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THE UNIVERSALITY OF THE RULE OF LAW – SOME CONSIDERATIONS

Rainer ARNOLD¹

Abstract:

The rule of law is at the center of contemporary constitutionalism. It means the binding and exclusive application of law by the institutions endowed with public power. These processes, acts, omissions and also factual processes, must comply with the law. There must be no lawless spaces. Political and legislative discretion is also not free of law. The choice of means, the timing of their use and their content are genuine tasks of politics, but their use, in whatever variant, must not contradict the law.

Keywords: rule of law; contemporary constitutionalism; separation of powers; order.

The problem

The rule of law is at the center of contemporary constitutionalism. Is the rule of law a conceptually necessary structural principle of a legitimate legal order? Does this apply generally to all legal orders, in the state as well as in the extra-state supra- and interational) sphere, i.e. universally, wherever institutional public power is exercised over individuals?

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In order to come closer to this question, we must first define what the rule of law is.

In this context it has to be underlined that a distinction must be made between normative reality and perceptions of normativity (Arnold, 2023, pp. 83-93; Arnold, 2022, pp. 41-56).

Normative reality is the purpose of all law and of all state or extra-state organizations based on the rule of law, namely, the protection and promotion of human beings. Normative reality refers to what actually exists and this is man in his/her dignity - as an anthropological fact.

Perception, on the other hand, is how this fact is recognized: in political and legal conception and implementation, that is, in laws, jurisprudence, political decisions, even in the constitution itself.

Perception ideally coincides with reality, but it often diverges temporally and regionally. If we ask the question about the universality of the rule of law, normative reality is the relevant point of reference.

Universality thus arises when the rule of law is inherent in an order by its very nature (conceptual approach) or when it is realized universally or quasi-universally in legal orders (comparative approach).

1. The law as exclusive orientation in the exercise of public power

The idea of the rule of law: the *Rechtsstaat* - the state based on law; *l'Etat de droit*, *lo Stato di diritto*; the *community of law* - the supranational organization bound by law - are the central concepts of contemporary constitutionalism. In this context, rule of law means the binding and exclusive application of law by the institutions endowed with public power. These processes, acts, omissions and also factual processes, must comply with the law. There must be no lawless spaces. Political and legislative discretion is also not free of law. The choice of means, the timing of their use and their content are genuine tasks of politics, but their use, in whatever variant, must not contradict the law. Since there are various possibilities of design, this is a matter of free design, of discretionary leeway, of political discretion. But if one of the design options is not compatible with the law, it is contrary to the rule of law and therefore violates the constitution (Arnold, 2015, p. 54).

2. The human-related finality of law - the anthropocentrism of the rule of law

The ultimate finality of law is man, to protect and promote man. Gustav Radbruch rightly states (*Rechtsphilosophie*, 1973, pp.119-120) that this basic reference of law to man forces us to determine the finality of the rule of law and also of the legal community in the same way. The constitutional state, the community of law is necessarily anthropocentric. Only the value-bound state can be a constitutional state. At the center of these values is human dignity, with which freedom of the individual as a principle is necessarily connected and to which people are entitled by virtue of their being human. Human dignity, freedom of the individual as a principle and equality form the basic constitutional value system that characterizes the constitutional state. It is irrelevant whether these values are explicitly expressed in the constitution; in any case, they exist at least implicitly (Arnold, 2023, pp. 83-93).

3. Exclusive orientation to law means orientation to the totality of legal norms in their hierarchical structure

Orientation to law means orientation to the entire binding legal order, and to external law, in its hierarchical order of precedence applicable to internal law and in accordance with the conflict-of-law rules relevant to external (international and supranational) law. In internal law, it is necessary to emphasize the primacy of constitutional law over other internal norms, which derives from the essence of the constitution as a fundamental order, superior to the specific order of legislative and other legal acts. Thus, it is not decisive whether the primacy of the Constitution is explicitly embodied in the text of the Constitution. In any case, it is inherent in a constitution, provided that, as a rule, it is formal constitutional law distinct from ordinary statutory law. One of the important exceptions is Great Britain, which subscribes to the dogma of parliamentary sovereignty, which has since been relativized in several respects. The supreme internal source of law is the parliamentary act, although here, too, there are tendencies to dissolve the distinction

between substantive constitutional norms and simple legislation by recognizing a constitutional statute, as emphasized in the Miller case¹. A parliamentary act of this kind should only be expressly but not implicitly repealable or modifiable by a later piece of legislation. The (relatively weak) safeguard of such a "special" legislation is not a higher position in the hierarchy of norms but the rather political safeguard to allow such a derogation only on the basis of a politically conscious, often controversial decision.

It should be emphasized for the EU member states that the supremacy of supranational law claimed by the EU even over the entire national constitutional law does not cancel the primacy of the national constitution in the national legal order even if one follows the absolute view of the supranational institutions (See ECJ Internationale Handelsgesellschaft ECLI:EU:C:1970:114, para. 3.). It is not a question of hierarchy within the same legal order, but of the primacy of the applicability of another legal order, which makes quite a difference dogmatically. The primacy of the constitution in the national legal order remains unaffected by this and does not lead to the denial of the constitutional primacy as an essential feature of modern constitutionalism.

Moreover, the absolute primacy of supranational law is also relativized by the increasing emphasis on national constitutional identity by the constitutional courts of the member states in application practice². An unresolved problem is how to reconcile this national law-centered perspective of the constitutional courts with the supranational perspective

¹ See <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment-accessible.pdf> paras. 66 and 67. See further <https://www.uniset.ca/other/cs2/2003QB151.html> in particular paras. 58, 59 and 63.

² For Germany see FCC (Federal Constitutional Court), Lisbon Treaty decision http://www.bverfg.de/e/es20090630_2bve000208en.html (Engl transl.) paras. 218, 219, 239 etc.

of Article 4 TEU, the supranational perspective of the national identity of the Member States.

We can therefore conclude that the national rule of law of the EU Member States also includes the orientation towards supranational law, i.e., in addition to the obligation to observe international law, it is another essential part of the national rule of law.

4. The separation of powers as an essential element of the rule of law: functionally determined exercise of public authority.

The separation of functions within the (in the supranational community of the EU relativized) uniform state power has a power-limiting, the individual liberty and also the democratic system promoting effect, makes at the same time possible the balanced co-operation of the institutions wanted by the constitution, increases the efficiency of the task realization by their appropriate institutional assignment and permits due to transparency the necessary control (Badura, 2003, pp. 313-314).

Of essential importance is the "organizational and functional" (Badura, p.314) division of state power, which counteracts an excess of functions and thus an abuse of power. The necessity of a division also arises from the totality of the constitutional order and from the nature of the functions:

- the formation of the specific will of the people, that is, of the totality of individuals in the political unit, through their representatives in parliament in the form of laws adopted by majority vote and conforming to the constitution as a basic order (or else through direct, plebiscitary decisions) as acts of individual self-determination, postulate of human dignity,
- then the execution of this will by concretization and realization of the law in the individual case and
- independent judicial control to ensure the proper exercise of public power through legislation and administration (Zoller, & Mastor, 2021, p. 3215 et seq.; De Vergottini, 2022, p. 581 et seq.).

Two traditional basic principles are of particular importance in this context: the *primacy of the legislation* over the other functions and the *reservation of the legislation* in the case of interference with freedom.

Through the legislation, the people, i.e. the totality of individuals in a community, expresses its specific will, as already explained. This is political design, which becomes a legal act, i.e. legislation, through the majority principle. The execution of the law is the subsequent concretization by institutions, which are also legitimized, albeit indirectly, by the people, but which do not engage in political shaping as the legislator, but concretize the will of the legislation in the individual case.

This relationship between the legislature and the executive power essentially results in the duty to observe the legislation, i.e. its primacy. However, the legislature does not have unlimited power; the idea of separation of powers does not allow it to exercise a genuine administrative function. This is not contradicted by the fact that there is also administrative activity independent of the legislation, for example in the area of planning; but here, too, the law has priority and guides or limits administrative activity.

Nor may the legislature, any more than the administration, assume the genuine function of jurisdiction, if only because it acts politically, while judicial activity is based on strict independence and neutrality, i.e. exclusively on law-orientation.

The functions are, however, intertwined to a certain extent due to the necessity of their interaction. Concerns from the perspective of the rule of law could only arise if the functional core were to be taken over by another function. A functional core shift is inadmissible in any case.

The further rule-of-law principle of the *reservation of legislation* is freedom-securing. The fact that the legislation expresses the will of the people as the totality of individuals in a given community, it reflects the consensus on the restriction of freedom. Therefore, the reservation of legislation, that is, the reservation that a restriction of liberty can only be made by legislation or on the basis of legislation, is to be explained from this context.

The reservation of legislation also has a further effect insofar as the executive power, instead of a law, may only interfere with freedom by means of a legal act issued by it if the constitution permits this (which is not the case in Germany, where parliament-independent, government- or administration-autonomous normative interventions are not permitted) or if a formal-legal, i.e. parliamentary, permission exists and determines the intervention by the administration with sufficient precision.

If, as has just been explained, this concerns freedom for the individual, there is also a more general connection with the liberal structure of the constitutional system (Badura, 2003, p. 314), i.e. with democracy. The separation of powers requires that the essential decisions in a community, i.e., beyond the encroachments on liberty, also the essential life arrangements that are not of an encroaching nature, be made by the people, the individuals. The basic decisions require direct democratic legitimation and must be made by the people or at least by their representatives in parliament (Hufen, 2020, pp. 109, 110).

5. The law and its nature as an instrument of order

If law is to be an instrument of order, it must fulfill this function sufficiently: it must be clear, precise and definite, and it must be possible for the addressee to understand it, since only in this way can his obligation to obey come into effect. In the case of legal norms that stipulate requirements, the violation of which is punishable by law, particularly strict requirements must be met in terms of clarity and precision (see for example Art. 103.2 German Basic Law). The further development of the law beyond the text and analogies are therefore generally inadmissible in this special context and incompatible with the rule of law. So-called indeterminate legal concepts that require concretization by the institution applying the law in the context of their application are permissible. Likewise, it is permissible to provide for discretionary powers for the administration in normative terms, which must, however, be exercised without discretionary errors.

6. Legal security as an element of order and as a constitutional requirement

Law must be stable and secure. Law can fulfill its function of organization and order only if it is stable. The fulfillment of the constituent elements of a legal norm must create a secure legal situation.

The creator of a legal norm can annul it by *actus contrarius* or can change it. However, this is only possible if this is done with the same type of legal act and basically in the same procedure as when it was enacted. If an amendment is subject to aggravated conditions, as is usually the case with a constitutional amendment, this type of law should enjoy special stability. This is generally the case with a constitution as a basic legal order.

However, the stability of a legal situation often also has an important constitutional aspect. Legal certainty as an objective element and confidence in the law, in a legal position once it has been legally achieved, is the subjective element of the protection of confidence, which is also regularly anchored in constitutional law. This anchoring ultimately lies in the principle of human freedom as an element of human dignity; restrictions on freedom, and this is also the elimination of a legally obtained legal position favorable to the individual, have an exceptional character and may only be made if they are necessary, that is, proportionate.

The protection of legitimate expectations (Young, 2021, p. S179 – S207) is an extremely important aspect of the rule of law.

Legal certainty also means that the legislature cannot *retroactively* intervene in already existing legal positions to the disadvantage of the beneficiary - the fundamental prohibition of retroactivity is an important aspect of the rule of law (Korioth, & Müller, 2022, p.68 et seq.). If a process subject to statutory regulation has already been completed in the past, it cannot be legally invalidated retroactively. A retroactive burdensome intervention is then contrary to the rule of law. If the process has not yet been completed, but has an effect in the present and also for the future, a change in the legal position, even negative for

the person affected, may be possible if a weighing leads to the conclusion that there is no overriding protection of legitimate expectations.

Finally, it should be mentioned that legal certainty also requires what is known as legal peace. Disputes must have an end point. The procedural codes therefore provide only a limited number of possibilities for repeated judicial review of a dispute. Once the last instance has spoken, formal legal force has been achieved; legal peace then outweighs the question of the correctness of a decision.

7. The principle of proportionality as an instrument for delimiting freedom and restriction

As mentioned above, the fundamental freedom of man flows from his dignity. Restrictions on freedom can only be understood as exceptions to this principle, otherwise freedom as a principle would not be upheld. The line of demarcation results from the application of the principle of proportionality (Favoreu, Gaia, Ghevontian, Mestre, Pfersmann, Roux, & Scoffoni, 2022, pp. 145 et seq.; Le juge constitutionnel et la proportionnalité. *Annuaire international de justice constitutionnelle*, 2010, pp.87 - 439). This principle, which was developed early on in the German legal system by the Federal Constitutional Court (Hufen, 2020, pp.113-120), following the case law of the Bavarian Constitutional Court (Lindner, Möstl, & Wolff, 2009, pp. 601-603), states that restrictions on freedom which are indispensable because of the “community-relatedness” (see German FCC vol. 4, 7, 15/16) of human beings may only be imposed for legitimate reasons of community welfare, and then only with the consent of the people affected by the restriction as expressed in a formal piece of legislation. The restriction must be suitable to realize the legitimate reason of community welfare or at least to promote its realization. Above all, the restrictions must be necessary in their intensity; if there is a milder but equally effective means, it must be chosen. The principle of freedom is only respected if the intervention in freedom is limited to the necessary minimum. Finally, the intervention must also be proportionate in a narrower sense. The individual interest in maintaining freedom must be balanced against the public interest of the

community to be pursued. Only if and to the extent that the public interest prevails can the interference be carried out.

The principle of proportionality is now a widespread instrument of universal constitutionalism, and its practical flexibility is extremely important for the protection of liberty and the rule of law.

8. Effective judicial protection as a necessary safeguard for the Rule of Law

Judicial, i.e. politically independent, control of the exercise of public authority is a necessary safeguard of the rule of law. Even in the earlier historical forms of the rule of law, such as those that emerged in Germany in the 19th century, judicial control of executive acts was regarded as an essential element of the rule of law.

Judicial protection against encroachments on the freedom of the individual must be effective, that is, it must be provided without gaps or obstacles by the legal system (Callejón coord., 2020, pp.311 et seq.). This does not preclude compliance with procedural requirements, insofar as they do not constitute a hidden obstacle to access to legal protection. Compliance with time limits, provided they are not unreasonably short, is also compatible with the rule of law and is even desirable for the sake of legal peace. The requirement of effective judicial protection also fundamentally precludes legal and court-free spaces, at least in the case of encroachments on liberty.

The courts are also responsible for monitoring public authority on the basis of the constitution and this falls under the guarantee of judicial protection required by the rule of law.

The constitutional review of legislation is also required by the rule of law, even if this realization has not yet prevailed everywhere. In today's constitutionalism, this is increasingly carried out by separate constitutional courts in the sense of *Hans Kelsen's* model, but it is also a fundamental competence of the ordinary courts if the constitution does not concentrate the exclusive right to reject legislation with a constitutional court. The right to review the constitutionality of legislation is, in any case, a matter for every court, just as it is its duty to

interpret laws, as far as possible, in conformity with the constitution. In the case of clear unconstitutionality, the courts have only the option of not applying this law, or, depending on the regulation in this legal system, the pronouncement of inapplicability or, even more frequently, of the *ex nunc* or *ex tunc* nullity what is regularly reserved for a constitutional or supreme court. The constitutional judicial review of norms is, as it is sometimes expressed, the “perfection of the rule of law”.

Conclusions

Overall, we can state that the elements of the rule of law identified in the course of the above considerations arise from its essence and are therefore universal. This is true at least for the functional core of these elements, even if their design may differ in detail.

For this reason alone, we can conclude that these elements are generally valid, i.e. universal. We also find them, partly written, in the texts of the constitutions of many states, regardless of geographical region, historical tradition or culture. What is not expressed by the text of the Constitution is implicit, insofar as it concerns the elements dependent on the essence of the rule of law. In most cases, jurisprudence has made manifest these unwritten parts of the Constitution and developed the details.

One can substantiate this statement by analyzing the text of the various constitutions and by examining the jurisprudence in other countries. However, this cannot be done in this short article and is reserved for later studies.

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BEING AND NOT BEING: THE BORDERS BETWEEN NATIONALS AND STATELESS PERSONS. THE CASE OF THE BALTIC COUNTRIES

Alina Elena RAMARU¹

Abstract:

Not only the right to a nationality is a recognized human right, but also the statelessness supposes a lack of other rights, though without a nationality, a person has no legal protection, no right to vote, no employments and no education. More than four million of stateless persons are living all over the world and more than half million in Europe. The case of the no citizen people with alien passport or persons without a determinate nationality is a particular case of statelessness in the Baltic Countries. The status of these persons based on the national legislations has its echo and influences their foreign status in other EU countries like Spain. Although UNHCR planted on abolish the statelessness until 2024, this doesn't seem realistic, therefore urges a more implication from all the states, new practical administrative measures or new conceptions.

Key words: *stateless persons; nationality; no citizen; alien's passport; nationality challenges.*

Introduction

“To be stripped of citizenship is to be stripped of worldliness; it is like returning to a wilderness as cavemen or savages”, said Hannah

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Arendt in an essay published in 1951; this phrase is often quoted to talk about statelessness and it was taken up again on the occasion of the 70th anniversary of the Universal Declaration of Human Rights.

Hannah Arendt is a German philosopher who not only spoke and wrote about statelessness, but lived it as a person. Her work has marked social and political thought after the Second World War, and her reflections often appear in different UNHCR papers and in her repeated requests to governments to take strong measures to curb statelessness. Not having a nationality means not only lack one right but many more, such as education, the right to vote, the right to a job, etc. (UNHCR, n.d.)¹ Being stateless means being deprived of the right to have rights. (Arendt, 1951).

Despite the work carried out in recent decades by international organizations and the states themselves, despite the UNHCR objective of abolishing it before 2024, statelessness continues to be a global and current problem.

The statelessness it is also a systemic challenge affecting millions of people placed in vulnerable situations.

After the pandemic (with hardly any statistics in that area) and Ukraine War which determined intensified cross-border migration and massive refugee influx, experts consider that the statistics on the number of stateless persons have to be seriously revised.

According to the Institute of Statelessness and Inclusion, there are more than 4.2 million stateless people living in 76 countries around the world, and although it has been possible to notice a certain decrease in recent years and in some countries, the figures are still worrying²(ISI, 2020).

¹ UNHCR, https://eacnur.org/es/blog/hannah-arendt-de-la-apatridia-al-pluralismo-tc_alt45664n_o_pstn_o_pst

² This note offers an overview and analysis of global statelessness statistics for the end for the end of 2019, as published in June 2020 in UNHCR's 2019 Global Trends Report. Due to this publication, in Thailand, Estonia and Latvia – three countries in the top 10 of largest reported populations globally – the data shows a decrease of numbers, but only at a rate of 2.5%, 8.5% and 10% respectively over the past three years.

1. Terminological distinctions

In order to talk about statelessness and its varieties, if there actually can be something between being and not being, an important point that must be addressed on this subject is definitely the distinction between nationality and citizenship and its relationship with statelessness.

In the *Nottebohm* case (*Liechtenstein v. Guatemala*), second phase, the International Court of Justice defined nationality as follows: "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State." (*Nottebohm Case (Liechtenstein v. Guatemala) (second phase) (1955) ICJ Rep 4, 1955*)¹

Therefore, nationality is the closest and most effective legal bond that unites the individual to whom that nationality has been conferred

Globally, a total of 754,500 stateless people acquired or confirmed their nationality between 2010 and 2019: important progress and encouraging when seen in absolute numbers, yet less so when understood in percentage terms of the global stateless population. This must also be understood against a context in which inherited statelessness continues to cause tens of thousands of children a year to be born without access to a nationality and where new situations loom that have the potential to generate large-scale statelessness.

¹ *Nottebohm Case (Liechtenstein v. Guatemala) (second phase) [1955] ICJ Rep 4*. The primary focus of the ICJ ruling revolved around the State's obligation to provide diplomatic protection. Liechtenstein filed a case against Guatemala, asserting that Guatemala was mistreating one of its citizens in violation of international law. The ICJ dismissed the case, citing, among other reasons, Guatemala's argument that Mr. Nottebohm did not have a genuine connection with Liechtenstein. The Court upheld the concept of 'effective nationality,' which is often referenced with this widely quoted passage.

with the population of the State that granted that nationality (Hernández Moreno, 2020).

Among the multiple doctrinal and jurisprudential definitions of nationality, we must highlight the particular distinction that Weis establishes between nationality as an element of national law and its role as an instrument of international law. In relation to the latter, the classical doctrine defines nationality in this context as a relationship between a subject of international law and the objects of that same law. This relationship implies the existence of sovereign States and the application of rights and duties between them. As for nationality as an instrument of national law, the author maintains that it is a notion defined by state legislation, which implies that its meaning and content depend on this legislation. Therefore, there is no single definition of nationality, but as many as there are existing States. However, the Weis defends a general definition that describes nationality as a mechanism that indicates a special bond between the person and the State that grants reciprocal rights and duties, different from those that arise from the relationship between a foreign person and the same State in question. (Weis, 1979)

The doctrine, in a more sociological aspect, usually also relates nationality to a sense of national identity. National identity is not only given by the fact of being born in a certain country, but there may be cases in which people who are not originally from that territory feel a bond of belonging to the customs and traditions of a certain nation to which they want to belong. In other words, we would be facing two senses of nationality, based on the differentiation of the bond, on the one hand the bond of the citizen with the state (political or civic nationality) or the bond of the citizen with a group of people (ethnic nationality). (Hernández Moreno, 2020)

Nationality, as we have seen, is usually defined from a legal and political perspective, understanding this legal term as the bond that unites a subject with the political organization called the State.(Fuentes, 2008)

But apart from the legal and political bonds that give rise to a certain nationality, we have seen that nationality is also related to the sense of identity and belonging to a geographical space in which traditions, worldviews, language, history are shared.(Figuera Vargas & Robles Arias, 2019)

The bond between a person and a specific nation is determined by several characters and in order to determine it, two opposing conceptions have been used: the objective and the subjective. The objective perspective is based on factual elements determined by ethnology, such as: territory, language, religion, race or culture. Regarding the subjective conception, it frames the nation in terms of an ideal and spiritual order and considers that the nation derives from a state of consciousness, shared by the members of a specific group, which distinguishes itself from other similar groups. (Rousseau, 1966)

As for the term citizenship, in most cases it is used as a synonym for the term nationality, both colloquially and in international law. Although in most languages and in UNCHR¹ terminology they are used interchangeably (Economic and Social Council, 2022), if we dig deeper there are certain nuances that differentiate both terms. The majority doctrine considers that nationality has a broader spectrum than citizenship. Likewise, citizenship implies the set of rights and duties that the citizen has: political rights. The terms citizenship and nationality complement each other since citizenship is the consequence of nationality, that is, a state grants citizenship (political rights, such as the right to active and passive suffrage) to the person who is already its national by fulfilling certain requirements, while a person can be a national but not a citizen because they do not have certain rights, such as minors, people declared to be unfit because of a criminal conviction or psychological circumstances. (Córdova, 1953)

According to Barbara von Rutte, the discussion shifts from the 'right to nationality' to the 'right to citizenship' in order to reflect a contemporary, more inclusive and rights-based understanding of equal membership in democratic states (von Rütte, 2022; Kesby, 2012).

¹ The terms nationality and citizenship are often used interchangeably at the international level to describe the legal bond between an individual (the national or citizen) and a State. According to the existing practice of UNCHR (global reporting on statelessness statistics, Recommendations), nationality and citizenship have the same meaning

A particular case is the European citizenship that is granted to any national of the countries that make up the European Union. Likewise, in the preamble to the Maastricht Treaty, the EU Member States have already stated that they are “resolved to create a common citizenship for the nationals of their countries”. Article 8.1 stated that: “an EU citizenship is created. Any person who holds the nationality of a Member State will be a citizen of the EU Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. The current article 17.2 of the TFEU states that:

“EU citizens are holders of rights and are subject to the duties established in the Treaties. They have, among other things, the right:

1. a) to move and reside freely in the territory of the Member States;
2. b) of active and passive suffrage in the elections to the European Parliament”.

