power under the State of law." *Journal of Philosophy, Sociology and Political Science* 3 (2013): 375.
2. Iovan, Martian. "Power, Authority, and Counterfeiting of Power Abuse." *Scientific Annals*, IV$^{th}$ edition. (2003): 85.

**Legislation**

1. *Constitution of the Republic of Moldova*, adopted at 29.07.1994.

**Case Law**

1. Decision number 2 of 09.02.2016 of the Constitutional Court for the interpretation of Article 135 paragraph (1) letters (a) and (g) of the Constitution of the Republic of Moldova (exception of unconstitutionality), *The Official Gazette* 55-58/9 (2016).