And finally, the term statelessness is defined by antagonism to nationality. The 1954 Convention (*Convention Relating to the Status of Stateless Persons* (adopted on the 28th of September 1954, entered into Force on the 6th of June 1960), n.d.) establishes the universal definition of stateless person in its Article 1:

“For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law”.

According to *Handbook on protection of stateless persons; under the 1954 convention relating to the status of stateless persons* of UNHCR the article 1(1) can be analysed by „breaking the definition down into two constituent elements: “not considered as a national...under the operation of its law” and “by any State”. When determining whether an individual is stateless under Article 1(1), it is often most practical to look first at the matter of “by any State,” as this will not only narrow the scope of inquiry to States with which an individual has ties, but might also exclude from consideration at the outset entities that do not fulfil the concept of “State” under international law“. And finally concludes: „indeed, in some instances consideration of

his element alone will be decisive, such as where the only entity to which an individual has a relevant link is not a State.”(UNHCR, 2014, p. 11)

The 1954 Convention doesn’t distinguish between *de jure* stateless persons and *de facto* stateless persons.

The handbook (UNHCR, 2014) addresses a range of issues concerning the identification and protection of stateless persons as defined in the 1954 Convention, but avoids qualifying stateless persons as *de jure* or the *facto* stateless persons as that terms appear nowhere in the convention.

The term *de facto* statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons¹. (UNHCR, 2014)

In spite of the fact that, as we have seen, the trend is to broaden or unify the range of rights that national citizens of certain countries have, as is the case with the European Union, the reasons that have given rise to the existence of nationality continue to exist: the need to establish the legal status of people and voluntary or forced migratory movements, the latter of which continue to pose a challenge to the international

¹ On *de facto* statelessness: Section II.A. of UNHCR, Expert Meeting - The Concept of Stateless Persons under International Law (“Prato Conclusions”), May 2010, <http://www.refworld.org/docid/4ca1ae002.html> : (1) *De facto* statelessness has traditionally been linked to the notion of effective nationality and some participants were of the view that a person’s nationality could be ineffective inside as well as outside of his or her country of nationality. Accordingly, a person could be *de facto* stateless even if inside his or her country of nationality. However, there was broad support from other participants for the approach set out in the discussion paper prepared for the meeting which defines a *de facto* stateless person on the basis of one the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad. (2) The definition is as follows: *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality.

community, such as the recent war in Ukraine. But in addition to a necessity, is the nationality a human right too?

2. Nationality as a human right

The seriousness of the stateless status and its strong consequences cannot be understood if we do not start from the definition of nationality as a human right.

The right to nationality as a civil and political right is codified in most international and regional human rights.

In this sense, article 15 of the Universal Declaration of Human Rights (*Universal Declaration of Human Rights*, 1948), provides that

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Therefore, the States that make up the universal system must guarantee the existence of a nationality and the prerogatives that derive from it. Therefore, the people who are protected within these protection systems have the right to nationality from birth and there are no conditions for obtaining it. Another thing is obtaining nationality through naturalization, which is part of the prerogatives of each State and its sovereignty in terms of the criteria for its acquisition. However, being faced with a fundamental human right, it is obvious that it is the responsibility of each State to comply and legislate or legislate or apply administrative or jurisprudential criteria of interpretation that avoid situations of statelessness.

The right to nationality imposes negative and positive obligations: not to interfere with the right, *protect* against interferences with the right to nationality by third parties, taking active and, if necessary, preventive, measures to ensure its full realization that can include legislative or institutional measures, such as foreseeing the necessary regulatory framework that allows for otherwise stateless children to acquire nationality based on their place of birth or descent to prevent them from becoming stateless. Barbara von Rütte concluded „having an effective and enforceable right to citizenship in a specific state on the basis of

one's actual social connections would fundamentally transform the relationship between states and individuals, between citizens and non-citizens, between belonging and exclusion. At a time when large-scale international migratory movements intersect with a re-emerging nationalism, the closure of territorial borders and the construction of symbolic boundaries of belonging and an increasing skepticism of the significance and potential of international human rights law, the novel interpretation of the right to citizenship suggested in this book would offer significant safeguards for the rights of individuals“ (von Rütte, 2022, pp. 397-402).

3. Nationality and immigration

Nationality and statelessness cannot be studied without taking into account the matter of immigration. Because a national of a country has certain rights in the country with which they have a bond and therefore a status, but once outside, said status does not disappear and they are entitled to certain rights based on the immigration law of the receiving state.

Ever since Roman Law, the concept of nationality was linked to that of immigrants, on which one of the fundamental principles of Private International Law was subsequently recognized. Likewise, the *Jus gentium* (Law of Peoples) and the *Jus civile* (Civil Law) gave a different treatment to foreigners and Roman citizens, although there are authors who consider that we cannot speak of private international law in Roman law since the *ius civil* and *ius Gentium* coexisted within a single political legal system (Pereznieto Castro, 1991). The *Jus gentium* or Law of Peoples included the institutions of Roman Law in which Roman citizens participated as foreigners, institutions that included the set of rules applied to all peoples without distinction of nationality. If this construction of the Roman Empire is related to the current legal reality, the State has the duty to protect the individual who is in the national territory, whether he is a national or not. As for the *Jus civile*, it was exclusive to Roman citizens, that is, it implied certain rights, including political ones, to which foreigners could not, of course, have access.

Related to the current legal-political systems, it would mean that not every citizen has the power to participate in the creation of the government, but only those who have those rights granted by the Constitution. Thus, the creation of the government as a general rule remains in the hands of the nationals, and not of all (for example, minors or criminally convicted do not have suffrage rights). Therefore, being a national does not necessarily imply citizenship, but citizenship implies being a national (Orantes, 2004).

4. “Non citizen” in Spain

We have seen both at a legal level and at a colloquial level what is a "national", "a citizen" and the diametrically opposite "stateless". But that what is a "Non Citizen" or a person with an Aliens Passport or as referred to in documents of the Ministry of Foreign Affairs of Spain "foreigners with undetermined nationality"?

In order to better understand these concepts, we have to go to the relatively recent history of the Baltic countries, especially Latvia and Estonia.

After the Second World War and for almost 50 years, Latvia and Estonia were under Russian occupation, forming part of the USSR. In this period the Russians took over the territory of the Baltic countries and many Russians established their residence there, while the Baltic population considered that it was an illegal occupation that violated international law (Rodríguez Suárez, 2015) or an occupation based on void pacts by operation of law, considering the case of the Baltic countries as a case of "continuity of states" ¹. (Van Elsuwege, 2004, p. 2)

¹ „Any analysis of the present situation has to take into account the burden of history. This is particularly true for the Baltic states, whose statehood is essentially based on the concept of legal continuity between the independent inter-war republics and the states that arose out of the disintegrated Soviet Union.⁹ The forcible incorporation of the Baltic states into the Soviet Union in 1940, on the basis of secret protocols to the Molotov-Ribbentrop Pact, is considered to be null and void. Even though the Soviet

After gaining independence in August 1991, the inhabitants whose ancestors lived in these territories before World War II automatically obtained Latvian, Estonian or Lithuanian citizenship. But those who came to these countries after World War II as well as their children obtained the status of *non-citizens in the case of Latvia or “individuals with undetermined citizenship” in the case of Estonia*.

The cases of Estonia and Latvia are very similar and occur in the same historical conditions and for the political leaders and the citizens of the Baltic countries themselves, the migrants who arrived in Estonia and Latvia after the Second World War are considered to have done so illegally and for this reason they refused to grant citizenship to that Russian minority. (Haeri Oyola, 2021)

The new rulers of Estonia and Latvia were nationalist in nature, as were their internal policies, which were aimed at "purging" their society of the Soviet presence.

The non-existence of rights or their violation in terms of Russian minorities is substantially more noticeable in Estonia and Latvia than in Lithuania. In the first two countries, these minorities cannot obtain citizenship, their participation in political life is extremely limited: they are excluded from the most important issues on the political agenda of both countries, they do not have the possibility to develop their professions on equal terms that their Estonian compatriots (they cannot be notaries, military, police, lawyers, etc.), have limitations on the acquisition of real estate and until recently, could not express themselves culturally in the Russian language.(Rodriguez Suárez, 2015) Hence also the economic inequalities that have resulted in the emigration of these minorities to other countries in the European Union such as Spain.

Unlike the “true Latvians”, the “non-citizens” are not only deprived of elementary rights but are even often called “Black”.

Of course, given the worldwide pressure for the eradication of statelessness and the interest of the Baltic countries to enter the EU and

Union occupied these countries for a period of fifty years, Estonia, Latvia and Lithuania continued to exist as subjects of international law.“

NATO, especially for security reasons, Estonia and Latvia have been forced to soften the requirements for said minorities can acquire nationality, following the recommendations of the EU. (Haeri Oyola, 2021). However, despite these recommendations, it is clear that the efforts have not been enough as Latvia and Estonia continue to be among the first countries in the world with "stateless people" according to UNHCR (ISI, 2020, p. 1 &4).¹

We say according to UNHCR, since the Baltic countries consider that it is not estictu sensu statelessness.

The inequalities to which these minorities have been exposed have also given rise to a migratory phenomenon and some of these "non-citizens" have arrived in Spain, before and after the entry of the Baltic countries into the European Union.

In Spain, the administrative practice in immigration and the scarce jurisprudence have not been uniform in conceptualizing or offering solutions to this new situation.

Although it would seem that the Russian minorities of Estonia and Latvia with "aliens Passport" or "Passport of non citizen" and recognized as "stateless" by UNHCR would have no problem in being recognized as such in Spain and thus be able to have all the benefits of such status, we will see that in practice this is not the case.

By way of example, in judgment 421/2016 of the National High Court(*Sentence 421/2016*, 2016) we have the appeal of an Estonian citizen (hereinafter we will call her "Belen") with "aliens Passport" whom she

¹ In Thailand, Estonia and Latvia – three countries in the top 10 of largest reported populations globally – the data shows a decrease of numbers, but only at a rate of 2.5%, 8.5% (75,599 stateless persons) and 10% (with 216,851 stateless persons)respectively over the past three years. Globally, a total of 754,500 stateless people acquired or confirmed their nationality between 2010 and 2019: important progress and encouraging when seen in absolute numbers, yet less so when understood in percentage terms of the global stateless population. This must also be understood against a context in which inherited statelessness continues to cause tens of thousands of children a year to be born without access to a nationality and where new situations loom that have the potential to generate large-scale statelessness.

had been denied stateless status. The legal basis first states that the plaintiff was born in TALLINN (ESTONIA) and is the daughter of a Russian father and a stateless mother (alive), the father having died in 2010, the plaintiff arriving in Spain in 1999. Her passport issued on 11/26/2007 was valid until 12/2/2007, but the Estonian Embassy does not renew it; instead, it certifies that she has "certain nationality" but that "she does not have Estonian nationality" and that "as this person does not have any valid document, Estonia cannot issue for that person a return permit to return to Estonia. The person can apply for new documentation, together with the Estonian residence permit (identity card), only in Estonia. The person cannot request a new identity document through the Embassy". For its part, the Russian Embassy has certified that the applicant is not a citizen of Russia. Having requested the report of the Ministry of Foreign Affairs of Spain, it replies: „The regime of these people of indeterminate nationality is the following: they do not have Estonian nationality, being considered as foreign residents in Estonia (...) they have the right to document themselves through the aforementioned passports or resident card; said documentation allows them to leave the Schengen territory for a maximum of 90 days; they are not required to perform military service; and the embassies and consulates do not consider them nationals, so they do not protect or document them; They only issue them a kind of safe-conduct when they have lost the documentation. Estonia has not signed any international convention for the protection of stateless persons. In order to issue the return permit it is necessary to have residence in Estonia. That is to say, "if a person has allowed the expiration date of their documents to pass without renewing them, residing in fact in a third country, it is most likely that they will be denied the issuance of a return permit to Estonia because they are no longer considered as a resident".

The report also indicates that "when they find themselves in Schengen territory or in a third state without valid documentation,...they often become de facto stateless in the classic sense of the word, unable to move or return to the place where they had settled their residence".

In view of this, a report related to Russia is also requested, and the embassy replied by means of a verbal note with the requirements to

obtain Russian nationality: „They have had a parent of Russian nationality who has resided in the territory of the Russian Federation. Having had USSR nationality, have resided and are residing in the states that were part of the USSR, without being granted the nationality of said states.“

The magistrates decide to reject the petition arguing that the plaintiff, despite having provided a certificate from the Russian Embassy stating that she is not Russian, understand that this does not imply that she cannot obtain Russian nationality.

If in 2016 the National Court denied Belén statelessness status, we will see how 5 years later she continues in Spain in a situation of "tolerated illegality" and without a determined nationality (*Sentence 1019/2021*, 2021). Having expired her passport and since the Estonian Embassy could not issue another passport, Belén requests an "identification card", a document that the Spanish state issues to foreigners who, for the reasons established in Law 4/2000 in relation to the RD 557/2011 are unable to be documented. It is denied at first considering that it does not prove a nationality and then it is argued that it does not meet the requirement of accrediting "exceptional reasons of a humanitarian nature, public interest or compliance with commitments acquired by Spain".

After assessing the evidence provided, the court upheld Belén's request, arguing "We understand that the documentation provided by the plaintiff sufficiently satisfies the requirements of article 211.3 of RD 577/2011 and that the statement contained in the appealed judgment that the reason why "after obtaining an identification and residence document in Estonia in 2007, she appears in Spain and requests his identification" has not been explained. Contrary to what was stated by the Administration, the documents provided by the plaintiff constitute indications or proofs of her identity, origin and nationality and she has also been accredited that she cannot be documented by the corresponding diplomatic mission or consular office.

Consequently, it is necessary to uphold the appeal and, with the reversal of the lower court ruling, recognize the right of the appellant to obtain the requested identity card.”

Obtaining the registration card does not give in itself the right to reside and work in Spain, although we understand that once having this identification document, it is possible to obtain all residence rights by demonstrating social or labour roots.

The situation of “non citizens in Spain” is not very different either. With the difference that in their case, the Latvian embassy does issue and renew the "passport of non-citizen" so the problem is not documentation but legal residence.

Furthermore, it must be said that when these citizens first arrived in Spain, the immigration administration was unaware of their special status, which is why many of them (with a non-citizen passport issued by Latvia) were issued a community NIE (Identification Number for Foreigners in Spain).

This is the case of Pavels G. who was first issued a non-EU residence permit when Latvia was not yet part of the European Union and when it expired, the administration itself decided to issue a community resident certificate. In 2010, within the framework of a criminal investigation that was later archived regarding the "non-citizen", the Canary Islands Government Delegation opened an expulsion file for reasons of public order, understanding that he had falsified the data referring to his nationality, since he was not Latvian but Russian. However, the Administrative Court number 3 of Las Palmas de Gran Canaria (*Sentence PA 138/2010*, 2010) in the judgment of May 24, 2010, decides to revoke the expulsion order, understanding that it has not been proven by the administration the offense of falsehood, nor about the documentation that was exhibited at the time that allowed him to obtain the certificate of residence. Although the expulsion order is revoked, the community residence certificate is annulled, without the "non-citizen" having been able to date to regularize his situation.

Summing up, we understand that administrative practice and jurisprudence in Spain have not been very resolute in the face of this problem, considering on the one hand that the situation of these non-citizens is statelessness in the strict sense but difficult to demonstrate in practice, since that it is not statelessness given that such citizens have the

option, at least theoretically, of being Russian or Latvian/Estonian. Therefore, in practice this has resulted in a tolerated irregularity.

Conclusions

In order to get out of the vicious circle that in the practice of immigration represents the solution to this situation, I consider that starting from the concepts of nationality, statelessness or citizenship, it would be necessary to conceptualize and accommodate this new reality of "non-citizen", all this while the humanity continues to drift apart from the conclusions of Kant who in 1784 warned that since the planet was spherical and since we all move on the surface of the sphere we have no other place to go, so the ideal would be the perfect unification of the humanity in a common citizenship.

However, in the last 200 years the world has been busy making the control of human movements the sole prerogative of the powers of the States and erecting barriers against all uncontrolled movements and the advent of the State coincides with the emergence of the stateless and the *sans-papiers*. (Baumann, 2003)

Although UNCHR seems to consider the situation of "non-citizens" as a statelessness, we see how in Spanish administrative practice it is not considered as such.

The issue is that if we are not facing a situation of statelessness, then we are facing a new concept not yet included in any of the existing ones but which needs study and immediate practical solutions.

If Spanish nationals have a range of rights, if community citizens or nationals of an EU state have another range of rights within Spain, if stateless people also enjoy certain rights and procedures, what do we do with non-citizens? We understand that one of the ways could be their regularization by granting a registration certificate in those cases in which they lack identity documents with their corresponding regularization as if they were any foreigner.

However, we must not forget that the right to have a nationality is a fundamental right and until reaching the Kantian ideal of common citizenship, it will be necessary to stop, re-evaluate concepts and try to

ensure that the practice abroad, before following cumbersome paths; we will have to configure this new situation, resorting to a transversal study and through the union of private, public, administrative, procedural international law and last but not least, through the philosophy of law, which allows evaluating whether the norm is adequate to guarantee the end that it intends to pursue and thus avoid latent conflicts that could lead to repeating war atrocities over and over again.

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RULE OF LAW, LEGAL CERTAINTY AND ECONOMIC DEVELOPMENT: FREEDOM OF ENTERPRISE IN THE SPANISH CONSTITUTION

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Abstract:

Legal certainty is one of the supreme values of the Rule of Law. Citizens have the right to know with certainty what their rights and duties are, the consequences that will be attributed to their actions or omissions, the predictability of the legal effects of his acts. The principle of legality, the masterpiece of the Rule of Law, has, above all, this purpose.

Confidence in the Law is not only a requirement of freedom, but also of the efficiency and prosperity of a society. Not just in the long term, but even in the short term, the prosperity of nations is based, more than on their natural wealth, on their civility, on the respect for the rules for coexistence, the market, contracts, property and, above all, of the Law, which is what keeps all of the previous, standing. Respect for the established law, compliance with the rules, the autonomy of the institutions, the separation of powers and their functions, the intervention and control of public spending, etc., is the secret of good government.

Keywords: rule of law; freedom of enterprises; good government.

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Introduction

Economics and law are disciplines with differing methodologies and differing objects of knowledge. Legal science has as its original task the interpretation of norms as a preparatory stage for the application of law. Reality is not something immediately relevant for legal science, but only as an object of regulation, as material content of the norm (Atienza Rodriguez, 2003).

On the contrary, economic science has as its purpose the understanding of a part of social reality, specifically that one which unfolds in the field of economic life. In economic models, current legal regulations have the status of one more piece of information to be taken into account when analysing the problem. While, for law, economic science is the perspective that reveals certain interdependencies and correlations, the knowledge of which is essential for the elaboration of regulations on concrete material aspects. For law, then, the contents of economic knowledge are binding elements for the construction of the normative structure (Mercuro, 1991).

Economics and Law, in short, are different ways of grasping the social order, with the substantial difference that economic science deals with the knowledge of a social order independent of human will, it is a "discovered" reality, while the object of legal science is an order derived from the human will, it is a "constructed" order, as Cotarelo García (p. 130) rightly states. In fact, it is hardly possible to point out an economic decision that is not mediated by multiple legal norms, whether we look at the operations of private subjects (companies and consumers), or if we analyse the economic interventions of the public power, mainly in its legislative and executive manifestations (Martin & Wagner, 1974; Ortiz, 2004; Ortega, 2001). Norms, all of them, that demonstrate the interest and importance of Law for the economy.

All business operations of a certain size require a careful analysis of the legal context in which they are adopted, and neither the execution of economic policy nor the specific administrative interventions can be carried out regardless of the constitutional framework and the distribution of powers and functions between the various political and administrative

authorities. To fulfil its purpose, the economy needs of the law and institutional analysis, because without a legal-political-economic framework that creates a certain stability, and at the same time favours progress, economic development is not possible (Immenga, 2001).

One of the keys to progress, precisely the one that usually distinguishes developed countries from those that aspire to being developed, is legal certainty, which ultimately consists of knowing what to expect. Something essential for economic development and social tranquillity, as Max WEBER perfectly pointed out: "Industrial capitalism... must be able to count on the reliability, security and objectivity of the functioning of the legal system, with the rational, primarily predictable character of the law and the administration" (Weber, 1993).

1. Social-Economic system: Rule of Law and Constitution

It is a commonly accepted idea today that the institutional framework is one of the essential pieces of the structure of civilization, to the point of having affirmed that economic growth is a function of the institutional quality of each country. Economists, however, have been slow to accept this evidence.

Caged in the study of supply and demand, they did not pay due attention to the fact that they do not interact in a vacuum but rather over time and space between people who sometimes know each other but usually do not and whose survival and well-being needs place them, respectively, before two antagonistic demands: on the one hand, the need to distrust strangers and, on the other, the need to cooperate with them. In order to obtain the benefits of cooperation without incurring in the risks of lack of knowledge, individuals create institutions whose essential mission is to prevent cheating among strangers, thus enabling the necessary trust for cooperation to be possible and, in this way, supply and demand can meet. Without such institutions, the development of the market whose essence consists precisely in cooperation -agreeing-between strangers, would not be possible.

Note that trust is not based on the blind belief of the philanthropy of our neighbour, but on the reliability of the institutions, which are not an obstacle to cooperation but, quite on the contrary, the condition that makes it possible. From a broad perspective, it can be argued that the general function of institutions is to promote the progress of society, understanding as such the development of an increasingly deep and complex cooperation between individuals within increasingly large and impersonal groups. And the larger the groups, the more complex and, therefore, more costly institutions are required; but its cost is more than justified because its presence facilitates agreeing to contract among strangers and, therefore, increases the possibilities of specialization (Mendez Gonzales, 2009).

This is the nuclear fact behind the important growth achieved by successful modern economies. Societies have a lot at stake in being able to equip themselves with adequate institutions. However, state or authority-derived institutions are often perceived as counterintuitive because they do not appear to be the direct result of a bottom-up evolutionary process, but rather the product of a designer acting from the top down, without realizing that the State is an evolutionary form required by the increase in the size of groups and the needs for exchange and division of labour, something that is usually outside the individual horizon, as the Property and Mercantile Registrar, Fernando Méndez González (2009), very accurately writes.

Precisely, it clearly derives from the neglect of political, legal, monetary and other institutions of diverse nature that their function is a *sine qua non* condition for economic development, since all economic theories simply presuppose them (regardless of how they should be configured). The different theories discuss what role the State should play in the creation and maintenance of these institutions, but the guarantee of legal certainty is a factor that is generally expected from the State (or from society).

The Rule of Law, and legal certainty as an essential part of it, are concepts that have found a permanent place in the theory of Law, especially in the theory of Constitutional Law and the State (Lösing, 2002). But, in what matters here, legal certainty is also an extremely

important foundation for entrepreneurial decisions and, therefore, for the economic and social development of a country.

Exposed from the beginning to dangers, it is not surprising that security is man's deepest need: security for one's life, for freedom, for economic and social development, to mention just a few areas in which we demand security. Dangers lurk everywhere, from the forces of nature, wild animals, and especially from our fellow men. It is the state of nature so characteristic of Hobbes, the war of all against all (*bellum omnium contra omnes*), in which each man represents a wolf to other men (*homo homini lupus*). This state can only be transformed, according to Hobbes, into that other in which a contract is reached oriented towards a state-managed domain. In this regard, he emphasizes:

"Agreements without the mere sword are mere words and have not the force to offer a man even the slightest security. In case a binding power is not erected or it is not strong enough for our security, any man will trust, and justly so, trust his own strength and skill to secure himself against all other men." (Hobbes, 1992)

And, legal certainty is not considered only as a state's task, but is also, in reality, a basic reason for the formation of the State in the first place. The end of security of the modern State resides in the protection of citizens against private power, an end by virtue of which, says Thomas Hobbes, men have been created: *"so that they can ensure their existence on Earth and provide peace."* (Hobbes, 1992). It is thus that the refinement of the culture of fundamental rights creates subtle needs for protection and demands the adequacy of the state duties of protection. For example, the recognition of the fundamental right to the free development of the personality requires the guarantee of legal certainty (De Asís Roig, 2002).

Legal certainty is, according to constant jurisprudence of the German Federal Constitutional Court (Streinz, 1997), a basic element of the rule of law. Legal certainty means, according to this jurisprudence, reliability and predictability of the legal system. Our Spanish Constitutional Court also defines legal certainty in a similar way (Fernández Segado, 1992). According to it, this is *"the confidence by the citizen, based on reasonable grounds, to know or predict the*

performance of the public power in the application of the Law" (STC 36/1991, F. J. 5º) (sic). Legal certainty is, therefore, a guarantee of freedom within a society. Freedom also requires the reliability of the legal system. Because freedom means, above all, the possibility of shaping life according to one's own projects. An essential condition for this is that the circumstances and factors that can effectively influence the possibilities of forming such projects and their execution, especially State interventions for such purposes, can be calculated in the most reliable way possible. Legal certainty is, therefore, a legal-constitutional mandate, a final mandate that transcends fundamental rights, which, according to the prevailing opinion, can be achieved even at the expense of the interests protected by fundamental rights (Gallwas, 1985). It corresponds to it, therefore, a high-ranking importance that must be observed by both the legislation and the administration, as well as the jurisprudence. The effects on freedom and economic development are, in addition, enormous.

Strictly speaking, legal certainty only exists when reliability (of the legal system) is complemented by the concept of enforceability, predictability and the concept of acceptance. Understood in this way, legal certainty is the foundation of all social, economic or political development. Hence, that the task of the State to create and maintain a system that can be trusted, that finds acceptance in the vast majority of its citizens, is so necessary. And this legal order the State has to apply it effectively.

But how is the normative foundation for legal certainty created? The Spanish Constitution of 1978 easily makes it clear to us (Calvillo Arbizu, 2001). The starting point is the so-called principle of legality in a formal and material sense, that is, the submission of power to a Constitution that contains certain values and to the laws that are in accordance with the given Constitution.

The so-called principle of legality is closely linked to the principle of the social and democratic State of Law. The first legal-constitutional foundation for the principle of legality is article 1.1 CE, which reads:

"Spain is constituted in a social and democratic State of Law, which advocates freedom, justice, equality and political pluralism as superior values of its legal system".

The Rule of Law means, then, nothing other than the submission of all State power to the legal system and, in particular, to the Constitution. It also means full sovereignty (democracy), division of powers and, finally, the bond to, and the guarantee of, fundamental rights. This is how article 9.1 EC formulates it:

"Citizens and public powers are subject to the Constitution and the rest of the legal system."

Article 9.3 specifies in even greater detail the principles to which citizens and institutions are subjected to:

"The Constitution guarantees the principle of legality, the hierarchy of norms, the non-retroactivity of non-favourable sanctioning provisions or restrictive of individual rights, legal certainty, responsibility and the interdiction of the arbitrariness of public powers."

Finally, we must refer to article 25.1 CE, which concretizes the principle of legality for the punitive power of the State:

"No one can be convicted or penalized for actions or omissions that at the time they occur do not constitute a crime, misdemeanor or administrative offense, according to the legislation in force at that time."

The principle of legality means, ultimately, the submission of power to the Law and the Constitution. It is also known that the Law and the Constitution recognize and must protect certain values (for example, the person's dignity, life, liberty, private property) to enable not only a formal Rule of Law, but also a material one, for which purpose the principle of legality contains a reasonable framework, linked to values.

And, if the Constitution is the foundation of the Rule of Law and, therefore, of legal certainty and the reliability of the legal system, it must be effective. What is meant is that, in the drafting of a Constitution, the constituent must question over and over again whether the rights and principles set forth therein are also achievable. He has to examine whether the State, when it must be sentenced by a Court to make effective a certain legally-constitutionally guaranteed right, is in a position to do so. If it is not, it should not promise whatever right it is,

neither in the Constitution. Many constituents tend, often for opportunistic reasons, to overload Constitutions with rights and promises. It is possible to read, thus, that a right to adequate housing, to health, to work, etc., is recognized, and one must corroborate, disappointed, that it is only about constitutional poetry or desire. Its realization is missing.

The Spanish Constitution attributes to the public powers the function of promoting the freedom and equality of the individual and of the groups in which they are integrated, as well as that of removing the obstacles that prevent or hinder their fullness and facilitate the participation of all citizens in political, economic, cultural and social life (Art. 9.2. CE).

The tenor of these precepts makes it clear that the freedom and democracy proclaimed by our Fundamental Law are not limited to the sphere of the strictly political, since they also inform the actions of people in other spheres of society. Thus, the virtuality of the democratic State of Law does not end in the recognition to its citizens of a right to take part in political life, nor can it be reduced to their intervention in the functions of public powers. Democracy is something more, as evidenced by the fact that the Constitution advocates other spheres of freedom and citizen participation, different from the strictly political one (Viver Pi-Sunyer, 1987).

Freedom and the right to participation that the Constitution confers on individuals reaches, very particularly, the exercise of activities of an economic nature, by allowing them to make their own decisions within this area, as well as freely choosing the path and method that each considers more appropriate for the achievement of the objectives aimed for (Asensi Sabater, J.; Elizalde, J. M.; y Medina Rubio, 1982, p.22; Juan Asenjo, 1981, p. 3; Escribano Collado, 1985, p. 77).

The participation in economic life referred to in the Constitution also reaches the specific scope of the actions that citizens and their groups carry out in the market, whose first legal expression is undoubtedly the contract, due to the fundamental role that it plays in the circulation of the country's wealth, through the exchange of all kinds of goods and services. From this perspective, the constitutional parameters of free enterprise have come to reinforce the validity of the general

principle of autonomy of the will that, since ancient times, informs the regulation of contracts in our Civil and Mercantile Codes.

In effect, the freedom of enterprise is not limited solely to the phases of access to the market or to issues directly related to competition. As such, it must also apply to other aspects of commercial activity. The same constitutional freedom that allows a person to intervene in the market or stay in it, fighting with its competitors, also enables him to decide on the conditions of his economic transactions. This aspect of free enterprise affects contracting processes and, especially, when it comes to setting the content of the benefits that are the subject of such contracts.

2. Free private initiative and social interest

It is a primary verification that the principle of free private economic initiative, like all the great principles or concepts that serve as the foundation of a given economic-social system, can be contemplated from the perspective of very different branches of the social sciences. Economics and Sociology, Political Science and Law converge on it, turning it into an object of study and analysis: economic freedom is a necessary condition for the existence of the market as a framework for economic relations; a certain structure and social relations are derived from it; it acts as a dialectical element in society-State relations, influencing its goals and the political organization itself; and, in short, it constitutes an underlying factor in the legal regulation of the right to private property and the limitations imposed on it by the common social interest. Hence, the economic system, social relations, the conception of the State and the legal system appear to us with such a different face depending on whether free private initiative is accepted or rejected as one of the essential principles of the social order, that is, of the life of man in society.

The central element of economic freedom is the ability to choose. Individuals decide for themselves, through their creative work and their labour, the way in which they want to participate in society, and what uses they will give to the results of their activity, always guided by the interest of maximizing their well-being. In order to materialize their

legitimate aspirations, they must have the possibility of appropriating the fruits of their efforts and exchanging them freely with others. People enjoy economic freedom when the properties they acquire without violence, fraud or theft, are properly protected against physical invasions and can be used, exchanged or donated.

Unfortunately, not everyone understands the meaning and social utility of economic freedom, convinced that it has little or nothing to do with the other freedoms that they claim to hold dear. They do not seem to realize that economic freedom alone empowers the individual to choose (Von Mises, 1985). Furthermore, evidence has shown that the organization that directly guarantees economic freedom, namely competitive capitalism, is the most favourable to political freedom. History offers unequivocal testimony to the relationship between political freedom and a free economy.

But, there is no enterprise without freedom. Of the multiple judgments of the principles that are made to companies in market economies, the most insane are those that, in one way or another, oppose the interests of companies to the freedom of citizens. Far from violating any freedom, the company -as long as, of course, it is not in a monopoly situation- lives on freedom and cannot truly live without it.

3. Economic constitution, economic policy and market unity

In the Spanish Constitution of 1978, unlike what used to happen with the liberal Constitutions of the 19th century, and in a similar way to what happens in more recent European Constitutions, there are several rules intended to provide the fundamental legal framework for the structure and operation of the economic activity; the set of all of them makes up what is usually called the economic constitution or formal economic constitution.

Many authors have highlighted the ambiguity that characterizes the economic model of the Spanish Constitution, which after sanctifying the freedom of enterprise within the framework of the market economy, recognizes public initiative in economic activity (article 128) and general economic planning (article 131). The way in which article 38 was

elaborated –an agreed formulation or, rather, included as a compromise - and other circumstances, have given rise, in Cazorla's (Cazorla Prieto, 2001) opinion, to a great ambiguity in the legal formulation of the glossed norm, given that terms such as "market economy and "demands of the general economy" can hardly be more indeterminate and more susceptible to disparate interpretations.

On this point, the Constitutional Court has established an important doctrine: that there is an economic Constitution within the Constitution itself, or norms intended to provide the fundamental legal framework for the structure and operation of economic activity (STC 1/1982, de 28 de enero). Along with this principle, there is another one, also of a basic or fundamental nature in the economic order: that of economic unity or the need for the national economic order to be one throughout the State.

For the Constitutional Court, the freedom of enterprise in the market economy, which is compatible with public initiative and planning, supposes the establishment of the limits within which the constituted powers must necessarily move when adopting measures that affect the system of society, but it corresponds the Constitutional Court in each specific case to determine that which is the essential content of the right to free enterprise.

When article 38 of the Spanish Constitution recognizes "the freedom of enterprise within the framework of the market economy", it must be understood, first of all, that it is the market -not public institutions- that best determines what the wishes and the needs of citizens are. It is not the function of the public powers to supplant the market and dictate or interpret what people want, but to help the market work well, with a regulation that ensures access and equal opportunities to all agents operating in it, with respect of the rights of citizens-consumers. For these reasons it is clear that the framework of the market economy should not be understood as a limitation on the freedom of enterprise, but rather as a condition of its possibility. It is not even possible to imagine freedom of enterprise in a controlled economy.

Freedom and equality are the values that serve as a reference to understand and interpret article 38 of the Spanish Constitution. Freedom

is the first value of entrepreneurial action and equality is the first value of the market. Freedom is the attribute of a person and of her action. Equality is the quality of a relationship. What characterizes the person is not equality, but privacy: each person is unique. Equality is a value proper to the social relationship and also to the economic relationship: we are all equal before the law; we are all equal in the market. In this way, it is understood that freedom and equality are not contradictory values in the economic order when they are correctly emphasized: freedom, in entrepreneurial and productive action; equality, in the market; and respect for the rights of others.

Free enterprise is certainly one of the fundamental pillars of the constitutional economic order. Not surprisingly, each of the political forces that agreed on its wording gave it different meanings, some placing the accent on the individual freedom that it implied and others on its social dimension or aspects: on the public intervention that it consecrates. This precept, like many others that make up the Spanish Constitution (CE), harbours numerous legal problems that increase if one takes into account that its normative elements refer to meta-legal issues, such as the market economy, which also have a strong ideological charge. And, it's the author's opinion that a concept like the market economy that is not accompanied by some kind of adjective means, in itself, very little. What, in any case, is clear is that the economic system sanctioned by the EC mainly revolves around it.

How is this freedom of economic decision guaranteed to individuals? How is entrepreneurship protected? Within the framework of the market economy, the key to the true existence of this initiative lies, from my point of view, in the predictability of the regulatory framework in which the company is going to develop and the direction of the administrative interventions that necessary conditions of the calculability of the possible results of the company can be adopted. The certainty regarding what is allowed or prohibited, what can or cannot be done in the business sphere, and about what the Administration can do or not do when intervening in business and economic activity, are essential conditions for an exercise of constitutionally essential right.

Any Law that transgresses this calculability would, in my opinion, violate the essential content of free enterprise. That is to say, no prohibition could be absolute, but subordinated to the fulfilment of predetermined conditions by the norms. Knowing these, and being protected against arbitrariness, the businessperson can organize and direct its company with autonomy to achieve success (or fail) in his initiative. At the moment in which the norms do not guarantee that capacity of autonomy of the entrepreneur (Bassols Coma, p. 152)¹, which requires calculability, the essential content of the freedom of enterprise would be repealed. What is not acceptable is that the exercise or not of the right is subordinated to what the Administration can decide, with total or at least very broad discretion. What is not acceptable in a Market Economy, no matter how Social it may be, just as it is not acceptable state of Law, is arbitrariness (Aragón Reyes, p.18)². The fight against the arbitrariness of public powers, one of the main challenges of Administrative Law, also serves to protect the holders of this right, who very often face excessive exercises of discretion, hardly compatible with the market economy.

The businessperson would not freely exercise his powers if it were impossible to predict the decisions of the Administration over its company; nor would his interests be protected at all in a scenario in which the Administration had full discretion to allow him or not to carry

¹ "This is one of the most relevant facets of free enterprise and perhaps, deep down, it constitutes its authentic content..., free enterprise seems to demand a potential autonomy of economic management".

² Before going into the analysis of the essential content of free enterprise, Aragón Reyes points out the limits of public interventions on it, among which he points out that the limits must be "constitutionally adequate", and explains this adequacy as "...the eradication of arbitrariness case by case; In this sense, the administrative actions of authorization and control will sometimes be regulated and others may even be discretionary, but with a strictly understood discretion, that is, legally based (according to the criteria of "reasonableness" and "proportionality") and , therefore, jurisdictionally controllable. If such demands fail, the freedom of enterprise recognized by the Constitution is undoubtedly violated". Perhaps the solution to the riddle is here.

out activity, expel him from the market, condition his organizational decisions or completely alter his investment recovery expectations.

Clearly, any intervention by the public power requires justification: the public powers must give reasons for their actions, because they do not enjoy the freedom of private people. The burden of proof of the need for the intervention corresponds to the public power, which, however, enjoys at the same time its powers to impose it, forcing individuals to go to court if they consider themselves harmed by such interventions, a circumstance that leads this argument to the decisive point, which is the degree of intensity with which the courts can filter and, where appropriate, annul, the administrative limitations of the freedom of enterprise.

Legal certainty is one of the supreme values of the Rule of Law. The citizen has the right to know with certainty what their rights and duties are, the content of the legal situation in which they find themselves, the consequences that will be imputed to their actions or omissions, the foreseeability of the legal effects of their acts. . The principle of legality, the master piece of the Rule of Law, has, above all, this purpose.

Confidence in the Law is not only a requirement of freedom, but also of the efficiency and prosperity of a society. Not just in the long term, but even in the short term, the prosperity of nations is based, more than on their natural wealth, on their civility, on the respect for the rules of coexistence, the market, contracts, property and, above all, of Law, which is what keeps all of the above standing. Respect for the constituted law, compliance with the forms, the autonomy of the Institutions, the separation of powers and functions, the intervention and control of public spending, etc., is the secret of good government.

The crisis of a society is, to a great extent, the crisis of the law. The situations that then occur constitute a pure contradiction with the State, which is replaced by its antithesis: the “reason of State”.

Understanding the Law as a mere instrument of the will of the ruler, identifying it with the force that he would be able to exercise, is to reduce it to a caricature.

The Law, the procedures, the forms, the guarantees that today constitute the common rule of the functioning of the State is not an artificial product or an obstacle course; it is wisdom accumulated over the centuries; its compliance is not only a guarantee of justice, but also a guarantee of good governance.

Putting the Law at the level of the new circumstances, in this case to promote free enterprise and, with it, economic progress corresponds to all of us.

Conclusions

1. The Spanish Constitution establishes the model of an open, free and competitive economy -market economy- and the State has the mission to order and protect its normal functioning. The essential principle is free and real competition, and any measure that contributes to distorting, limiting, reducing or altering competition must be interpreted restrictively.

2. The Treaties of the European Union have come to reinforce these requirements. Whatever the way in which each Member State wants to organize business activity, public or private, property regime, planning, etc., it is required, in any case, that the fundamental freedoms established by the TFEU be respected: freedom of movement for people, goods and capital, freedom of establishment, rules for the respect of the market and fair competition, etc.

3. Political freedom and economic freedom are very difficult to dissociate, as history demonstrates. This is probably why the Spanish constituents decided to include, among the rights and freedoms of citizens, the main economic freedoms. But they did not limit the economic Constitution to the recognition of free enterprise, rather they deliberately opted to give it a social character that legitimizes and orders all those public interventions on the Economy tending to carry out the guiding principles and objectives of the Constitution. Hence, the interpretation in terms of the Social Market Economy in the Spanish Constitution can be sustained.

4. Free enterprise is recognized in the constitutional text within the framework of a specific economic system, market capitalism, broadly called “market economy”. In other words, the Constitution, which is not neutral in terms of the political system, is neither neutral in terms of the economic system, nor does it admit the coexistence of various economic systems. The framework of free enterprise can be neither socialism (directed or market) nor directed capitalism. The only economic framework that the Constitution admits is market capitalism, which is what the expression “market economy” means.

However, the market economy is recognized within the framework of the Constitution, not the Constitution within the framework of the market economy. This means that, although the Constitution does not “create” the market economy, by incorporating it within it, it delimits it in accordance with its rules, although it also guarantees it. “Market economy” as an economic system, social State in the economic field and plurality of public powers with economic competences (although with a marked role of the central State): these are the relevant decisions around which the economic constitutional order is articulated.

5. The Spanish Constitution guarantees the economic system of the market economy, but it does not guarantee any specific model of the market economy. It is an open market economy, in which there is room for as many specific market economies as the constituted powers may want, with two limits: there is no room for any ‘socializing’ policies that may end with any of the elements of the “constitutionalized” economic system, nor is there room for any ‘liberalizing’ policies that may completely ignore that the Spanish state is a social state.

6. One of the institutional elements with great impact on business activity is legal certainty, understanding this as the existence of clear, stable and transparent laws, the compliance of which is guaranteed by the judicial system. Moreover, legal certainty is for many authors one of the most relevant institutions for progress and prosperity. And, in the absence of a sufficient level of protection of legal certainty, the right to freedom of business, in general, entrepreneurship, are faced with high transaction costs. In this way, the injustices of an insecure legal system

negatively affect not only those who suffer them directly, but also society as a whole, whose progress is jeopardized.

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FROM THE PRINCIPLE OF SUPREMACY OF LAW TO THE PRINCIPLE OF SUPREMACY OF LIBERTY

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Abstract:

Any attempt in the sphere of humanities to characterize and explain man in his individuality, but also in the social existential context, relates to the issue of freedom. Freedom is essentially related to the human being, but also to the existential phenomenality of man. Man is the only created being whose fundamental ontological dimensions are freedom and spirit.

In this study we briefly look onto the concept of freedom not only as a moral value or category, but also as an ontological dimension of man. In this way we make the distinction between ontological freedom and the legal freedoms established or recognized by the legal norms. The legal liberties are a phenomenal expression of human existence whose legitimacy and motivation is conferred by the ontological dimension of human freedom. In this context, the main features of the legal freedoms and the practical importance of the ontological meaning are to be found in the freedoms consecrated in the law.

Conscience is a defining existential reality of man, whose meaning can be seen only through an interdisciplinary unceasing effort of thinking and knowledge. In this study, we propose to make such an analysis of the conscience as an ontological

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foundation and characteristic of man, in its individual and social dimension, whose basis is made up of philosophical, theological and legal ideas, concepts and theories. Freedom of conscience is the main feature of the manifestations of man as a person within the specific environment of his/her existence. From the legal point of view, freedom of conscience is a complex fundamental right requesting a wide legislative system in order to establish and guarantee it. In our opinion, both the basis and the legitimacy of the legal system protecting the freedom of conscience are given by the philosophical truths and the truths of faith, as expressed in theological writings and meditations. In this study, we identify the theological and philosophical bases of the freedom of conscience and their reflection in the legal field.

In exceptional situations, such as the state of emergency or the state of alert established for a long time on the Romanian territory, the rulers have restricted the exercise of some essential fundamental rights, restrictions that seriously affect the private and social life of the people.

Key words: *freedom as moral value; characteristics of ontological freedom; the features of the legal freedoms; theological, philosophical and legal meanings of conscience and freedom of conscience; constitutional guarantees; exceptional situations, restriction on the exercise of certain rights and freedoms.*

Brief considerations on the philosophical meanings of freedom

Any attempt in the sphere of humanities to characterize and explain man in his individuality or in social relations also relates to the issue of freedom. It is natural to do so, because freedom is essentially related to the human being, but also to the existential phenomenality of man. The existence of man makes no sense without considering the freedom by which man becomes from the individual person also a creator of meanings and senses. The importance of this existential reality also lies in the fact that man is the only being created whose fundamental ontological dimension is freedom. By this he is not only a natural being, but also a spiritual being. Freedom, as ontological determination, makes the difference between an individual and a person. Only man, as a person, is a free being, not the individual. Constantin Noica said in this sense that "where freedom is not there is a number", because the number is the conceptual expression of the abstract and undetermined generality that characterizes any human existential structure based solely on the

existential phenomenality of the "ego", and not on the "self" down deepest of human being. (Andreescu & Puran, 2019, p. 40)

Father Dumitru Stăniloae said that man "is secrecy and light, it is a mystery of light." We might try to say that man is also a mystery of freedom, because by this own feature of him, to be free, he differentiates and opposes to the natural and temporary determinism, to the necessity of the repeating laws of nature, transfigures the existence from "what is" to what "must be" adding value and meanings to it. Through freedom as an existential given one can conceive and understand all the majesty and splendor of human existence, both in relation to himself, in relation to society, in relation to God, and to the whole universe.

1. On liberty and legal freedoms

Although philosophy, legal sciences, anthropology, morals, and other disciplines abound in conceptualizations and theories and descriptions of human freedom, one cannot say that a full understanding of the meanings and senses of liberty has been reached, especially if regarded not only from the perspective of rationality, but as an existential given, as an ontological determination of man. That is why freedom is a mystery of man, but which does not mean skepticism or the inability of the reasoning to understand, but rather the fact that the capacity and vocation to deepen more and more in the deepest senses of ontological freedom. Although it is an existential given of the human being, freedom is alive, is not frozen into abstract structures it rather relates to the becoming of man and society.

There is an indissoluble connection between freedom and love because, as Orthodox theology shows, the true freedom is determined by the love communion between man and God and through God, between man and his fellowmen, and the whole universe. Undoubtedly, philosophy first of all, but also other sciences, make an important contribution to the conceptual understanding of human freedom, an understanding which remains, in the sphere of rationality of abstract concepts, either moral or utilitarian, and is engaging less existentially the human being. Freedom is thought by philosophy as a dimension of ethics,

which is obviously correct because undeniably freedom is both principle and value of human ethics.

Kant, of course, remains one of the main thinkers who made an essential contribution to the phenomenology of human freedom in its moral dimension. The philosopher concluded the *Critique of Practical Reason* with a conclusion that synthesized his entire thinking and work: "Two things fill the soul with ever-new admiration and growing reverence, the more often and more persistently our reflection is concerned with them: the starry sky above me and the moral law inside me" (Kant, 2013, p. 214).

This profound and beautiful diction is, in fact, a rational basis for the unification of the two areas of human investigation, but also for the existence of man, respectively of nature and morality. It is also a basis for the entire moral conception of the philosopher from Königsberg. For a moral built on the basis of three postulates, two of which lie above the interpersonal relationships - *God and the immortal soul* - can be interpreted as uniting the high of the "starry sky" in which these ideas are projected with *the liberty* of the deepest self of man, there is a need for a different conceptual structure other than the one used to investigate nature, which means, as Kant points out, that concepts of practical reasoning are needed, which have an existential constitutive value. In this construction, the concept of freedom proves to be indispensable, due to its association with the rational being, the core of the deepest self of man. The Romanian philosopher, Constantin Noica, said that in order to reach freedom "he must be unfaithful to own self on his way towards himself". The moral ascendant of the liberty makes that through it the other *two rational ideas*, namely the existence of God and the existence of the immortal soul, to leave one's state of transcendental ideas, finding oneself in the moral immanence through which these can be understood also within certain proven limits. That is why Kant calls freedom the "keystone" of the whole system of pure reasoning. We have emphasized that in Kantian thinking and even in philosophical rationalism also in Christian Protestant orientations, including in the pantheistic or deist ones, God is not conceived as a person, and soul and freedom are not as realities but as rational ideas.

The Kantian perspective on freedom, in our opinion, forms a distinct note in relation to all other metaphysical systems that addresses this issue of freedom because it is connected to the practical transforming reasoning of man, to the vocation and capacity of human being to manifest itself in natural existence, to create and confer meanings and values.

The realistic and materialist philosophical thinking and pragmatism conceive freedom in relationship to necessity. Freedom is understood not as an essential aspect, defining, totally different from the current and temporary determinism, but rather as a consequence of this determinism. In other words, in the realism and ontological materialism, freedom is only a form of the necessity, of determinism, which it can overcome, but cannot transform or transfigure spiritually. The consequence is the subordination of freedom and, implicitly, of man to natural determinism. It is the materialist conception of freedom as a "necessity understood". This understanding of freedom as determined by the value, spiritual or juridical order is also found under more refined forms of the theological or philosophical thinking and indisputably is proper to legal thinking. The "order," no matter of what kind, expresses necessity, limitation and even coercion, all of which are contrary through meanings, to human freedom as existential given.

The relationship between freedom and necessity, between freedom and law, moral or legal is a recessive one. Necessity as order, no matter of its nature and configuration, is the dominant term and freedom is the recessive one. Of course, freedom does not result out of necessity, be it the spiritual order, it is not determined by such a necessity as in the materialist conception. As existence freedom is different from necessity, but in relation to the order whose expression is the necessary, freedom is always recessive and unfulfilled. In relation to the necessity of an existential order, as a recessive term, freedom is never full, it is not fulfilled, but it is always in precariousness.

In the previous studies dedicated to freedom (Andreescu & Puran, 2019) we have talked about such precariousness specific to the existential order in which man is. We refer to different forms and disappointments of human freedom, but which do not have a pejorative meaning, they are

the expression of freedom and not of the natural determinism. Here are some of these forms: natural freedom, moral, cultural freedom, social and legal freedoms.

The approach of the issue of freedom that we encounter in the legal sciences, has multiple conceptual particularities and, we would say, often more important than the philosophical concepts on liberty, since the legal is a status of human existence, a characteristic of the social status, distinct from the natural, material status. It is a contemporary status of human existence, namely the "juridical status", which comprises an existential order based on two realities: *the juridical norm and freedom*.

Law cannot be conceived beyond the idea of freedom. The normative system, the most important aspect of law, has its meanings and legitimacy in human existence, the latter having freedom as existential given.

But what kind of freedom can be said in the legal normativism and in the categories and concepts of the law? Inevitably, it is about the freedom of the legal norm, a liberty built, not an existential given. We must emphasize that the legal norm implies the constraint, as any other existential order applied to human phenomenology. Appears then an important paradox that some authors in the field of Christian metaphysics noticed, namely the coexistence of the legal constraints and the freedom of man, on the other way, both of which are essential for the order specific to the legal status in which the contemporary man is.

Another aspect is interesting, namely that the legal norm does not show what freedom is, it does not define it, it does not show its meanings, but only the situations in which freedom is restricted. Moreover, it is good to notice that, unlike metaphysics and ethics, the legal norm does not express or conceptualize freedom as such, but only as *freedoms or rights*, which is the phenomenal aspects of human manifestations in the social environment, by its nature a relational environment. It is obvious that the legal normative system cannot define freedom as such, because there is existential incompatibility between normative constraint and on the other hand, liberty as an ontological given. This is also reflected in the doctrine, in the legal concept on liberty. A closer analysis of the legal theory on liberty, even of the just-

naturalist conceptions, one notes the absence of the definition of freedom. The legal doctrine postulates the freedom of man and highlights the content of the legal freedoms, their limits, but it does not define freedom as an ontological given. The law, including the Constitution, or, in a wider sphere, the international treaties and conventions do not explain, characterize and define freedom, but only the *freedoms of man* which they consecrate.

It can be said that the legal normative system, which has as a component the necessity as a normative order and on the other hand the human liberties consecrated by this order, has the following characteristics:

1. There is no consecrated existential freedom, impossible to analyze by the legal norm, but only the freedoms built by the juridical norm, as an expression of the legislator's will at a determined historical moment. In this context, it is interesting to note, however, that the first Constitution of the world, namely that of the United States of America, in its original form, does not consecrate and, therefore, does not normatively express any of the legal freedoms. The doctrinaires said at that time that the Basic Law cannot regulate freedoms because it expresses the liberty itself. Subsequently, through the amendments adopted, this situation has also changed with respect to the United States' Basic Law. In the sphere of liberties and constitutional rights, of course, the individual freedom is the keystone. If we study the Constitution of Romania, we notice the same things that I mentioned above, namely the impossibility of the normative definition or the rational explanation of individual freedom. Article 23 paragraph (1) of the Constitution of Romania consecrates the individual freedom, individual safety and these ones' inviolability: "The individual freedom and individual safety are inviolable." Inviolability remains, however, the sphere of the legal phenomenological relativism, because the very legal norm constrains the freedom and, moreover, the exercise of individual freedom can be restricted by the state means;

2. The legal freedoms, which, we say, have their source in the ontological freedom of man, are characterized by negative expressions, that is, the general obligation of state not to restrain them and, more

rarely, the positive obligations of state to promote them. Sometimes there are also concrete situations where freedom is restricted. In other words, the legitimate situations in which state, in accordance with the law, may restrict the exercise of certain rights or freedoms.

3. The legal freedoms are always limited and conditional. The whole construction of the system of legal freedoms is based on the concept of the "coexistence of liberties" which is natural to the phenomenology of the legal order and at the same time to social one.

4. The normatively consecrated legal liberties are the expression of the human dignity within state-organized society. Their owner, the man, or the "individual," as they call it in the doctrine, can oppose these freedoms to the state power, may demand for their observance. The effectiveness of such a behavior specific to human dignity in the social environment is conditioned by two major aspects: a) the degree of awareness of the legal freedoms by their owner; b) the efficiency of the legal means for guaranteeing these freedoms.

5. There is also an important aspect that we find especially in the international legal instruments on human rights and freedoms, namely the expression used in their preamble, in the sense that the signatory states "recognize" the rights and freedoms they consecrate. This expression is very important because it evokes the idea of man's existential freedom, previous to the legal freedoms, and in relation to which the rights and freedoms specific to the legal status of man, find their legitimacy. "To recognize" is to admit that freedom is a given of the human being, and not just a legal construction;

6. The legal norm, especially in the conditions of the "juridical normative" will, which the contemporary society knows, is moving further away from the human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but one of a formal recognition within the normative system contemplated. Abandoning the values results in the normative relativism based almost exclusively on the legislator's pure will at a decisive historical moment.

7. There is, however, an aspect that the philosophical concepts or other concepts of freedom cannot realize; freedom united with the legal norm can do it. It is about guaranteeing the legal freedoms, obviously not

the ontological freedom. The legal norms, which consecrate liberties, together with justice, have this purpose to be able to guarantee the individual freedoms in relation to the interferences or abuses of all kinds that may exist in a state-organized society. Only the normative system, and in particular the constitutional one, can guarantee to every man that the freedoms recognized or consecrated by the law can be defended, first of all before the power of the state, which at any time can become discretionary, but also against the interferences of other lawful subjects in the sphere of their own freedom. The guarantee of the individual freedoms by the legal norm is a requirement of the lawful state. The reality of the guarantees and the efficiency of the legal means, for the defense of the subjective rights and liberties, is a matter that depends on the particularities of each state, the system of government, the concrete forms of achievement of the state power, the relationships between state and citizens and, last but not least, the efficiency of the act of justice.

In this ideological context, we keep in mind that the legal freedoms, as a structural element of the juridical status of man, are based on the metaphysical principle of the coexistence of liberties, postulated also by just-naturalist, but also by the 1789 French Declaration of Human Rights. It is a natural expression of the social existence of man, understood through the limits and not through the absolute of the existential freedom. In other words, in this phenomenal legal plan the freedom of man, as individual, approaches up to the freedom limit of his neighbor. It is about the distinction specific to law between "mine" and "yours", through which the legal liberty is not a spiritual opening but a closure within individual's limits. We believe that the legal norm, in this way, cannot address to the person, focused on the ontological idea of freedom, but only to man as individual, contained in the multiple structures of the social scaffolding. Obviously, such a reality is not by itself negative, because the dimension of the social phenomenality of man is a reality in which the human essence manifests itself.

2. Aspects of the ontological dimension of freedom

In earlier studies, we recalled the so-called precariousness of freedom, that is, forms of human freedom, unfulfilled, but which have existence and manifest themselves. We were talking about natural freedom, moral freedom, cultural freedom and obviously, not least, the legal and social freedom. It is a matter of knowing, which is the source and, at the same time, the legitimacy of these forms of freedom.

There are two explanations. First one, the normativist, according to which the normative order, as the case may be, of the natural determinism, moral or cultural values or legal norms, represent sources of the freedom in precariousness.

The second conception attempts to explain all forms of human freedom, not by the order created by the necessity of any kind of a natural and social determinism, but through profoundness and essence aspects that belong only to the being and the reality of man as a person. To this explanation, we mean to go through some modest references.

The ontological freedom is the freedom of the spirit, is the original freedom of man. In the world of the spirit, freedom is not a recessive term related to necessity, for the simple reason that the necessity in any form of the natural determinism specific to this world no longer manifest itself, it was overcome and transfigured by the boundless wealth of values of the spirit. Freedom as fullness and spiritual fulfillment is no longer the freedom of an order, it has no limits imposed by the law, nor the existential conditions specific to this world. The only order compatible with the freedom of the spirit is the order of love and commandments of God. Fulfilling God's commandments is the condition of the freedom of spirit when man sets himself steadily, existentially into good and truth. The facts of the freedom of spirit, even if defined and outlined, are openings to the infinity of the spiritual truths. The freedom of spirit is not a freedom of the law it is a *freedom of grace*, working together with man and Holy Spirit. In a single word, the freedom of the spirit is the freedom of man as a person in this world, but not within the boundaries of this world, which spiritualizes itself and the whole universe. It should also be emphasized that the spirit is not always the

reasoning, always abstract, limited and impersonal, but the authentic living through the understanding feeling in truth and in life. Lord Jesus said, "I am the way, the truth, and the life (John 14: 6). Being with God this is the freedom of spirit as a fulfillment, as fullness.

The truths of faith, found in all Orthodox theological thinking, affirm and claim that "man was created as a free being." It is about the ontological freedom, inherent to human being, and not the freedom of value of the rational categories or legal norms.

The meanings of ontological freedom or spirit are also illustrated in Orthodox theological thought. In his works, Saint Augustine distinguishes between the so-called minor freedom and, on the other hand, the major liberty of man. The ontological freedom has two different meanings: "By freedom is meant both the initial, irrational freedom that precedes good and evil, determining their choice, as the intelligent freedom, the final freedom in good and in truth." (Berdiaev, 2009, p. 145) It is the freedom of man to choose between good and evil, between truth and lie, between value and non-value, and ultimately, to choose between the world, subjected to natural and biological determinism, with all its precariousness, and on the other hand, the true and eternal life in God.

The second form of ontological freedom expresses a supreme spiritual principle: which is the freedom of truth and good, the natural order in which man should be. "And ye shall know the truth, and the truth shall make you free" (John 8:32). And the spiritual knowledge, God's knowledge, does not have the boundaries of thinking, as Professor Galeriu pointed out.

The Savior also said, "So if the Son will make you free, you will be free indeed" (John 8:36). This freedom is the one given by the incarnated Logos, as a gift of God, and at the same time, the man's vocation to know God, which is "the way, the truth, and the life." It is the absolute spiritual freedom of life in communion of love with God and, at the same time, of the life full with the uncreated energies of divinity. St. Paul the Apostle stated that "where the Spirit of the Lord is, there is freedom" (II Cor. 3:17).

The theological thinking has presented many aspects regarding the relationship between the two forms of ontological freedom, which is: the freedom of choice, involving the freedom of human conscience, and discernment of distinguishing good from evil and, on the other hand, the supreme, ontological freedom as the ultimate goal of human existence, that is to live effectively in good and in truth.

It has been said that accepting the freedom of choice, including choosing evil, and refusing the good given by God, is contrary to human nature and, as a result, cannot be accepted. It is the theological conception promoted in particular by the Catholic thinking and some forms of Protestantism. Criticizing this conception, Nikolai Berdiaev notes that "human freedom is not only the freedom in God, but also the freedom related to God. Man must be free in regard to God, to the world and to his own nature" (Berdiaev, 2009, p. 147). Therefore, the possibility of choosing between good and evil as a determination of the human being is essential to explain the communion between man as a person and God. This connection between man and God is not imposed it is not a result of an inexorable normative determinism, or of an order in which man participates as a simple element. If so, there would be no possibility of a connection and, moreover, of a communion of faith and love between man and God, and man would be a simple element subjected to an absolute determinism, be it spiritual and not a free person, endowed with conscience.

The same author I mentioned above emphasized: "If we only admit the liberty given through truth, given through God, and reject the freedom of choice and acceptance of truth, we are fatally engaged into tyranny and the freedom of the spirit is replaced by its determination" (Berdiaev, 2009, p. 146). In fact, the idea of a single freedom of the order of good and truth had consequences in the plan of philosophical and theological thinking. It is, in fact, the expression of a freedom that arises from necessity, either of a divine order imposed on man or of a social order, also imposed, in the idea of good and full happiness. We have to notice that the Communist order wished to impose on man its own order, which it considered to be of the good, truth and absolute happiness. Therefore, any attempt to understand the spirit, through coercion and

normative necessity, cannot be accepted as a way of ontological freedom. "Catholic and Byzantine theocracy, like atheist socialism, are naturally inclined to deny human freedom, to coerce and organize human life in good, that is, to identify freedom, either with the necessity of a divine organization or with the necessity of a social organization of life." (Berdiaev, 2009, p. 160) The consequence is that man becomes a simple element of natural determinism in which his consciousness is basically annihilated by the desire to consider freedom only in the sphere of good and truth and to exclude the possibility of evil as a free choice of man. It is true that the same author quoted above notices that "man deprived of the freedom of evil is but an automaton of good." (Berdiaev, 2009, p. 150).

In this context, we try to highlight some meanings of the ontological freedom by combining its two forms: the freedom to choose and, respectively, the freedom to live in good and indeed, the fulfillment and the fullness of freedom.

Undoubtedly, freedom of choice cannot be denied as a dimension specific to the human being, through which man can complete oneself. The devoutly Varsanufie and John stated in this regard: "God has made man free, so that he may surrender towards good. But inclining towards good, by free will, he cannot do it without the help of God. For it is written, "It is not from he that pleases, neither from he that executes, but from the God who mercifully pleases" (Romans 9:16). If, then, man surrenders his heart onto good and calls God for help, God, having his good will in regard, gives strength to his work. Thus they both meet; freedom of man and power of God. For good comes from God, but it is fulfilled by His saints. And so God is glorified in them all, and He glorifies them " (Paraschiv, 2013, p. 281).

This is the synthetic, dogmatic and rational explanation of the unity of human ontological freedom, namely the freedom to choose and the freedom to live in good and truth. It is, in fact, the explanation of the theandric work between man and the Holy Spirit to reach the experience of freedom in truth. It also means the dynamic character of freedom, which is, in essence, the becoming of man in Christ, with Christ and towards Christ. This becoming involves a most important aspect of the

freedom specific to the freedom of spirit and which we do not encounter in the existential precariousness of man. It is the *liberation* as the constituent moment of ontological freedom. It is the liberation from passions, the cutting of your own will, and the unconditional obedience to God's will, is the liberation proper to the man who has replaced his own thoughts with the thoughts of God. Liberation is synonymous with the acquisition of the virtue of humility as a foundation for the other virtues.

3. Legal meanings of the freedom of conscience

This fundamental right is stipulated and recognized in most of the international declarations and treaties referring to the human fundamental rights and freedoms, starting with the Universal Declaration in 1948. It is at the foundation of other fundamental rights, such as the freedom of speech, freedom of association, freedom of mass media. At its core is a natural law that provides for the individual to be able to express, in private or in public, a certain conception about the world, to have or not have a religion, to belong or not to a religious faith or an organization of any kind, recognized by the existing constitutional order at a given time. It expresses at the same time the freedom to think, to have opinions, theoretical concepts, feelings, ideas expressed publicly, privately or not, so that no one can interfere or censorship, or know without the person's will, these thoughts. It is a natural right, because man distinguishes from other forms of life by the very existence of conscience and freedom to think, to have feelings.

Human conscience must not be directed by administrative means, though it must be the result of his freedom to think and to share his own thoughts expressed. The freedom of conscience involves also the moral and conscience responsibility for the thoughts expressed. The responsibility, including the juridical one, intervenes only when the thought or opinion are being expressed, in which case they may harm the dignity, honor and freedom of thought of another subject of law or even the social order or lawfull order, therefore the freedom of conscience is closely related to the freedom of expression, the latter one representing

precisely the possibility acknowledged to man to express his thoughts. Consequently, the freedom of conscience has a complex content, whose legal content is expressed in three dimensions: freedom of thought, freedom of conscience and freedom of religion.

The freedom of religion, as a matter of content of the freedom of conscience, means the exteriorizing of a faith, religions and, secondly, the freedom to join a religious organization and the ritual practiced. It is necessary that religion or religious organization be known by the state through the law and the activity of a certain religious cult not be considered as contrary to the lawfull order or good morals. The organizing of the religious cults recognized by the State, is free and reflected in their own statutes. Over time, the relations between the state and the religious authority can be categorized into three types: 1. State is mistaken to the religious authority; 2. State supports the religious authority, but differentiates from it; 3. State takes a position of indifference towards the religious authority.

Romania's Constitution consecrates the separation of state from the authority, but obliges the state authorities to support religions cults recognized by law, including by financial means. It also proclaims the religious autonomy, meaning that each denomination is free to organize the form of the ritual, education, relations with the cult followers, the relationship with the state. The religious autonomy must be exercised only by respecting the human rights, morals and lawfull order. Art. 29 of the Constitution refers to the relationships between religions, according to the following principles: equality between believers and nonbelievers; it requires cultivating tolerance and mutual respect; are forbidden all forms, means or acts of religious enmity.

The doctrine in specialty reveals some interesting aspects about the legal content of the freedom of conscience, sometimes called the freedom of thought.

Thus, an important dimension of the juridical content is *"the right to have a belief"*. This is a right with a general character, protecting the interior citadel, ie the domain of the personal opinions and religious beliefs. It is important to notice that, legally, the right to have an opinion may not be subjected to restrictions, conditioning, limitations or

exceptions. The European Court of Human Rights in Strasbourg emphasizes that the freedom of religion is "one of the vital elements that contributes to forming the identity of believers and their conception of life" - Decision on 20th of September 1994 A.295 - A. Understood in a wider sense by the European Court, this right is used both by believers and by the atheists "agnostics, skeptics and neutral people."

According to the Strasbourg Court, "the belief" - a term used by the international legal instruments - distinguishes from the mere "opinions and ideas" and denotes the "views that reach a certain degree in intensity, seriousness, consistency and relevance" – Decision on 25th of February 1982, A.48. We emphasize an interesting statement in this regard of the Court: a faith that is essentially or exclusively in the cultivation and distribution of a narcotic drug can not enter the scope of a legal protection given by the European Convention on Human Rights.

The right to have opinions relates, therefore, to the practicing of spiritual or philosophical opinions that have a valuable, identifiable content and thus may be subjected to the juridical protection. The right to have an opinion involves state neutrality in regard to the moral and political beliefs. This obligation of neutrality excludes any assessment of state authorities regarding the legitimacy of beliefs and ways of expressing them. Understood thus, the right to have an opinion takes a triple aspect in legal terms. It represents, firstly, the freedom of every person to have or adopt a belief or religion in its sole discretion, without involving the freedom to deny the validity of the compelling legislative provisions, backed on objections arising from certain religious beliefs.

A second issue concerns *the freedom of not having a belief or religion*. In this way, in legal terms, the individual is protected against "any duty to directly participate in religious activities against his will" (see, on that regard the Court decision on May 9th, 1989, A187).

Finally, *the right to express an opinion expresses the legal guarantee of individual's freedom to change his belief or religion without suffering any coercion or prejudice*. In this spirit, the United Nations General Assembly adopted on 25th of November 1981 the Declaration on the Elimination of all forms of intolerance and of discrimination based on religious faith or beliefs, international document which prohibits "any

distinction, exclusion, restriction or preference based on religious faith or belief".

Another aspect is the "*human right to manifest one's beliefs*". This right includes every person's freedom to manifest one's beliefs, individually or collectively, in public or private. The right has to do with the freedom of expression and refers in particular to the manifestation of religious beliefs. It is interesting to notice that in the European Court's opinion, the freedom to manifest the religious beliefs includes also "the right to try to convince your neighbor."

Social expression of freedom of thought, conscience and religion, with very diverse consequences, the freedom to manifest the beliefs may be subjected to some restrictions within law provisions. The European jurisprudence provides many examples of restrictions on the right of the individuals to express one's beliefs, justified by the protection of public order, lawfull order or moral order, or even health.

As highlighted in a decision delivered on 25th of May 1993, the European Court held that: "In a democratic society where several religions coexist within the same population, the limiting of the right of individuals to express their beliefs may prove to be necessary to reconcile the interests of different groups and ensure that everyone's beliefs are respected". The 'public order' clause allows in these situations the protection of the freedom of thought, conscience and religion and condemns the "poor quality" proselytism, characterized by abusive pressure which take the harassment form, or the abuse of power. In the same spirit, the protection of children's right to education, where conflicting with the right of parents to respect their religious, prevails on the latter one.

The freedom of individuals to manifest one's religion includes the participation in religious community life and assumes that the latter one "can function peacefully, without the state arbitrary interference" (see the Decision on 26th of October 2000, A.78). The state has the obligation to guarrantee not only the religious pluralism, but the internal pluralism within a particular religious denomination; on this purpose, it must not arbitrate in matters of dogma conflicts within a religious community and must not interfere in favor of a community or other religion.

The freedom of religion must be interpreted so that the religious communities have the opportunity to ensure their own legal protection, of their members and assets and in particular, of its legal personality, in case where under the national law only the recognized religious denominations can be practiced (see the Metropolitan Church of Bassarabia and others against Moldova, the Decision on 13th of December 2001: The refusal of the authorities to officially recognize a Church).

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GOVERNEMENTS VS. PARLIAMENTS. COMPETITION FOR LEGAL AND POLITICAL SUPREMACY. BRIEF CONSIDERATIONS

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Abstract:

One of the most important debates of recent decades has been that of the relationship between parliaments and governments in relation to the power they should hold in society. The 20th century and the last few decades have been a unique situation in history, in which political rights have spread widely, irrespective of the limitations that political actors have set. In this perspective, it becomes imperative to know not only the rights established by the constitutions of national political-administrative bodies, but especially the power relationship between them, especially in the sphere of lawmaking.

For too many people the political competition is more important than the strength of the law and the entire legal system. However, it is time for a re-evaluation of the political power concept, as citizens of most countries in the world are not particularly satisfied with their own governments. Hence, a need to analyse and perhaps redefine some of the characteristics of the two institutions in order to establish a new relationship between the citizen and the state in this century. Governments and parliaments must become more present in the intellectual life of citizens, and this will lead to clarifications of their power in the political sphere, but especially in the enactment of legislation.

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Key words: *public law, standards for good governance; war; citizens; dignitaries; public administration.*

Introduction

One of the most important debates of recent decades has been that of the relationship between parliaments and governments in relation to the power they should hold in society. The 20th century and the last few decades have been a unique situation in history, in which political rights have spread widely, irrespective of the limitations that political actors have set. In this perspective, it becomes imperative to know not only the rights established by the constitutions of national political-administrative bodies, but especially the power relationship between them, especially in the sphere of lawmaking.

For too many people the political competition is more important than the strength of the law and the entire legal system. However, it is time for a re-evaluation of the political power concept, as citizens of most countries in the world are not particularly satisfied with their own governments¹. Hence, a need to analyse and perhaps redefine some of the characteristics of the two institutions in order to establish a new relationship between the citizen and the state in this century. Obviously, the subject deserves a volume-sized analysis, but in a scientific journal article we will outline only the essential issues, to allow other researchers to extend this line of study.

Governments and parliaments must become more present in the intellectual life of citizens, and this will lead to clarifications of their power in the political sphere, but especially in the enactment of legislation. Declining voter turnout means distrust in both the political

¹ For an extensive description see Edelman Data & Intelligence, *The 2022 Edelman Trust Barometer*, available at <https://www.edelman.com/trust/2022-trust-barometer> , consulted on 27 of June 2023.

class and its legislative output, which will mean fewer acceptances of the legal rules that come from it. From here to the desire to completely change the state and society is not much further, and in this respect new technological developments (Artificial Intelligence, for example) will be called upon to play a role never had before.

1. The organisation of human societies has the immediate effect of creating specific structures, with the role of leading communities in one direction or another. The desire for organisation and hierarchy is natural and hard to combat, because the limits of safety and the possible gains of a man in an anarchic society would be quickly cancelled by any medium-level disturbance. For this reason, it is mandatory to finally create political-administrative structures whose role is precisely this general management of society.

The concept of hierarchy is, however, more important in the legal system than in the political one, because the former is the one that has less fluidity and – implicitly – is more resistant to different crises. Therefore, in the analysis of political systems it is a great mistake to "forget" the public administration and its hierarchies (which are expressed by legislation), and to focus only on the situation of parliaments is only a part of the whole picture of a state, but never enough. Basically, it is the hierarchy in the system of legal rules, especially specific to the system of government and public administration, which is responsible for the day-to-day running of a country, which gives it (the government) a greater frequency of activity and a continuity that parliaments cannot approach.

In recent decades we have witnessed the demise of political regimes of various shades (communist or somewhat democratic), and while most people have looked more at how power was lost/gained, fewer have paid attention to the administrative mechanisms in these countries¹ (Bräuninger & Debus, 2009).

¹ <https://doi.org/10.1111/j.1475-6765.2009.00850.x> .

It is important to understand that the public administration must function uninterrupted in almost its entirety, that public services must be fulfilled even when hundreds of thousands of people come out on the streets of the capitals protesting against the governments¹ (Peters, 2015). Basically, governments are seen as an accumulation of political power, but above all as providing activities for the benefit of society – whether continuous (sanitation, drinking water supply, etc.) or strictly necessary (fire-fighting, criminal prosecution, etc.). In essence, it is governments that reveal the true functional capacities of a country, because a lack of quality in the provision of public services leads to a decrease in the medical capacities of a country's inhabitants, and thus to a decrease in their life expectancy.

Having this function throughout the territory of a country, it is therefore equally obvious that the ways of documenting the main problems of society are more numerous as far as governments are concerned, and less relative to the capacities of parliaments. By definition, schools and police units must be present in every locality, which gives governments the ability to educate the population according with some specific values, but also to develop a policy – better or worse – regarding the various criminal phenomena. Citizens are just as direct in their assessments, because the presence of public administration in all localities implies a reasonable and daily relationship with this institutional colossus. The man passes by a school and remembers his years of study, but also expresses in various forms his concern about the education of his children and of society; he sees the quality of the streets and the sanitation of the city every day, observes the quality of medical care in hospitals, and knows very well that for all this the government and the local public administration are legally responsible.

We should also not forget the historical tradition, which in this debate is particularly important and unavoidable: people have always had leaders, but less parliaments. There were the leader's advisors, there might have been a group of aristocrats who provided effective leadership

¹ <https://doi.org/10.1016/j.polsoc.2015.09.005> .

of the state with the leader – which gave them influence over decisions, and the leader consulted them on certain issues – but all these people were not accountable to the people and could be replaced almost at any time, including at the whim of the supreme leader.

Thus, leaders have not once ruled in complete freedom to abuse – usually on the basis of customs and rules provided by the coercive force they held – and what they provided to the people were at best a few public services, usually defence and justice (the latter as they understood it, or as they used it for their own interests). Most of the public works were also expressions of the same idea of defending the territory, and the people were regularly confronted with the work of the fiscal agents of these leaders. In fact, very often the single constant presence of state was the tax operations, being very often the main reasons for revolts. The systems of general schools, medical care, the provision of an infrastructure necessary for the economy (electricity, water pipes, etc.) appeared very late, and would be seen from the beginning for what they were, namely an expression of the administrative power of a state.

2. Parliaments are an institution that has therefore from the beginning difficulties in historical legitimating.

The need for public consultation cannot be disputed¹ (Sanchez de Dios, 2014), and even less the need for society as a whole to accept different types of state organisation measures, because in the end it will pay for them, and in case of non-acceptance, violent revolts may occur. History is full of crises of governance and societal discontent, and standards of good governance are rather violated, although they are proclaimed in the constitutions of all states.

Thus, it is necessary for the political power to find effective mechanisms to understand the main ideas of the society², its main

¹ <https://www.ucm.es/data/cont/docs/862-2014-06-21-PADEMIA-1.pdf>, consulted on 27th June 2023.

² *Citizen's Consultation on Europe*, https://www.gouvernement.fr/sites/default/files/locale/piece_jointe/2019/02/11_citizen_consultation_europe.pdf, consulted on 27th June 2023.

suggestions and especially to persuade it to accept certain development plans – often these can sometimes turn into measures to restrict freedom, or to enrich the ruling political group¹ (Chwalitz, 2017).

Two famous authors – Acemoglu and Robinson – point out in one of their recent works, called *The Narrow Corridor* (Acemoglu & Robinson, 2019), that most of the time world states and societies in general have been held in the grip of dictatorships. Although the paper is of lesser value than it should be (related to their first volume, *Why Nations Fail* (Acemoglu & Robinson, 2012) – and this by outright propagating ideas that have not been validated by economics and history – it draws attention to unprofitable societal conduct that political leaders have not once developed.

The majority of financial resources concentration in the ruling group hands weakens the loyalty of citizens to the country, reduces their desire to contribute to the "common good" and in many ways makes them think of leaving the country. The phenomenon of leaving the country is not new, but most of the time in history it was a sign of fleeing persecution, perhaps because it was very difficult to travel long distances with a lot of luggage – the most famous case being the French Huguenots who went to the countries of the Germanic space, contributing to their prosperity. The advent of trains, but especially of the airplane and finally of the Internet led to the explosion of labour migration, and as the main cause of this phenomenon is dissatisfaction with living conditions in one's own country, it follows that in the future well-governed countries will have a surplus of skilled labour-force.

This phenomenon – the flight of intellectual elites (brain drain) – is one that forces forward-looking political leaders to consider that the administrative power of the state is not sufficient to allow a real development of society² (Kone & Özden, 2017). It is clear that the role of governments cannot be circumvented, but as far as cooperation with all

¹ <https://www.oidp.net/docs/repo/doc214.pdf>, consulted on 27th June 2023.

² https://www.knomad.org/sites/default/files/201704/KNOMAD%20WP19_Brain%20Drain%20gain%20and%20circulation.pdf, consulted on 27th June 2023.

members of society is concerned, it is clear that great strides must be made towards bringing as many responsible citizens as possible into the decision-making mechanisms.

Again, the discussion should not be understood as a plea for what is today called "direct democracy"¹ (Bulmer, 2017), because fully educating a nation to participate politically, civically and conceptually in the formulation of a country's policies is objectively impossible. However, we cannot fail to notice that the generalization of education systems has led to the reasonable understanding by most citizens of many disciplines related to the concept of good governance: history, economics, logic, world literature, geography, biology. Thus, today's adult can understand most of the issues of good government on the basis of a supplementary documentation to that required in school and high school, without excluding the games of propaganda and manipulation. Having therefore this huge intellectual resource, governments must admit that it is necessary to give as many voices as possible – which must necessarily be heard – the opportunity to express themselves and to impose certain trends in society.

At this point the two separations appear: the voice of the citizen in relation to local issues, on the one hand, and the voice of the individual in relation to state issues, on the other.

In the first situation things are simpler, because communities with no more than a few tens or hundreds of thousands of inhabitants – the exceptions being fewer, with cities of over a million inhabitants – can more easily find a form of dialogue based on their geographical concentration. At the same time, most local interests are not likely to challenge central political power, and the fundamental issues of mayors and public administration can be more easily understood by any discerning person.

Even if the idea of community decision-making – or, more precisely, letting decisions concerning communities are taken as much as

¹<https://www.idea.int/sites/default/files/publications/direct-democracy-primer.pdf>, consulted on 27th June 2023.

possible at the bottom of the demographic hierarchy (towns and villages), there is still a big problem: the cost of implementing some decisions, compared to the idea of the national economic whole. In concrete terms, it is forgotten that the financial power is not the same in every locality and for many ambitious plans are halted due to the absence of money, as the local economy is not able to provide sufficient resources to fulfil the various public services. At the same time, it should be borne in mind that often local problems cannot be solved strictly because of the remoteness of the source of major problems: the big polluters may be in other districts, regions or even countries; the source of droughts or of the various problem water courses (drinking water, of course) is in another country. What could a community do in the face of these major, often insurmountable problems – and should we begin to answer this question with the economic capacities of small towns and villages in mind?

This is where the second problem comes in: the voice of citizens on national issues. Many constitutions enshrine a ban on citizens making legislative proposals on tax matters, but this does not mean that a poor fiscal policy will not lead to economic downturns and emigration of significant proportions of the population. The restrictions that legal means may enshrine cannot prevent the subjects of fiscal responsibility from assessing the day-to-day work of tax agents and the amount of taxes, just as this awareness and appreciation operates in many spheres of social action. Basically, educating the citizen makes him not only subject to the right to vote, being able to choose different leaders, but also a possible politician in the future. That is why concentrating the messages on the degree of involvement in decision-making only at the level of small communities is rather a mistake, because each of us is aware that the power of government will always be greater than that of a mayor – but this should not be an obstacle into cooperation between those institutions.

3. Therefore, a careful analysis of the idea of representing citizens and especially their consultation is necessary. Basically, political leaders usually want and protect themselves through various measures (special housing, security, less taxable own income, etc.), but the citizens are the

ones who bear all the tasks of the public authority on a daily basis. As we stated above, the major decrease in trust in the political class and political institutions that is registered at the local level is based precisely on this reporting on political practices, and the 281 million people who migrated outside their own countries in 2021 (*World Migration Report 2022*, p. 21) represent basically a failure of the government, but also of the public consultation.

In reality, the two institutions – governments and parliaments – must cooperate, but in many countries the perception is that they are detached from the common man will, which usually does not happen in the case of local public administration. At the same time, the budget that the government has – and that the parliament approves – is huge, compared to what the local public administration has, and the disproportion of resources makes the common man lose even more confidence in the state power. In reality, a curious relationship has been reached, in which the biggest claims are against the state institutions, but it is precisely the organization and provision of public services by them that legitimizes the local public administration, which is also the poorest in terms of capacity in this public action area.

Basically, this is not only a case of cooperation between institutions, but also a competition for legitimacy and political strength. It is not enough to have powers, even established by a constitution, but it is necessary to demonstrate to today's electorate that you deserve them. This is not at all a strictly political statement, but a fact, linked to the balancing of the citizen's trust in the various institutions, with important long-term effect. We say this in view of the fact that in the field of public law, legislation changes faster than in the field of private law, and only constitutional provisions are usually more protected against this process of changing rights and obligations. But if trust is greater in local public administration institutions, but their power is limited both by their economic availability and by territorial competence, what can central institutions do when faced with the demand for more powers? The political calculation says something, but the territorial reality is exactly the opposite, because – as we said above – many improvements to life in a country can only be addressed in a strictly national matter, because we

will not find in the same locality the same rainfall, the same flow of rivers (if they exist), etc. In addition, the different size of the states and the layout of certain forms of relief – implicit in the hydrographical lines – means that many major problems are trans-boundary, an aspect for which local public administration has no prospects of solving.

Consequently, governments have a legal and economic advantage over local governments – and local public administrations, even if they join their political efforts – because among its unique powers are the establishment of the state budget, the possibility to intervene at any time in the budgetary exercise (regardless of using extra-ordinary legal means), as well as the possibility to conclude international treaties. In addition, the fact that some local governments are poorer – and therefore more willing to receive help from the government – means that the power of local representatives is more limited.

In this situation, where are the parliaments? In practice, they establish the general limits of government activity, through the enactment of laws. However, in the parliament there are majorities that form the government, and if the parliamentarians do not respect party discipline¹ (Photiadou & Dunleavy, 2017), they can be excluded from them, which implicitly mean that their legislative proposals will not pass. In addition, the party leaders prefer to have positions in the government (if they are in the ruling coalition), hence there is an additional advantage over the less powerful members. Practically, a revolt of the parliamentarians against the government actually means a revolt against their own party leaders, which will end with the replacement of the prime minister. But once the prime minister is changed, the loyalty-legislation cycle resumes, which make the parliament become more of an appendage institution of the government, and by no means a partner or a factor that can condition its activity.

¹ <https://blogs.lse.ac.uk/politicsandpolicy/how-effective-is-parliament-in-controlling-uk-government-and-representing-citizens/>, consulted on 27th June 2023.

Conclusions

Political and administrative power more than once determines competitions that use dozens of intellectual and technical resources, and the result is sometimes the most negative possible, based on different more or less controllable contexts. In any situation, drawing the constitutional framework of a country also means fixing the starting positions in this competition, without really limiting the tools that politicians will use in their activities (to obtain power).

The Parliament is credited as the most important political institution, as a result of elections at the national level. At the same time, the government is the institution where party leaders are sent, not the weakest (politically) party members. What is the result of this hierarchy within the parties? First of all, the near impossibility of changing the government, in the absence of political disturbances of the alliances, as well as a real and de facto subordination of the parliament to the government.

Thus, the legitimacy of parliaments actually erodes before the power of governments, and dissatisfied citizens begin to eliminate the idea of representation, focusing only on their own relationship with the government, the state administration and the parties in the governing coalition. In the medium and long term, this affects the idea of the separation of powers in the state, reducing the role of the parliament and replacing it with the citizens themselves, who in the Internet world have a more subdued voice, unique in history.

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THE WORKING TIME AND DUE SALARY RIGHTS, DURING THE SECONDMENT PERIOD, IN THE CASE OF DRIVERS WHO CARRT OUT INTERNATIONAL ROAD TRANSPORT OR CABOTAGE, IN TERRITORY OF THE EUROPEAN UNION

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Abstract:

Mobile workers who carry out international road transport activities, benefit from specific European and national regulations, adapted to the particularities of the work performed. In the context of special occupational risks, the protective dimension of health and safety at work is reflected both in the establishment of maximum driving times, but also in the maximum working time, as well as in ensuring the appropriate remuneration, throughout the period that the work is carried out under the same conditions with workers from a member state of the European Union.

These rights of mobile workers are the object of analysis of this study, determined by the intervention of the European institutions in imposing some measures in the mobility packages applicable to drivers who carry out international road transport or cabotage operations on the territory of the member states and the reaction of the national legislator in their implementation.

Keywords: *mobile workers; protection of rights; occupational hazards; minimum wage; health and safety at work.*

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Introduction

Persons who carry out mobile road transport activities fall under the category of mobile workers. Consequently, the analysis of the concepts of working time and salary rights is circumscribed to the specifics of this form of activity provision, in which there are interferences of national, union and international law. The performance of the activity for the benefit and under the authority of an employer whose main headquarters is in a member state of the European Union, on the territory of other states, is regulated by law in such a way as to ensure the principle of equal treatment (Serban-Barbu, 2009, pp. 30-41) both for workers and for international transport operators. Normative lines were designed and modified to ensure conditions for fair competition between economic operators performing the same activity, for the same categories of beneficiaries and in the same geographical areas.

1. National regulation of working time and salary rights of mobile workers who carry out international road transport activities in EU or EEA member countries

By transnational secondment is meant the situation which the operator with headquarter in Romania (Gheoculescu, 2022, p. 488), within the provision of transnational services, posts the driver on the territory of another EU or EEA member state, in the situation regulated by art. 5 para. (2) lit. a) from Law 16/2017¹, respectively: *secondment of an employee from the territory of Romania, on behalf of the company and under its coordination, within the framework of a contract concluded between the seconding company and the beneficiary of the provision of services that carries out its activity on the territory of a member state, other than Romania, or on the territory of the Swiss Confederation, if*

¹ Published in Official Journal, I Part no. 196 form March 21, 2017, with subsequent amendments

there is an employment relationship, during the secondment, between the employee and the company that makes the secondment.

The driver is not considered an employee posted from the territory of Romania, when:

- a) performs bilateral road transport operations of goods;
- b) carries out, in addition to carrying out a bilateral road transport operation, a loading and/or unloading activity in the member states or in the third countries it transits, provided that it does not load goods and unload them in the same member state;
- c) carry out a maximum of two additional loading and/or unloading activities in the member states or in the third countries they transit, provided that they do not load or unload goods in the same member state, when the bilateral road transport operation started in the member state of establishment, during which no additional activity was carried out, is followed by a bilateral road transport operation to the Member State of establishment;
- d) transits the territory of a member state, without loading or unloading goods or without embarking or disembarking persons;
- e) performs the initial or final road segment of a combined transport operation, if the road segment, taken separately, represents a bilateral goods transport operation.

The driver who performs international transport operations, being sent to work for a limited period of time on the territory of a member state, other than Romania, or on the territory of the Swiss Confederation, and who does not fall under in the previously mentioned situations, benefit from the provisions regarding delegation provided for in the Labor Code - Law no. 53/2003, republished, with subsequent amendments and additions, respectively of the following additional rights, compared to the salary rights negotiated through the individual employment contract: payment of transport and accommodation expenses, as well as a daily delegation allowance, under the conditions provided by the internal Regulation.

During the transnational secondment (Gheoculescu, 2022, pp. 95-102), the driver benefits from salary rights related to the working hours performed, at least at the level of the minimum salary in each country in

which the activity of international transport of goods is performed. The minimum salary applicable on the territory of a member state or on the territory of the Swiss Confederation, for the employee posted from the territory of Romania is that defined by the legislation and/or practice of the member state, other than Romania, or of the Swiss Confederation, to whose territory the employee is posted.

The employee will receive, in addition to the salary rights according to the employment contract, an allowance specific to the transnational secondment/calendar day during the period of the transnational secondment, which is included in the calculation of the minimum salary level that must be provided by the employer. Specific allowance for transnational secondment is the allowance intended to ensure the employee's social protection, granted in order to compensate for the inconveniences caused by the secondment, which consist in the removal of the employee from his usual environment, the fiscal regime provided for in the Fiscal Code being applicable. The level of the delegation allowance/specific to the transnational secondment is determined in compliance with the provisions of art. 76 paragraph (2) letter k) and m) of the Fiscal Code, respectively:

- (i) in the country, 2.5 times the legal level established for the allowance, by Decision of the Government, for the staff of public authorities and institutions, within the limit of 3 basic salaries corresponding to the job held;
- (ii) abroad, 2.5 times the legal level established for diurnal, by Decision of the Government, for Romanian staff sent abroad to carry out temporary assignments, within the limit of 3 basic salaries corresponding to the job held.

The ceiling related to the value of 3 basic salaries corresponding to the job held is calculated by relating the 3 salaries to the number of working days in the respective month, and the result is multiplied by the number of days during the period of delegation/secondment/performance of the activity in another locality, in the country or abroad.

During the entire journey, mobile workers have the obligation to respect the driving time, the rest time and the rest time provided by GD no. 38/2008.

Transnational travel ends if the individual employment contract is suspended or legally terminated. The employer will be able to unilaterally order the termination of the transnational movement/secondment. The mobile employee cannot unilaterally terminate the period of transnational travel/ secondment. Any transport costs of the employee, for trips made during the travel period, trips in the interest of work, are fully borne by the employer. The employee is informed, since the conclusion of the individual employment contract, that the employer ensures his return home after a maximum period of 4 weeks and that he has the right to refuse to return and to rest for a minimum of 45 hours, in the town where he is on the date completion of the 4-week period. During the journey, the mobile employee is provided with accommodation by the employer, either in accommodation spaces or in the cabin of the motor vehicle, depending on his option. If the employee does not request accommodation in spaces other than the cabin, it is assumed that his option is to be accommodated in the cabin. Once every two weeks, the employee has the obligation to stay in accommodation spaces, other than the car cabin, the costs being borne by the employer.

For the activity carried out during the period of transnational secondment, in the EU and EEA countries, the provisions of Directive 2020/1057 EU also apply, with reference to: maximum work periods and minimum rest periods; the minimum duration of paid annual leave; minimum rates of remuneration, including increased rates for overtime; health, safety and hygiene at work; reporting a possible work accident remains the responsibility of the employer.

Each host Member State has created a unique national official website, in accordance with art. 5 para. (2) of Directive 2014/67/EU of the European Parliament and of the Council of May 15, 2014 on ensuring compliance with the application of Directive 96/71/EC on the secondment of workers in the provision of services and amending Regulation (EU) no. 1.024/2012, which can be found at https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_ro.htm.

2. Conceptual delimitations regarding the working time and salary rights due to mobile workers during the period of transnational secondment, in the context of European Union legislation, transposed into national legislation

2.1. The working time of mobile workers posted from the territory of Romania to the territory of another member state of the European Union or EEA.

The source of the definition of the working time of mobile workers who carry out road transport activities is the provisions of art. 111 of the Labor Code, which is supplemented by specific provisions. Thus, by art. 11 paragraph (2) from G. O. no. 37/2007¹ established the adoption of a specific regulation regarding the organization of the working time of mobile workers in the road transport of goods and persons, being issued and adopted Decision G. no. 38/2008², which transposed Directive 2002/15/EC.

According to art. 3 lit. a) from the Directive, the working time of the mobile worker represents the period from the beginning to the end of the working time, during which he is at his workplace, at the disposal of the employer and in the exercise of his functions or activities, that is:

- the period dedicated to all road transport activities. These activities are mainly the following: driving the vehicle; loading and unloading; assistance given to passengers when getting on and off the vehicle; cleaning and technical maintenance; all other activities aimed at ensuring the safety of the vehicle, its cargo and passengers or the fulfillment of legal or regulatory obligations directly related to the ongoing transport operation, including supervision of loading and unloading, administrative formalities related to the police, customs, immigration service, etc.;

¹ G. O. no. 37/2007 regarding the establishment of the framework for the application of the rules regarding driving periods, breaks and rest periods of drivers and the use of devices for recording their activity (Official Gazette no. 565/16.08.2007).

² G.D. no. 38/2008 regarding the organization of the working time of persons who carry out mobile road transport activities, published in Official Gazette no. 49/22.01.2008.

- the periods of time when he cannot freely dispose of his time and is required to be at his work station, ready to undertake his normal activity, performing certain tasks associated with the service, especially during the periods when he is waiting for charging to be done or discharge, if their foreseeable duration is not known in advance, namely either before departure or even before the effective start of the period in question, or under the general conditions negotiated between the social partners and under the legislation of the member states.

This definition has also been taken over in art. 3 paragraph (1) lit. a) from G.D. no. 38/2008. In addition to driving time, the period dedicated to other activities related to driving was also included in the working time, the mandatory breaks in the driving activity being excluded from the working time. According to art. 5 of G.D. no. 38/2008, people who carry out mobile road transport activities can work for a maximum of 6 consecutive hours without a break. The working time will be interrupted by breaks of at least 30 minutes if the total working time is 6 to 9 hours, and of at least 45 minutes if the total working time exceeds 9 hours. Breaks can be divided into periods of at least 15 minutes each.

According to art. 2 para. (1) of this normative act, it applies to persons who carry out mobile road transport activities that are the subject of Regulation of the European Parliament and of the Council (EC) No. 561/2006 on the harmonization of certain provisions in the social field regarding road transport and fine of Council Regulation (EEC) No. 3.821/85 and Council Regulation (EC) No. 2.135/98 and repeal of Council Regulation (EEC) No. 3.820/85, the European Agreement on the activity of crews of vehicles carrying out international road transport (AETR) .

Directive 2002/15/EC - road activities, applies to mobile workers employed in companies established in a member state, who participate in road transport activities regulated by Regulation (EEC) no. 3820/85 of the Council of 20 December 1985 on the harmonization of certain social provisions on road transport (OJ L 370, 31.12.1985) or, in the absence of special provisions, by the European Agreement on the work of crews of vehicles engaged in international road transport (AETR).

Regulation (EC) no. 561/2006¹ delimits road transport to which the provisions of the Directive apply to the transport of goods by vehicles (Gheoculescu, 2022, pp.95-102), including vehicles with a trailer or semi-trailer, whose maximum authorized mass exceeds 3.5 tonnes (2.5 tonnes from 2026) or of passengers in vehicles that are constructed or permanently fitted out to be able to carry more than nine persons, including the driver, and which are intended for that purpose.

The Regulation applies, regardless of the country of registration of the vehicle, to road transport carried out: exclusively within the Community or between states from the Community, Switzerland and countries that are parties to the Agreement on the European Economic Area. The AETR remains applicable, instead of this regulation, to international transport operations carried out in part outside the previously indicated areas, for: vehicles registered in the Community or in the countries that are parties to the AETR, for the entire route; vehicles registered in a third country that is not an AETR part, only for that part of the route located on the territory of the European Union or of countries that are AETR parties.

Particular attention must be given to the delimitation of the field of application of Directive 2002/15 from the field of application of Directive 2003/88. This delimitation is supported by the provisions of art. 3 of Regulation no. 561/2006, according to which it does not apply to regular passenger transport for distances of less than 50 km, those carried out with vehicles with a maximum speed less than 40 km/h; those carried out by the armed forces, by the fire brigade and civil protection services, by those who ensure the maintenance of public order within their attributions, those of a humanitarian or medical nature or those of a non-commercial nature, the latter carried out with vehicles

¹ "Regulation (EC) No. 561/2006 of the European Parliament and the Council of 15 March 2006 on the harmonization of certain provisions of social legislation in the field of road transport, amending Regulations (EEC) No. 3821/85 and (EC) No. 2135/98 of the Council and repealing Regulation (EEC) No. 3820/85 of the Council", OJ L 102, 11.4.2006

whose mass does not exceed 7,5 tons; those necessary for troubleshooting operations within a radius of no more than 100 km from the base and those carried out for tests, technological improvement, for repairs or maintenance; those made with vehicles that have not yet been put into circulation, or that have a historical character, used for non-commercial purposes.

Another special component of working time, regulated at the European level, is the night work of mobile workers carrying out international road transport activities, establishing the following main rules:

- if night work is performed, the daily working time does not exceed ten hours for each 24-hour period;
- compensation for night work is granted in accordance with national legislative provisions, collective conventions, agreements between social partners and national practice, provided that this compensation is not likely to jeopardize road safety.

Regulation 561/2006 responded to a need to harmonize the conditions of competition between land transport modes, in particular as regards the road sector and to improve working conditions and road safety, to promote better control practices and application of rules by Member States and better working methods in the road transport sector.

However, the European Union regulations do not affect the right of member states to apply or introduce more favorable legal, regulatory or administrative provisions regarding the protection of the health and safety of people performing mobile road transport activities or their right to facilitate or allow the application of collective agreements or other agreements concluded between the social partners which are more favorable to the protection of the health and safety of mobile workers.

2.2. The salary rights due to mobile workers seconded from the territory of Romania to the territory of another member state of the European Union or EEA.

During the period of transnational secondment, mobile workers maintain their employment relationship with the transport operator based in Romania and therefore all salary rights established by the

applicable individual or collective employment contract.

Through the adoption of Law 16/2017, the aim was to establish a common framework of provisions, measures and control mechanisms, applicable on Romanian territory to the posting of employees in the framework of the provision of transnational services, including measures to prevent and sanction any abuse or circumvention thereof, as well as specific rules regarding certain aspects regarding the posting of drivers in the road transport sector. Law 16/2017 transposed the following directives:

- Directive 96/71/CE of the European Parliament and the Council of December 16, 1996 regarding the secondment of workers in the provision of services, published in the Official Journal of the European Communities, series L, no. 18 of January 21, 1997;

- Directive 2014/67/EU of the European Parliament and of the Council of May 15, 2014, on ensuring compliance with the application of Directive 96/71/EC on the secondment of workers in the provision of services and amending Regulation (EU) no. 1.024/2012 regarding administrative cooperation through the Internal Market Information System ("IMI Regulation"), published in the Official Journal of the European Union, series L, no. 159 of May 28, 2014;

- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC on the secondment of workers in the provision of services, published in the Official Journal of the European Union (OJEU), series L, no. 173 of July 9, 2018;

- art. 7 para. (2) and (4) of Directive (EU) 2019/1.152 of the European Parliament and of the Council of 20 June 2019 on the transparency and predictability of working conditions in the European Union, published in the Official Journal of the European Union (OJEU), series L, no. 186 of July 11, 2019.

The concepts incident to the salary rights due to posted workers within the provision of transnational services, used in Law 16/2017 are the following:

- transnational secondment - the situation in which an enterprise established in a member state or on the territory of the Swiss

Confederation, within the framework of the provision of transnational services, posts employees with whom it has established employment relationships on the territory of another member state, in the situations regulated by art. 5;

- the minimum salary applicable on the territory of Romania for the employee posted on the territory of Romania is that stipulated by the Romanian legislation and/or the collective labor contract concluded at the sectoral level, with extended applicability to the entire activity sector, according to the legal provisions;

- the minimum salary applicable on the territory of a member state or on the territory of the Swiss Confederation, for the employee posted from the territory of Romania is that defined by the legislation and/or practice of the member state, other than Romania, or of the Swiss Confederation, to whose territory the employee is posted;

- expenses generated by the secondment - any expenses with transport, accommodation and meals, made for the purpose of the secondment;

- specific allowance for transnational secondment - the allowance intended to ensure the social protection of employees granted in order to compensate for the inconveniences caused by the posting, which consist in removing the employee from his usual environment, being applicable the fiscal regime provided for in Law no. 227/2015 on the Fiscal Code, with subsequent amendments and additions;

- the remuneration applicable on the territory of a member state of the European Union, other than Romania, or on the territory of the Swiss Confederation - the amount of money established by the internal law and/or the national practices of the member state to which the worker is posted, representing all the constituent elements of the remuneration that are binding according to internal law, statutory and administrative acts or collective agreements or arbitral awards, which have been declared of general applicability or which apply in accordance with art. 3 paragraph (8) of Directive 96/71/EC in the respective Member State.

The national legal provisions aim at guaranteeing an adequate level of protection of posted employees in the provision of transnational services, in particular ensuring compliance with the application of employment terms and conditions and the protection of employees'

health and safety at work. This creates the necessary normative framework to facilitate the exercise of the freedom to provide services for service providers, to promote a climate of fair competition between them and to support the functioning of the internal market.

Employees posted from the territory of Romania in the framework of the provision of transnational services benefit, regardless of the law applicable to the employment relationship, from the working conditions established by legal acts, administrative acts, by collective agreements or arbitral sentences of general application, valid in the state member, other than Romania, or in the Swiss Confederation, on the territory of which the services are provided, regarding the remuneration applicable on the territory of a member state of the European Union, other than Romania, or on the territory of the Swiss Confederation, including the payment of overtime, at allowances or reimbursement of transport, accommodation and meal expenses for employees obliged for professional reasons to travel to and from their usual place of work in the Member State to whose territory they are seconded or if they are temporarily sent by their employer from the place their usual work at another workplace, in accordance with the legislation or collective labor agreement with general applicability in the host state.

Conclusions

From the presentation of the normative framework applicable to mobile workers carrying out international road transport activities, it follows the special concern, both of the European and national legislator, for the respect and implementation of the principle of free movement of people (Șerban-Barbu, 2008) and goods, equal treatment, fair competition and balancing the level of development of the member states. However, it is important, at the national level, to identify the best courses of action in order to be able to combine the protection of workers' rights, ensured at the European level, with a national tax regime adapted to the circumstances of the road transport sector. New technologies penetrate this field as well, and therefore, the social component of the political decision should not be ignored. The advantages of an

interconnected industrial world are hard to deny, but the social impact on mobile workers and transport operators has legal and economic dimensions that are difficult to predict.

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THE THREE HORSEMEN OF POVERTY – A LEGAL STUDY ON PERSONAL INSOLVENCY

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Abstract:

The article is concerned with the legislation and regulation of social awareness processes on the effects of certain types of services or products that can impact people's lives when they are not used in a responsible way causing them to go bankrupt. The authors address from a socio-legal perspective the issues of smoking, gambling and debt in a way that has relevance to personal insolvency procedures. The article concludes that the state plays a fundamental role in the harmonious development of its citizens and to maintain its evolution regarding social norms in relation to current social realities.

Key words: tobacco; gambling; debt; personal insolvency.

Introduction

We have found a deep correlation between the social phenomena that are disrupting the wellbeing of the citizens and the level of general

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education inside a nation. The consumption of tobacco products, sourcing of entertainment that can be found in the gambling industry and the financial instruments that are creating the necessary capital for purchase different assets (households, electronics, furniture etc.) are surely not to be blamed in regards with the individuals irresponsible conduct that are constantly creating social and economic hazards. The only link that is currently weakened in all this social environment is the education one, the people simply are not given the necessary education in regards with this social construct on which they can create performant decision-making mechanism in their personal and professional life.

It is important to understand in all these cases the harmful socio-financial effects that can impact all of our lives at a point.

1. Tobacco, gambling and debt – trigger events for bankruptcy

1.1. Tobacco Industry

Even though tobacco consumption is a prime factor in weakening a person's health and wealth, the industry can be used as a mild positive example because it finances aggressive campaigns to discourage smoking. Phillip Morrison International for instance, since 2018, contributes with approximately 80 million \$ per year for 12 years to reduce deaths and harm related to smoking (Truth Initiative 2017). All these actions being possible thanks to a legal framework both nationally and internationally.

The importance of building a form of deterrence is based on the principle of preventing some negative social effects that may arise from the use of these products (*e.g.* the main financial supporter of a family falling ill with cancer). It was observed that less than 15% of deaths are related to tobacco smoking among former smokers aged 30 and over despite them representing nearly 33% of the ever smoker population of over 30. (GBD 2019 Tobacco Collaborators 2021, 2351)

This leads to the destabilization of the micro-universe of a family, both financially and emotionally, which has subsequent negative

ramifications in the entire society. In most cases, through the public health system, all the costs related to the treatments, as an example, are covered by the contributions of the contributing class.

The tobacco industry in this article is a positive example because it constantly creates social awareness mechanisms on the effects of tobacco, to the detriment of the area of profitability. These mechanisms are constantly adjusted depending on the population to which they are addressed, in order to transmit a form that is as relevant as possible from the point of view of awareness for the person from the respective environment.

There have been attempts towards the banning on the purchase of tobacco products for people born after a certain year to create a so called “*Smoke-free generation*”. (Berrick 2013, i22)

Another example of efficient tobacco control measures through taxation, strict packaging regulation of tobacco products, restriction of tobacco advertisement, smoking ban on school grounds, and others alike come from the Netherland. Their government, implementing the Smoke-free Generation concept, aims at a goal of less than 5% smokers in 2040. (Willemsen and Been 2022, 1)

Based on these forms of prevention, we can find optimized solutions for the two areas of interest specified below, which have similarities regarding the negative social impact that can be generated by the irresponsible use of those services or products.

1.2. The gambling industry

Taking into account there are little information relating to statistics on the number of betting agencies or slot machines, our personal inquiry on the matter found that in Romania there are over 7,000 sports betting agencies and approximately 73,000 slot machines, with a rate of 4 machines per thousand inhabitants. The gambling industry generates approximately 600 million Euros for the state budget every year. (Baicu 2019)

This industry, at least on the national level, does not benefit from a legislative form for the awareness of the adverse effects on the social

and economic stability of the people engaged in this kind of activities, both around gambling and sports betting.

The negative social effects are similar to those of smoking because, when we discuss about personal bankruptcy, we must take into consideration damage caused both to the gambler or smoker and to the people directly affected by their habits, respectively their family.

This similarity is found in the economic and social impact we have on the Romanian state, both in a direct and indirect form. As an example, we can specify the high crime rate in rural areas due to the poor financial education and the high accessibility to this kind of activities, as well as the people who end up in a form of "personal bankruptcy" and are no longer able to honor all of their financial responsibilities (loans, household and family expenses), all of which are taken over both directly and indirectly by the state.

All these risks, previously exposed, can generate social imbalances at a higher level, through the misunderstanding of the general phenomenon, both economic and legislative.

According to this consideration, a legal framework must be built to limit access to this type of entertainment. We propose entering a maximum amount of 1 RON at a time in the device so as not to facilitate the entry of withdrawn amounts of money.

1.3. Debt and over indebtedness

Any form of lending has the purpose of obtaining a good or service at a time as close as possible to the present, as an example we can discuss mortgage loans that are often used to purchase a home. These have the purpose of obtaining that good immediately at the expense of a monthly installment that is paid to the bank, this installment being composed of the balance (the actual borrowed amount) and the interest (the bank's profit) which varies according to the IRCC and ROBOR indexes.

This phenomenon creates an increase in the purchasing power of the population in an artificial way since the people do not have those

sums of money, so in conclusion the home could not be bought at that time.

In this whole phenomenon, the consulting part in the lending area plays a crucial role, whose role is to guide the population towards the best service in the most optimal parameters. The current problem that we are addressing is the increased level of encouragement that banking and non-banking financial institutions have regarding accessing these types of services (mortgage loans, personal loans, shopping cards, etc.), to a population which does not have a level of education and financial perception aligned with European standards.

In a study conducted by the World Economy Institute of the Romanian Academy, it has been shown that the level of financial literacy in Romania is 8%, a staggering 92% of respondents having a poor level of financial knowledge; these scores put Romania on the lower level in Europe. (Nițoi, M., Clichici, D., Zeldea, C., Pochea, M., Ciocîrlan, C. 2022, 6)

As solutions, we have identified two possible options that can be implemented from a legislative point of view:

I. Discouraging the purchase of a loan in a way that is as visible as possible on the websites of the institutions that provide this type of service, in order to create the best possible visibility on the negative effects they have on the quality of people's financial life, if they are not used or accessed in a responsible manner.

II. Implementation of a financial education system based on the principle of saving. As a practical example, all people who want to access a loan for various needs must prove that they have the ability to create a system for saving for a period of 6 months before submitting the credit file. This can be proven through a national financial tracking platform where the person can create an account and enter all the data regarding his income balance, expenses, and savings.

Under this form, we can ensure a much higher level of financial security of the population in a crediting process, as well as facilitating a lifestyle that is as healthy as possible from a financial point of view.

All the social dangers expressed in the present section are being mitigated on a global scale by the UN new international program that has the goal to raise the level of education globally, while also creating social mechanism to develop the economic level in the participant nations. This international program is called Sustainable Development Goals (SDG) and it comes in direct contact with our present theme for the current article regarding the actions that has been taken on a global scale to raise the level of education. That is the main reason for poor decision-making skills regarding all aspects of life, but it is truly visible in regards with the economic stability of an individual.

As a direct answer to that problem Goal 4 of the SDG program addressed the issue of the global level of education which is trying to raise awareness that as we speak an estimated 300 million students globally do not meet the basic education criteria to have a chance to be productive individuals in the modern society.

This information is a direct correlation with the problem that we are addressing in the present section, also reinforcing the principle that education is the primary structure to our financial understanding of the social mechanism that surround us every day. And when we are not given even the chance to comprehend this phenomenon, it will take over our life by the poor decision that we agreed upon.

It has been noticed that in social interaction with people from all social classes, one aspect that strikes our minds and it is in direct contact with the situation that we are discussing is the fact that at this moment in Romanian there are people that had not been financially harmed by the system itself but more by their sole decision regarding their financial stability. An example that is very commonly is the situations where people that are taking loans to have the necessary financial capital to take a bigger loan for the upfront payment.

This is a direct contradiction in regards with the basic financial principles that from our perspective should be taught in primary school, let alone the fact that in a world full of information and possibilities the banking system in the Romanian market is making the most of its profits from loans not investments of deposits. This emphasizes the fact that we do

not have the necessary basic understanding of the social mechanism that we previously discussed.

The SDG progress report is a great tool to understand the international effort and goals of the UN in contrast with the member states, however at this moment their efforts and goals are off track in regards with their deadlines and the actual international and national realities. From our perspective we should harness the information and expertise from this important analysis and create social constructs that are 100% applicable for national needs, therefore moving the focus from an international unitary work conducts to a more genuine applicability on the specific needs of each country that is facing the education problem. (UN Secretary General 2023, 1)

2. Legal aspects of personal insolvency

Personal insolvency proceedings have always been treated separately from the corporate insolvency proceedings due to their slightly different goals: while the later aims either at sanitizing the market of unsustainable companies (through judicial liquidation) or to offer a second chance to those who have potential (judicial reorganization), the former aims to offer the possibility of debt forgiveness under certain conditions prescribed by law.

What happens when a debtor's patrimony is not enough to cover all that is owed? Firstly, from the point of view of individualized action, payment can be seen as the prize of the competition between creditors offered to the one who was fastest and most diligent – this is also due to the fact that, according to Romanian law, creditors don't have a recognized right to start a personal insolvency procedure; but, in the case of insolvency procedures, all valid creditors are brought together at the *creditors table* and share the risk. In this sense, personal insolvency is similar to corporate insolvency, both being based on *pari passu* principle (Murray and Harris 2018, 54).

Personal bankruptcy procedures tend to be simpler, entail fewer creditors, the debit sums are relatively small, and they have a smaller risk of running fraud schemes compared to juridical person debtors; this of

course does not eliminate from discussion the application of the principle of good faith of the debtor in benefitting from the prescriptions of the law.

According to art. 1 of Law nr. 151/2015 regarding personal insolvency procedure, the purpose of this law is to establish a collective procedure for the recovery of the financial situation of the debtor, a natural person, in good faith, to cover as much of his liabilities as possible and discharge his debts, under the terms of this law. Also, analyzing the law's prescriptions we can underline clearly that it is supporting the debtor's exit from insolvency, including by discharging debts, in accordance with the law, in a systematic and rational way, so that the debtor is motivated to make efforts to carry out income-generating activities, to facilitate his reinsertion into the social environment and its contribution to the economic life of the community, according to the level of professional training and accumulated experience.

Insolvency, in the eyes of the law, is that state of the debtor's patrimony which is characterized by the insufficiency of funds available for the payment of debts, as they become due. Thus, the legislator implemented a cash-flow test for insolvency. The debtor's insolvency is presumed when he, after a period of 90 days from the due date, has not paid his debt to one or more creditors; this presumption is relative. According to art. 3 point 24, the threshold value of the debt needed to start such a procedure is 15 minimum-wage salaries.

The law produces a counterintuitive effect: considering its effects, natural persons might be seduced to file for a personal bankruptcy proceeding. But, for these effects to take place, good faith is mandated. One of the main effects sought after from this law is the release from residual debts, as prescribed in art. 71-77.

What is good faith in the context of financial well-being? Is smoking, gambling or blatant over indebteding oneself compatible with the principles of good faith? Of course not, and a closer study of Law nr. 151/2015 permits us to draw some conclusions in this remark.

The personal bankruptcy procedure offers three different types of forms it may manifest: a) insolvency procedure based on a debt

repayment plan; b) judicial insolvency proceedings through liquidation of assets; and c) simplified insolvency procedure.

One of the very first elements that the debt repayment plan must include is the reasons that led to the insolvency state; here is where the administrator of the procedure may underline the good faith or bad faith of the debtor.

There is one exception we could find by a *per a contrario* interpretation of art. 4 par. 1 pt. b), where, even though of good faith, a debtor might not benefit from the effects of the law: if there is a reasonable possibility for the debtor to become again able to perform its obligations as they were contracted (so without a change in the debt coverage ratio) within 12 months, then the insolvency procedure may not opened. For this prognosis, the court may assess the reasonable probability by considering the total amount of the obligations in relation to the income achieved or forecast to be achieved (the debtor has an obligation of diligence to find work if not employed) compared to the level of professional training and expertise of the debtor, as well as to the traceable assets owned by him.

According to the definition section of the law, all three procedures are applicable to *bona fide* debtors in good faith. Bad faith debtors will be liable with all their movable and immovable assets, present and future, as per art. 2324 of Civil Code, while good faith debtors may benefit from release of residual debts. The release of residual debts is the deletion, upon closing the insolvency procedure based on a repayment plan, of the claims entered in the table of claims that exceed the coverage quota agreed upon by the repayment plan; also, the deletion of remaining covered claims upon termination of the application of the simplified insolvency procedure; and finally, the deletion of outstanding receivables after the post-closure supervision period of judicial insolvency proceedings by liquidation of assets.

In order for the legislator not to condone repeated irresponsible financial decisions, even if both times the debtor was of good faith, it had implemented a restriction in accessing the provisions of the law when a debtor has already gone through a personal bankruptcy procedure that ended with a release of residual debt 5 years prior the initiation of the

new proceeding. The law strictly makes a case for prohibiting a second procedure only if the former ended with a release of residual debit. *Ergo*, if the former procedure unfolded without said release, due to the debts being paid in full but only on a different timeframe needed for the implementation of the plan, then a new procedure may be accessed.

Law nr. 151/2015 offers evident examples of good will in debtors before, during or post procedure, in correlation to the financially irresponsible habits discussed in the first part of the article.

If a debtor is in financial difficulty and opts for a personal bankruptcy procedure, he must reconsider the spending habits he has had until then; at least when it comes to the procedure involving debt repayment plan, because in the proceedings entailing liquidation of assets the debtor can no longer exercise the right of disposition over the assets and traceable income from his wealth. In the later situation, the liquidator has the right of establishing the amount of expenses the debtor can make to ensure a reasonable standard of living, which cannot be lower than the minimum wage in the economy in Romania.

In our opinion, fixing said amount of expenses should not, to a reasonable degree, take into account voluptuous expenses like the ones who support smoking or drinking alcohol, and not at all the expenses for activities like gambling.

Supporting this we invoke Decision nr. 10/2022 of the Central Insolvency Commission adopting The general criteria for establishing a reasonable standard of living, from 15.09.2022. The structure of expenses provided for by the document makes no references to expenses like tobacco or alcoholic beverages, but it does permit expenses of 2% out of the minimum monthly consumption basket for “*various products and service*” – approximately 65 RON – where a debtor may hide such expenses.

Gambling implies a so-called random contract where at least one of the due benefits depends on an uncertain event (Pivniceru 2009, 4). Being a random contract, skill or personal performance are not decisive like in the case of commutative contracts. Thus, it cannot be held that gambling activities may be seen as plausible means of getting out of debt, especially when most of the times irresponsible gambling is the trigger

for personal bankruptcy. According to art. 37 par. 1 pt. d) first thesis, the debtor has to carry out, under the conditions of the law, according to his skills and professional training, an income-producing activity; gambling activities fall outside the scope of the article.

There is a class of income the law prohibits from pursuit in court: non-pursuable income represents the share of the debtor's total income necessary to cover expenses to ensure a reasonable standard of living. *Inter alia*, the law refers to the sums necessary to ensure housing, food, transport, health and other current needs of the debtor and the persons to whom he currently provides livelihood. These expenses are approved in insolvency proceedings to ensure a reasonable standard of living so as to ensure respect for their fundamental rights and freedoms and human dignity. The criteria for establishing the reasonable standard of living will be established, annually, by the insolvency commission at the central level.

There are situations when, even with a debt repayment plan a debtor will not or cannot keep up in following it. If, for reasons attributable to the debtor, the measures provided for in the plan are not executed or are executed late or incompletely, any creditor, the administrator of the procedure or the insolvency commission may immediately ask the court to close the insolvency procedure; through the same request, the creditor can also request the opening of insolvency proceedings through the liquidation of assets. If the debtor. Finding the non-fulfilment of the plan due to reasons attributable to the debtor, the court closes the insolvency procedure based on the repayment plan and, if all creditors express their agreement and formulate a request in this regard, it can order the opening of the judicial insolvency procedure through liquidation of assets. If they do not make such a request, then the normal, individual action, may be continued to settle each of their claims. At any stage of the procedure, if it is discovered that the debtor has contracted or acted in any way to defraud the creditors prior to the opening of the insolvency procedure or during it, any creditor may request the court to close the procedure. If all the creditors agree, the insolvency procedure through liquidation of assets can continue, but the debtor does not benefit from the release of residual debts. In this case, the

debtor is required to cover the claims included in the claim table, in their entirety, including interest and penalties that would have accrued if the suspension had not been implemented.

Another important aspect of regaining financial stability is the obligation, as per art. 37 par. 1 pt. g), for the debtor to participate in financial education courses and programs. It may be one of the most helpful obligations the debtor has to undertake in these proceedings if we are thinking long-term. This way, the probability for the debtor to relapse are minimized. In Elmer and Seelig (1998) it was noted that “[w]ealth and leverage are fungible, so shocks to any form of wealth can spread to affect mortgage defaults, and otherwise must be considered alongside the consumer's total financial risk position”. Financial education is crucial when contracting long term obligations, like taking out a mortgage for a house, and very important in our day-to-day spending habits.

Conclusions

In this article we have tried to address certain current social problems, which affect the life of every citizen both directly and through indirect effects, and to offer the most practical and easy-to-implement solutions both on a public and private level.

All these aspects started from the premise of prevention through awareness of the situations to which people can expose themselves if they do not use these products/services in a responsible manner.

We believe that the state plays a fundamental role in the harmonious development of its citizens and to maintain its evolution regarding social norms in relation to current social realities.

Regarding to the three triggers of insolvency analyzed, we conclude that, a devastating role in one's patrimonial demise is financial irresponsibility through gambling spending or uneducated over-indebtedness; even though we can rarely say smoking brings about personal insolvency, there are financially vulnerable people who would be substantially better off quitting.

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THE REGULATIONS ON THE ACADEMIC ETHICS AND DEONTOLOGY. A PLUS OR A SURPLUS BROUGHT BY THE NEW HIGHER EDUCATION LAW?

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Abstract:

The new higher education law no. 199/2023 sought to regulate the issue of university ethics and deontology in a unitary manner in order to avoid recourse to the provisions of different regulations regarding members of the academic community.

Unlike the previous law, which did not carefully refer to this area, understanding that it should be supplemented with the provisions of L. no. 206/ 2004 there are also some aspects that require additional clarification and interpretation to determine the applicable law, even if it seems that the legislator aimed for all aspects related to the activity carried out in higher education institutions to be regulated by this new normative act.

Key words: *law; higher education; ethics and deontology; applicable rules; interpretation.*

Presentation

The major concern for university ethics appeared at the beginning of this century (Ungureanu, & Munteanu, 2005, p.36), until then it was considered that the general moral rules recognized with a certain legal

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force (Chelaru, 2014, pp. 19-20) in society were sufficient to regulate the attitudes that had to be followed by those involved in: the activity didactic, research, dissemination of its results, in management positions or who were called to evaluate certain institutions or individuals.

The emergence of situations in which plagiarism was invoked put the decision-makers on guard, especially those dealing with higher education, to avoid situations that, in addition to violating an essential moral norm, do not covet what is not yours, which has become a legal norm in various forms, could also affect the prestige of higher education institutions, so measures were taken to prevent such situations from perpetuating.

It was thus necessary to regulate concrete ethical and deontological rules, especially in the field of scientific research, which was initially left by the legislator to the discretion of the universities, with very few exceptions where a certain content of the norms from the local regulations was imposed by law and, later after 2023, it was opted for the concrete and exact regulation of these situations even within the normative act, namely the higher education law.

1. Until Law no. 199/2023

Law no. 1/2011 entered into force in the middle of the academic year¹ (Tabacu, Drăghici, Iancu, 2011), was adopted under the conditions in which previously Law no. 206/2004² regulated rules regarding good conduct in research and development activity regardless of the institution in which it was carried out. Therefore, in terms of research activity and higher education institutions were subject to this pre-existing norm, so there was no need for the new normative act, which regulated both pre-university and university education, to expressly refer to types of

¹ National Education Law no. 1 of January 5, 2011, published in the Official Gazette no. 18 of 10.01.2011, in force from 9.02.2011.

² Regarding good conduct in scientific research, technological development, and innovation, published in the Official Gazette no. 505 of 04.06.2004.

deviations to the rules of ethics and deontology, under the conditions in which they were already provided for in the mentioned normative act.

So, the national education law did not concern itself with the concrete content of the ethics norms, from the perspective of concrete facts or deviations, although it enshrined them and recognized their necessity, the legislator's inclination being predominantly oriented towards the procedure for following up and sanctioning these facts.

Only a minimum of ethical rules was foreseen (Art.130 from L.no. 1/2011), that had to be contained in the regulations of each higher education institution, at that time the legislator opted for the regulation of ethics according to university autonomy. On the one hand, the obligation of universities to enshrine in their University Charter a Code of Ethics and Deontology, the concrete content of which was not limited by the norms of the law from the perspective of misconduct (Art.128 alin. 2 lit.b) from L.no. 1/2011), and, on the other hand, the duties of the Ethics Council were regulated and University Management and of the ethics commissions (Art. 218, art.306-308 from L. no. 1/2011), as well as the sanctions (Art. 318 – 319 from L.no.1/2011) that could be applied in the event of violation of the ethics rules.

Thus, the law compelled higher education institutions, as in the Code of Ethics and University Professional Deontology, to provide for: situations of conflicts of interest and incompatibilities and, necessarily, certain conflicts of interest as well as the educational, administrative, and technical measures necessary to guarantee the originality of works bachelor's, master's, doctorate, scientific articles, or other such works, as well as the related sanctions¹.

To ease the understanding of the legislator's intention and to have a term of comparison when drawing up the universities' own regulations,

¹ The provision that persons who are related by spouses, relatives and relatives up to the 3rd degree inclusive cannot simultaneously hold positions in such a way that one or the other is in a position of leadership, control, authority or institutional evaluation at any level in the same university and cannot be appointed to doctoral committees, evaluation committees or competition committees whose decisions affect spouses, relatives or relatives up to and including the 3rd degree.

the law expressly declared as serious deviations from good conduct in scientific research and university activity: a) plagiarism of the results or publications of other authors; b) fabricating results or replacing results with fictitious data; c) introducing false information in grant or funding requests (Art. 310 from L. no. 1/2011).

In this context, each university had the freedom to decide in the Code of Ethics, part of the University Charter, what these measures were to guarantee the originality of undergraduate theses, what programs for checking similarity or plagiarism they used, what were the concrete sanctions that could be applied in this meaning but also other deviations from good conduct in the research activity and in the didactic activity, apart from those expressly qualified by the law as serious deviations.

The concrete way in which it was proceeded at the level of higher education institutions, respectively the practice revealed at the level of the National Council of Ethics and University Management determined the need to adopt a normative act that would ensure legislative uniformity and include a clear norm, equally applicable to all, in addition to which, in the future, based on university autonomy, can be additionally regulated.

2. After 4.09.2023

The reasons that led to the taking of legislative measures in the field of academic ethics were determined by several factors, which justified the conclusion that it is necessary to make universities responsible¹.

It is serious that in the year 2023 there is talk about the need to adopt basic rules regarding academic writing and the correct citation of sources, given that each university has developed regulations regarding the methodology for preparing diploma, master's, and master's theses

¹ Statements of reasons - <https://www.cdep.ro/proiecte/2023/200/50/4/em270.pdf> accessed at 25.10.2023.

doctorate, more recently ethics and academic integrity courses became mandatory.

We do not have the necessary means to ascertain whether a reality specific to our country is given by the existence of regulations that meet European standards and are complete in the respective field, but which are not implemented. However, it is possible that one of the causes for which the findings in the statement of reasons of the law were reached is represented by the ignoring or the wrong or incomplete application of the multiple regulations that show the way in which the papers for completing studies in higher education must be drawn up.

From the perspective of regulation, the taking over as such of the provisions of Law no. 1/2011 or Law no. 206/2004 in the own codes of higher education institutions or a certain inertia in not regulating certain concrete deviations or, most likely, the need of legal objectification and clarification of the regulation determined the legislator to, in the new normative act, expressly provide for the types of rules, the categories of violations, together with the sanctions and the procedure to be followed for their application. The legislator referred only to the consolidation of the regulation in the matter of university ethics and deontology, however, the way in which he proceeded, by adopting Chapter XX of the first Title of the law, reveals first of all the intention to bring together in the same law the specific provisions in the matter and at the same time to clarify certain aspects that were not covered in the previous regulation, in particular regarding the duties and procedures that the commissions involved in this area had to follow.

Thus, Law no. 199/2023 regulates in chapter XX of its first title, in 3 sections, general provisions, deviations from the rules of university ethics and deontology, respectively the applicable sanctions.

Law no. 199/2023 enshrines several categories of ethics and deontology norms, depending on the type of specific activity carried out by members of the academic community didactic and university research activity; the activity of communication, publication, dissemination, and scientific popularization; exercising the duties related to management functions. As a corollary to all of them, the law provides for the category of ethics and deontology norms regarding respect for human being and

dignity, which must benefit from attention in the own regulations of higher education institutions and not exceed the minimum limit imposed by the education law. Thus, this presents the general framework from which universities can depart to develop the most complete norms, as it is necessary to take into account certain essential values for the smooth development of the educational process: the rights, the dignity of the direct beneficiaries of the right to education (Tabacu, Drăghici&Singh, 2007, p. 11); the prestige and recognition of the profession, the responsibility and trust conferred by society.

For the sake of clarity, although it was not necessary, given that, in the future, universities have the possibility to regulate based on university autonomy in addition to the law, it expressly states that the norms of university ethics and deontology that it contains are supplemented by the provisions of: the Framework Code of university ethics and deontology (Government decision); The framework regulation on the organization and operation of university ethics commissions, at the level of higher education institutions (Order of the Minister of Education); standards and guidelines regarding ethics management, as part of the external evaluation methodology, standards, reference standards and the list of performance indicators (Government decision); the code of ethics and university deontology of the higher education institution; the norms of ethics and professional deontology provided in other normative acts applicable to the staff of higher education institutions (Art.161 alin. 2 from L. no. 199/2023).

We will see whether a framework Code of university ethics and deontology that will be developed by Government decision will not be taken over as such in every higher education institution, which, on the one hand, represents a positive aspect because it ensures regulatory uniformity but, on the other hand, it will reveal little concern for identifying all situations that could represent violations of the rules of academic ethics and deontology.

Regarding the professional ethics and deontology rules provided in other normative acts applicable to the staff of higher education institutions, the reference from art. 199 of the new normative act to Law no. 319/2003. Thus, it is shown that the latter still applies to research and

development functions in higher education institutions and the staff who occupy them, so that only teaching staff would remain fully subject to the new law, resulting in the fact that for researchers Law no.319/2003 and, if it is silent or does not provide, L. no. 199/2023 will be applied in addition. How Law no. 319/2003 does not specifically refer to the deviations from the ethical rules in research and how they are provided in Law no. 206/2004, which continues to regulate deviations from good conduct in research activity, it can be noted that they also apply to researchers.

However, it is necessary to corroborate this reference with art. 260 para. 12 of L. no. 199/2023, which shows that the norms of university ethics and deontology provided for in art. 167 of the law applies to staff employed in higher education institutions, including research activities, by way of exception to the provisions of Law no. 206/2004. In other words, the law does not distinguish between teaching and research staff (Art.200 alin. 1 si 2 from L.no 199/2023), so all of them will be subject to Law no. 199/2023, in the conditions in which they carry out their activity within a higher education institution, only researchers from other institutions or research entities will be subject to the norms of Law no. 206/2004.

Conclusions

By adopting Law no. 199/2023 sought to develop a unitary normative act regarding higher education, without the need to refer to external provisions, such as, in the field of research ethics, Law no. 206/2004.

An obvious plus is given by the fact that the law comes to clarify a series of aspects that under the previous norm either remained at the discretion of higher education institutions and were not regulated or applied, or were found in the norms, but they were not characterized by clarity. It is important that the law shows what is its field of application and avoids parallels by indicating the normative act that applies to a certain category or situation, as well as the fact that it shows the types of deviations that must not be missing from a Code of Ethics, further

allowing higher education institutions to regulate additionally, especially since compliance with ethics rules remains their responsibility.

It should be noted, however, that with regard to the norms of ethics and professional deontology provided in other normative acts applicable to the staff of higher education institutions prior to the entry into force of the new law, it does not excel in clarity, as it is necessary for its addressees to be careful in determining the norm applicable, because it also provides for the conditions of incurring liability, as an undesirable effect, especially in the research activity.

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A CRACK IN THE DEFENSE OF PUBLIC OWNERSHIP OF FOREST LAND

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Abstract:

This article does not aim to highlight the importance of forests for mankind but, starting from this axiom, presents some of the shortcomings encountered in practice regarding the legal protection of publicly owned forests, while offering some remedies.

Key words: forest land; protection; public ownership; legal standing; title of ownership.

Motto: *Forest is not timber, wildlife is not wild game, and we are not few!*
Alex Găvan, environmental activist and high-altitude climber

Introduction

Given its particular importance not only for the present but also for future generations, the state-owned forestry fund enjoys the special legal protection regime created in national legislation for this form of property – public property. The three characteristics of public ownership – inalienability, non-applicability of limitation periods and non-

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excludability – provide the legal protection necessary for the preservation of property under this regime with a view to its safe transmission to future generations.

However, these substantive law benchmarks can only be used at a concrete level by means of legal levers of procedural law, because only within a process can the phenomenon of achieving justice take place. This procedural framework becomes as important as substantive law itself in terms of the legal protection of public property, because a poorly formulated or ill-conceived procedural approach can lead to failure in the attempt to protect public property. Such issues, identified in the civil process, will be analyzed below.

The forest fund, public property of the State, is managed mainly by the National Forestry Administration – Romsilva, an autonomous national interest directorate under the authority of the state¹.

In this capacity, as administrator of the forest land in the public property of the State, the National Forestry Administration – Romsilva, brings, in its own name, through its representatives in the territory, the County Forestry Directorates, actions for land claims whenever it is found that an encroachment has taken place on the forest land in the public property of the state. This practice of the National Forestry Administration – Romsilva is a constant at the national level, in the sense that it can be found in every administrative-territorial unit where there is a court of law, either a District Court or a County Court.

We ask the question: is such a practice, right? Does the National Forestry Administration – Romsilva have the legal standing to bring an action for land claims for the protection of the state's publicly owned forests?

1. The concept of active legal standing

The capacity to sue and be sued¹ refers to the identity between the capacity of plaintiff and that of holder of the right in question. In other

¹ http://www.rosilva.ro/articole/prezentare_generala_p_178.htm

words, the plaintiff has *locus standi* only to the extent that he claims to be the holder of the right in question. That is the only way he can act: on the basis of and in defense of his right.

The right claimed to have been affected in these disputes is none other than the right of public ownership of forest land.

The right in issue is not the subject-matter of the action. The procedural legal means by which it is sought, in the present case, to defend the right at issue (the right to public property), are represented by the subject-matter of the action and, specifically, they are represented by the action to claim the area of land alleged to be public property.

In this category of litigation, the plaintiff, NFA Romsilva, alleges that the defendants are unlawfully in possession of an area of land with forest vegetation which is part of public property.

The essence of the legal battle in the present case is the question which the courts must decide on the legal status of the land in dispute, whether or not it is public property.

Such a trial to determine whether or not a public property right has been misappropriated, whether or not it is part of public property, can only be conducted in adversarial proceedings with the holder of the allegedly misappropriated right, i.e., the holder of the public property right.

Why?

As we have indicated, the essence of the determination of entitlement in this case will be whether or not the area of land with forest vegetation to which the defendants also claim entitlement and which they consider to be private property is part of public property.

However, if the courts rule that this land is not part of public property, then the legal status of this area of land will remain established in perpetuity. Consequently, the person who brings a case before the

¹ Art. 36 of the Code of Civil Procedure: “Procedural quality results from the identity between the parties and the subjects of the litigious legal relationship, as it is brought to trial. The existence or non-existence of the rights and obligations asserted is a matter of substance”.

court in which such a declaration is made can only be the person who can also take the risk of losing the case. Nevertheless, the risk of losing the case can only be taken by the holder of the right in question, i.e., in this type of case, the holder of the public property right.

It is only by reference to this holder that it can be established once and for all whether or not the property in dispute is public property.

Just as an analysis of the validity or invalidity of the title exhibited by the defendants cannot be made without them having stood in the case, neither can an analysis of whether or not the land in dispute is public property be made unless the holder of the public property right is a plaintiff.

Art 563 of the Civil Code¹, which is the subject matter of the action in revendication, expressly states who may bring an action in revendication, the owner, i.e., moving to the procedural realm, the person who claims to be the owner.

It is obvious that, as far as the public property right is concerned, the claimant in the claim action or in any action in which the existence or non-existence of the public property right is in question cannot be other than the entity to which the law confers the quality of holder of the public property right, i.e., the Romanian state or the territorial administrative units. As, in the case law analyzed, it is claimed that the land in dispute is the public property of the state, therefore, no entity other than the Romanian state can have active legal standing.

NFA Romsilva through the County Forestry Directorates initiates the civil lawsuit, attacks an existing order of law, questioning the very existence of public ownership.

As the plaintiff in the cases in question is NFA Romsilva, which does not own the right in question, it is obvious that it does not have standing to bring the action and is thus unable to protect the public property right.

¹ Art. 563 of the Civil Code: "The owner of property has the right to claim it from the possessor or from any person who holds it without right".

2. The owner of the public property right

Both the fundamental law, the Romanian Constitution¹, and the main civil law, the Civil Code², explicitly state that the holder of the public property right can be none other than the Romanian state or the administrative-territorial units.

In the cases brought by NFA Romsilva, the latter is the plaintiff although it does not claim to be the holder of the public property right, but it submits to the court the determination of whether or not the disputed land is part of the public property, by filing a claim in its own name. This is not an effective way of conferring legal protection on public ownership.

Are there any decisions of the High Court of Cassation and Justice handed down in appeals in the interest of the law which are binding on the judgment in such cases?

I have noted the reference, under this heading, to Decision No 15/2011³.

HCCJ Decision no. 15/2011 rendered in an appeal in the interest of the law clarifies for the future that the NFA Romsilva has standing to file complaints against the decisions of the County Commissions and to bring actions under Art III of Law no. 169/1997 to declare the absolute nullity of the acts issued in the procedure of the land fund regarding the retrocession of forest land. This Decision is applicable exclusively to the categories of actions to which it refers.

Such a binding rule for the courts cannot be applied by any kind of extensive interpretation to NFA Romsilva's active procedural status in the context of an action to reclaim public property.

¹ Art 136 Para 2 of the Romanian Constitution: "Public property is guaranteed and protected by the law, and belongs to the State or to territorial-administrative units".

² Art. 858 of the Civil Code: "Public property is the right of ownership belonging to the state or to administrative territorial units...."

³ Decision no. 15/2011, published in the Official Gazette of Romania, Part 1, no. 827/22 November 2011

Thus, there are no decisions of the High Court of Cassation and Justice handed down in appeals in the interest of the law which have a bearing on the judgment of this type of case.

3. Texts from special incidental laws invoked by NFA Romsilva

It is argued that NFA Romsilva has, according to Art 11 Para 1¹ of Law no. 46/2008 (Forestry Code), the right to administer the publicly owned forest land and this text of the law, in conjunction with the provisions of Article 11 Para 10² of Law no. 46/2008, gives it the legal standing to bring the claims with which it has brought actions before the courts.

It is obvious and undisputed that the NFA Romsilva has the right to administer the publicly owned forest land, but this right does not give it the capacity to bring an action for claim.

Here it is why: the provisions of Art 865 Para 1 of the Civil Code states that: “The obligation to defend public property rights in court is incumbent on the holder”.

However, as we have shown, according to the provisions of Art 858 of the Civil Code and Art 136 Para 2 of the Constitution, the NFA Romsilva is not the holder of the public property right.

The provisions of Art 865 Para 2 of the Civil Code establish obligations for the holders of rights corresponding to public property

¹ Art.11 Para 1 of Law no. 46/2008: “The forest fund, public and private property of the state, is managed by the National Forestry Administration – Romsilva, an autonomous national interest administration, under the authority of the state, through the central public authority in charge of forestry, by the “Marin Drăcea” National Institute for Research and Development in Forestry and by the Autonomous Administration of State Protocol Patrimony, through its own forest division established under the law.

² Art.11 Para 10 of Law no. 46/2008: “In disputes concerning the right of ownership of forest land owned by the State, the holder of the right of administration is obliged to show the court who is the holder of the right of ownership, according to the provisions of the Code of Civil Procedure. The holder of the management right is liable, under the law, for damages caused as a result of failure to comply with these obligations.

rights, as is the case of the management right that RNP Romsilva has (the law imposes 2 obligations on them):

- To inform the owner regarding any disturbance.
- To bring the owner to court under the terms of the Code of Civil Procedure.

The question arises: in what capacity can the NFA Romsilva introduce the owner and through which procedural levers? The holder can be entered by means of “showing the right holder”.

The Code of Civil Procedure provides for the institution of the right holder’s notification in Art 75 et seq – the text starts like this: “the defendant ... could point to the one on whose behalf...”.

This legal possibility is accessible only to the defendant, never to the plaintiff.

The NFA Romsilva is the plaintiff in the claim, a plaintiff, as we have shown, without active quality.

In addition, according to Art 77 Para 3, the purpose of this institution is that the person who pointed out the right holder is removed from the process, which shows once again the lack of correspondence between the text provided by the law and the approach made by NFA Romsilva as plaintiff.

The second procedural lever through which the right holder can sue to protect his right is voluntary intervention. By means of this legal institution, the Romanian State could intervene, under the terms of Art 61 Para 2 of the Code of Civil Procedure, claiming for itself the right that is the subject of the proceedings. Under these conditions, a contradictory relationship also arose vis-à-vis the plaintiff, i.e., Romsilva.

In the same sense are the provisions of Art 11 Para 10 of the Law no. 46/2008 (Forestry Code): “In disputes concerning the ownership of state-owned forest land, the holder of the management right is obliged to show in court who is the holder of the ownership right, according to the provisions of the Code of Civil Procedure”.

This is exactly what we have said earlier. The interpretation of this text cannot be other than that if a dispute is brought against the holder of the right of administration concerning public property, he is obliged to show the court who is the holder of the property right.

NFA Romsilva cannot legally “lose” the right of public property of the state, it cannot deduct the right of public property of the state in a “petitioning” lawsuit, Romsilva cannot sue on its own even as a defendant without showing the holder of the right but, even more, it cannot be a plaintiff in such a dispute.

4. Jurisprudence invoked by the NFA Romsilva

We were able to see that Romsilva, in order to justify the possibility of bringing actions as plaintiff, also appeals to certain elements of the case law of the HCCJ. First of all, we show that the case-law cannot directly influence the outcome of the case unless either decisions rendered by the High Court on appeal in the interest of the law or on preliminary rulings for the resolution of questions of law are identified. As indicated, no such High Court decisions have been identified.

The case law presented could indirectly influence the resolution of the cases by highlighting reasoning based on the legal provisions, reasoning to which the judges of the present case should adhere and make concrete application of the highlighted legal provisions.

No legal reasoning capable of overturning the decision of the Court of First Instance can be drawn from the case-law set out in this framework. This is why:

a) Romsilva tends to extract from the jurisprudence the reasoning according to which it is allowed to promote actions in considering its attributions and through the G.E.O no. 226/2000, Law no. 66/2002, G.D. no. 796/2002, Order no. 105/2003 and G.D. no. 1105/2003.

In addition to the arguments set out in the preceding paragraphs, which prove, by reference to legal texts, the absolute impossibility for Romsilva to bring an action with such an object, it should be noted that the claim made by invoking the aforementioned case law, which refers to Romsilva’s powers, has a nuance that fundamentally changes the terms of the problem: Romsilva is allowed to formulate actions but not in its own name but as representative of the Romanian state. This implies that

in any situation in which the Romanian state is the plaintiff, it can be represented also by Romsilva in certain disputes, not only the Ministry of Finance.

This is a totally different situation from the hypothesis of the present study. The hypothesis of the present study is that Romsilva is the plaintiff, i.e., it claims for itself the right at issue, therefore the case law invoked cannot be applicable even as a reasoning to the situation generated by Romsilva's practice.

Conclusions

We wanted to demonstrate in this study that from any point of view we analyze this practice of Romsilva we come to the conclusion that it is wrong, and the immediate consequence is the failure to achieve the proposed goal, the protection of public property rights. By taking these steps, the only result is to delay or even block the defense mechanism, which for the forest can mean "life" itself.

As the holder of the public property right is the state, it must necessarily initiate the claim by being the claimant and correctly triggering the defense of the forest land. It is true that in this matter all the necessary data are held by the holder of the right of administration, i.e., Romsilva, but what prevents the state from granting a mandate to the administrator, in the name and on behalf of the state, to carry out, correctly this time, the defense of the public property right, by initiating the claim action?

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Code of Civil Procedure – Law no. 134/2010

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G.E.O. no. 226/2000 regarding the legal circulation of forest land

Law no. 66/2002 for the approval of the Government's Emergency Ordinance no. 226/2000 regarding the legal circulation of lands for forestry purposes

G.D. no. 796/2002 for the approval of the Acquisition Methodology, by purchase, exchange or donation, by the central public authority in charge of forestry, through the National Forestry Directorate, of the lands that can be included in the forestry fund that is the public property of the state

Order no. 105/2003 for the approval of the Regulation on the organization and operation of the land evaluation commission that can be included in the forestry fund as public property of the state through acquisition by the central public authority responsible for forestry, through the National Forestry Directorate, and for the approval of the Regulation on organization and operation of the commission for negotiating the sale-purchase contracts to be concluded for the inclusion in the forest fund of public property of the state of the lands acquired through the National Forestry Agency

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NATIONAL AND EUROPEAN JUDICIAL PRACTICE REGARDING THE CONCESSION AND SUPERFICIES AGREEMENTS, AS TOOLS FOR THE EXPLOITATION OF LANDS PRIVATELY OWNED BY THE STATE AND ADMINISTRATIVE-TERRITORIAL UNITS

Raluca CHELARU¹

Abstract:

As stated in the first part of this study (“National and comparative law regarding the concession and superficies agreements, as tools for the exploitation of lands privately owned by the State and administrative-territorial units”), often, local public authorities call for the establishment of superficies in favour of investors interested in building on the lands that are privately owned by administrative and territorial units. While such a possibility is not expressly forbidden by the legislation, the Romanian Administrative Code seems to limit the ways of exercising the right of private property of the State/administrative and territorial units. Thus, the most appropriate institution would seem to be that of the concession, which involves following the same arduous procedure as in the case of the public property of the State. Doctrinal and jurisprudential opinions are divided, but recent decisions of the Constitutional Court, but also of the Court of Justice of the European Union are a reference in the field and must be taken into account in practice, alongside with TFUE and European directives provisions.

Key words: superficies; concession; private property; Administrative Code; severance of private property.

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Introduction

Recent practice has shown in Romania that preference is given to superficies established by local public authorities for various investments. Authorities prefer to avoid the cumbersome procedure of concessions.

If the case law of the national courts of general law is not clear enough, the case law of the Constitutional Court, but especially of the Court of Justice of the European Union (alongside with the European law on the matter), speaks for itself.

1. Relevant national case law on the establishment of rights of superficies over the private property of the State and of the administrative and territorial units

As regards the right of superficies when discussing the private property of the State, the Craiova Court of Appeal (Decision no. 3812/2018) has shown that, according to Article 693 of the Civil Code, superficies is the right to have or build a construction on the land of another, above or below that land, over which the superficiary acquires a right of use. The right of superficies is acquired by virtue of a legal act, as well as by *usucapio* or by any other means provided for by law.

The phrase “under the conditions of the law” implies a legal regulation of the way in which private land is allocated.

In the present case, the method chosen by the defendant-appellant for the adoption of the decision is inappropriate and contrary to the limits which the law confers on the private property rights of administrative-territorial units, since the defendant-appellant cannot establish a right of superficies by direct allotment.

What the court examined is the legality of the adoption of the decision by the local council, in the light of the provisions of Article 36 of Local Public Administration Law No. 215/2001, which constitutes the general framework of the powers which the local council may exercise. That analysis was also carried out by reference to the general principle

applicable to public law, according to which a public authority is not entitled to take any action which it is not expressly permitted to take.

In other words, the court seems to have penalized the way the superficies contract was awarded, *i.e.* that such a contract could not be awarded directly.

There is, of course, the question of whether the court would have considered valid a superficies constituted by a public bid, for example. To determine the answer, we are of the opinion that certain arguments could be used to interpret the substance itself of the legal institution. Thus, even if it were called "superficies", if the conditions of a concession were met, the legal act could be reclassified. However, the question arises whether, for example, the term of 99 years would be reduced, by law, to the maximum allowed for a concession (when such a term is provided for in the law). However, as mentioned previously, for example, Law No. 50/1991 does not provide for a maximum term - in this case, other criteria will be used to determine the maximum duration, such as the interests of the affected community and of the authority in question, the duration needed to recover the investment, etc. Of course, such a solution of requalification of the act is debatable and should be analysed on a case-by-case basis, so as to ensure that such a requalification would not contravene to certain imperative rules that regulate the institution of the concession.

2. Relevant case law of the Constitutional Court of Romania

In the matter of the legal framework of the private property of the State or of the administrative-territorial units, Decision No. 139/2021 of the Constitutional Court of Romania is of reference.

The Constitutional Court held that Article 355 of the Romanian Administrative Code establishes that assets which are part of the private property of the State or of administrative-territorial units are in the civil circuit and are subject to the rules laid down in the Civil Code.

According to the reasoning of the Constitutional Court, given that the object of private property is made up of the assets that make up the private property of the State and of the administrative-territorial units,

assets that can be disposed of, can be subject to seizure and can be acquired by any means provided for by law, the State is free to dispose of its private property, including by transferring its assets free of charge to another subject of law, as is any private holder of private property rights.

Also, the Court notes that the land in question is the private property of the State, and the elements of the legal framework applicable to private property are outlined in Articles 44 and 136(5) of the Constitution. Thus, Article 136 of the Constitution does not contain provisions with a special protection framework with regard to the private property of the State or of administrative-territorial units, but only with regard to public property, establishing in para. (5) that private property is inviolable under the conditions of the organic law.

According to Article 44(1) and (2) of the Constitution, both the private property of the State and that of natural or legal persons under private law enjoy the same legal framework under private law. Therefore, the State, through its competent authorities and in accordance with its socio-economic development goals, has the legal freedom to dispose of this property within the limits of the Constitution.

The Court notes that the transfer of the State's private property right to a third entity by sale is regulated in the Romanian Administrative Code. That legislative act does not lay down all the methods of disposing of such property, since it is for the legislature to adopt special legislative acts regulating the transfer of State property in a specific manner and by other methods of disposal.

Under these circumstances, it is natural that the provisions of the Romanian Administrative Code should make it the Government's sole responsibility to decide on the transfer of State ownership by sale. The fact that the legislation grants the Government such decision-making competence does not mean that it has an original competence, but an assigned one. Thus, with regard to the transfer of the State's private property rights, the original competence is and remains with the Parliament, which may, directly by law, order the disposal of such property, including free of charge.

Given that private property is at the heart of the market economy, in which the role of the State cannot be denied, it must essentially ensure

the economic development of the country by enhancing the value of its public and private property, even by ensuring the development of the private property of other subjects of law.

In conclusion, although this decision analysed the constitutionality of a law transferring certain buildings free of charge from the private property of the State, we consider that the arguments provided by the Constitutional Court could be taken into account as a general rule in the field of private property of the State and administrative-territorial units. In other words, it can be concluded that, to the extent that the Romanian State would like to allow the creation of superficies on the private property of the State and the administrative-territorial units, there is nothing to prevent this from being regulated by law. *Per a contrario*, it would follow that, in the absence of express regulation of that possibility, it would not be possible to conclude superficies contracts in respect of land in the private property of the State and of the administrative-territorial units.

3. The view of the Court of Justice of the European Union. Services Directive

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (“Services Directive”) refers to Article 14(2) of the Treaty establishing the European Economic Community (EEC), *i.e.* the current Article 26(2) of the Treaty on the Functioning of the European Union (“TFEU”), according to which the internal market comprises an area without internal frontiers in which the free movement of services is ensured.

The Services Directive explains that services are the engine of economic growth and account for 70% of GDP and jobs in most Member States and aims to establish a general legal framework benefiting a wide variety of services, taking into account the specific features of each type of activity or profession and their regulatory system.

According to the case law of the Court of Justice of the European Union (“CJEU”), in order to determine whether certain activities, in particular those financed by public authorities or provided by public

bodies, constitute a “service”, each individual case must be assessed, taking into account all the characteristics of the services, in particular the way in which they are provided, organised and financed in the Member State concerned.

“Service” means any independent economic activity normally provided for remuneration.

The concept of “provider” should cover any natural person who is a national of a Member State or any legal person exercising a service activity in a Member State, taking advantage of the freedom of establishment or the free movement of services.

“Authorisation scheme” means any procedure which obliges the provider or beneficiary to make representations to the competent authority with a view to obtaining a formal decision or an implied decision on access to or exercise of a service activity.

For the purposes of the Services Directive, where the number of authorisations available for a given activity is limited due to the scarcity of natural resources or due to low technical capacity, Member States must apply a selection procedure to potential applicants that provides full guarantees of impartiality and transparency, including appropriate publicity of the opening, conduct and conclusion of the procedure. In such cases, the authorisation shall be granted for an appropriate limited period and may not be automatically renewed nor confer any other advantage on the provider whose authorisation has expired or on any person having a special relationship with the provider concerned. These aspects are regulated in Article 12 of the Services Directive.

In this connection, the Judgment of the CJEU, Fifth Chamber, of 14 July 2016 concerning “Reference for a preliminary ruling — Public contracts and freedom of establishment — Article 49 TFEU — Directive 2006/123/EC — Article 12 — Concessions of State-owned maritime, lakeside and waterway property of an economic interest — Automatic extension — Lack of tender procedure” in Joined Cases C-458/14 and C-67/15 (“CJEU judgment on services”) is of interest.

The CJEU Judgment on services concerns references for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative

Court for Lombardy, Italy) and the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court for Sardinia, Italy), by decisions of 5 March 2014 and, of 28 January 2015, received by the Court on 3 October 2014 and 12 February 2015, respectively, in the proceedings between Promoimpresa Srl (C-458/14) and Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro, Regione Lombardia, and Mario Melis *et al.* (C-67/15) and Comune di Loiri Porto San Paolo, Provincia di Olbia Tempio. The references for a preliminary ruling concern the interpretation of Article 12 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) and of Articles 49 TFEU, 56 TFEU and 106 TFEU.

These claims have been made in two disputes. The first dispute (Case C-458/14) is between Promoimpresa Srl, on the one hand, and Consorzio dei Comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro (Consortium of Municipalities of the Brescia Province situated on the shores of Lake Garda and Lake Idro, Italy, hereinafter ‘the Consortium’) and Regione Lombardia (Lombardy Region, Italy), on the other, in connection, first, with the decision of the consortium to refuse to renew a concession granted to Promoimpresa for the exploitation of public land and, second, with the decision of the Giunta Regionale Lombardia (Regional Council of Lombardy) to make the award of public concessions subject to a comparative selection procedure. The second dispute (Case C-67/15) is between Mario Melis *et al.*, on the one hand, and Comune di Loiri Porto San Paolo (Municipality of Loiri Porto San Paolo, Italy, hereinafter “the Municipality”) and Provincia di Olbia Tempio (Province of Olbia Tempio, Italy), on the other, in relation to certain decisions concerning the approval of the plan for the use of the coastline and the award of concessions of maritime property, and to certain measures by which the municipal police forced Mr Melis *et al.* to remove certain equipment from the maritime domain.

Case C-458/14

By the decisions of 16 June and 17 August 2006, the consortium awarded Promoimpresa a concession for the operation of a piece of land

in the public property for the purposes of a kiosk, terrace, baths, quays and pontoon, which is part of the Lake Garda domain.

Article 3 of this concession provided for its automatic termination on 31 December 2010, without the need for a notice of default and without the possibility for the concessionaire to invoke customs and usages in order to continue to benefit from the concession.

Also, the European Commission considered, in a letter of formal notice notified to the Italian Republic on 2 February 2009, that Article 37 of the Italian Navigation Code was contrary to Article 49 TFEU, since it provided for a right of preference in favour of the concessionaire whose authorisation had recently expired in the procedure for awarding concessions in the public maritime domain. The Italian legislator intervened to remove this right of preference. Subsequently, when Decree-Law No. 194/2009 was converted into Law No. 25/2010, the Italian legislator inserted a reference to another legislative text which thus allows concessions to be automatically renewed every six years. In an additional letter of formal notice of 5 May 2010, the Commission took the view that that reference, on the one hand, deprived the abolition of the right of first refusal of any effect and, on the other, was contrary to Article 12 of the Services Directive and Article 49 TFEU. Since the Italian legislature had decided to repeal the provision allowing that reference, the Commission considered that it could close the infringement procedure on 27 February 2012.

On 14 April 2010, Promoimpresa submitted an application for renewal of its concession, which the consortium rejected by its decision of 6 May 2011. That refusal was based on the fact, first, that the new concession could not be obtained on the basis of a simple application for renewal but only through a public tendering procedure and, second, that the expiring concession was limited to five years and excluded any form of automatic renewal.

Promoimpresa challenged the consortium's decision before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court for Lombardy, Italy), alleging, in particular, an infringement of Article 1(18) of Decree-Law No. 194/2009, converted

into Law No. 25/2010, which provides for the extension of the expiry date of the concessions.

The referring court states that the legal relationship between Promoimpresa and the consortium has the characteristics of a “concession” within the meaning of European Union law, since Promoimpresa has a right to use a public asset in return for the payment of a periodic fee to the administrative authority which owns that asset, and the risk of its exploitation remains with Promoimpresa.

The aforementioned court considers that the Italian legislation, by providing for the repeated extension of the duration of those concessions in the public property, creates an unjustified restriction on freedom of establishment, in particular by making it practically impossible for any other competitor to have access to the concessions which are due to expire.

In those circumstances, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court for Lombardy) decided to stay proceedings and submit the following reference to the Court for a preliminary ruling:

“Do the principles of freedom of establishment, non-discrimination and protection of competition laid down in Articles 49 TFEU, 56 TFEU and 106 TFEU and the principle of reasonableness contained therein preclude national legislation which, as a result of successive legislative interventions, provides for the repeated extension of the time-limit for the termination of certain concessions for assets of economic interest belonging to the maritime, lake and river public property, the duration of which is extended by law by at least eleven years, thereby maintaining the right to exploit the asset for economic purposes exclusively in favour of the same concessionaire, notwithstanding the expiry of the period of validity provided for in the concession previously granted to that concessionaire, with the consequence that interested economic operators are deprived of any possibility of obtaining the award of the asset following public tendering procedures?”

Case C-67/15

Mr Melis *et al.* are, for the most part, administrators of tourist-recreational activities in the area of the municipality's beach, under concessions of maritime public property awarded during 2004 for a period of six years, subsequently extended for a further year.

In 2012, Mr Melis *et al.* applied to the municipality for a formal extension decision. The latter did not respond. Mr Melis *et al.* deduced from this lack of a response that they could continue to legally carry out their activities since May 2012, in accordance with Article 1(18) of Decree-Law No. 194/2009, which provided for the automatic extension of concessions on the public maritime domain for tourist-recreational activities.

On 11 May 2012, after the approval of the coastal use plan, the municipality published a notice for the award of seven new concessions for assets in the maritime public property, some of which were located in areas already subject to concessions awarded to Mr Melis *et al.*.

On 5 June 2012, Mr Melis *et al.* submitted to the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court for Sardinia, Italy) a claim for the annulment of these decisions of the municipality. Subsequently, they submitted additional grounds, notified on 11 June 2012, thus extending their rebuttals to the decision by which the municipality had awarded the concessions which were the subject of the notice of 11 May 2012. Mr Melis *et al.* also complained against the measures by which the municipal police had ordered them to remove their equipment from the maritime public property.

The referring court states that the legal relationship between Mr. Melis & Others and the municipality has the characteristics of a concession within the meaning of European Union law, since it concerns the provision of a service, and the risk of operation is undertaken by the concessionaires.

It further considers that the automatic extension provided for by national law prevents the application of EU law, in particular Article 12 of the Services Directive, and the provisions of the TFEU on the freedom to provide services and the freedom of establishment.

In those circumstances, the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court for Sardinia) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

"1) Do the principles of freedom of establishment, non-discrimination and protection of competition laid down in Articles 49 TFEU, 56 TFEU and 106 TFEU preclude national legislation which, as a result of successive legislative interventions, provides for the repeated extension of the time-limit for the termination of concessions for maritime goods of economic interest?"

2) Article 12 of the Services Directive precludes a national provision such as Article 1(18) of Decree-Law No. 194/2009, approved by Law No. 25/2010, as subsequently amended and supplemented, which allows for the automatic extension of existing maritime domain concessions for tourist-recreational activities until 31 December 2015 or until 31 December 2020, according to Article 34 duodecies of Decree-Law No. 179/2012, introduced by Article 1(1) of Law No. 221 of 17 December 2012?"

CJEU Judgment

The CJEU held that Article 12(1) and (2) of the Services Directive must be interpreted as precluding a national measure which provides for the automatic extension of existing authorisations relating to the maritime and lakes sector for the pursuit of tourist and leisure activities, in the absence of any selection procedure among potential candidates.

Article 49 TFEU must also be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows an automatic extension of existing concessions in respect of public property intended for the pursuit of tourism and leisure activities, in so far as those concessions are of clear cross-border interest.

However, it has been held that a justification based on the principle of the protection of legitimate expectations requires a case-by-case examination to show that the authorisation holder could legitimately

expect its authorisation to be renewed and that it has invested accordingly. However, such a justification cannot validly be relied on in support of an automatic extension introduced by the national legislature and applied indiscriminately to all the authorisations concerned.

Further, the CJEU has held that it is also necessary to clarify that the concessions at issue in the main proceedings concern a right of establishment on land in the public property with a view to economic operation for the purposes of tourism and recreation, so that the situations at issue in the main proceedings fall, by their very nature, within the scope of Article 49 TFEU.

Conclusions to be drawn from the interpretation of the Services Directive

General consequences

First, it is clear from the interpretations of the CJEU that a national measure providing for the automatic extension of existing maritime and lake authorisations for the pursuit of tourism and leisure activities cannot be adopted in the absence of any selection procedure among potential candidates.

Extending this interpretation, it follows that, in all areas covered by Article 12 of the Services Directive, such an automatic extension is excluded. Article 12 of the Services Directive concerns those situations where 'the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity'.

The other consequences, apart from the fact that the possibility of an automatic extension is excluded, are as follows:

- the authority administering the resource must organise a procedure for the selection of the economic operators in whose favour the rights to the scarce resource are established, such a procedure must ensure compliance with the principles of equal treatment, non-discrimination and transparency, in accordance with Article 12(1) of the Services Directive;

- the contract thus concluded may only be for a fixed term, may not be automatically extended and may not establish pre-emptive rights or other advantages with regard to the conclusion of a new contract, in accordance with Article 12(2) of the Services Directive. No other advantages may be offered to the provider whose authorisation has expired or to any other person who has a special relationship with the provider in question.

In these judgments, the CJEU has achieved a unification of the application of the fundamental principles deriving from the TFEU to all those contracts by which public entities can influence the free market and economic activity, whether they are public contracts (whereby these entities acquire goods, works or services in return for a price and/or the granting of the right to operate them) or contracts allowing economic operators to use assets belonging to public entities.

A first question

The question arises of those services which are clearly not covered by the scope of Article 12 of the Services Directive. In other words, what happens when we are not talking about ‘scarcity of available natural resources’ or ‘scarcity of technical capacity’. At first sight, in such cases, the above interpretations and conclusions would not apply. However, we believe that the answer must be qualified.

First, in order to answer this question, we need to clarify what is meant by ‘scarcity of available natural resources’ and ‘scarcity of technical capacity’.

Among the most important exhaustible natural resources in Romania are: energy resources, i.e. oil, natural gas, coal; ferrous metal resources, e.g. iron; non-ferrous metal resources, e.g. gold, silver, aluminium, magnesium, copper, zinc and lead.¹

¹ A.D. (2015, February 21), Major natural resources in Romania (*Cele mai importante resurse naturale din România*). Retrieved from: <https://epochtimes-romania.com/news/cele-mai-importante-resurse-naturale-din-romania--230132>.

Romania's exhaustible natural resources can be both non-renewable and renewable. Non-renewable resources are destroyed by consumption, and they take a period of time measured on a geological scale (millions or billions of years) to recover. This category includes coal reserves, oil, iron ore and natural gas. Renewable exhaustible resources are those that are part of the biosphere, i.e. plants or animals, which can be replenished in much shorter periods of time.¹

The question therefore arises whether the meaning of 'scarcity of natural resources' in the Services Directive is the same as that commonly used, or whether the Services Directive takes a broader view. We consider that any natural resource that is found in a reduced quantity at a given time and in a given geographical area will fall within the meaning of the Services Directive. In other words, even if, in general, a particular natural resource is not scarce, if for a State in question that resource is scarce at a particular time, the provisions of the Services Directive become applicable. What will determine whether or not the natural resource qualifies as scarce will be a variable matter of fact. It will be up to the States to qualify them as such.

Of course, the question will arise whether a person concerned could prove the contrary, *i.e.*, demonstrate that a natural resource is not as scarce as the State claims. In other words, under the Services Directive, if the number of authorisations available for an activity is limited because of the limited amount of natural resources (or technical capacity), a selection procedure should be adopted from among several potential candidates, with the aim of developing through free competition the quality and conditions of service provision available to users. Such a procedure should provide guarantees of transparency and impartiality, and the authorisation thus granted should not be of excessive duration, automatically renewable or grant any other advantage on the provider whose authorisation has recently expired. In particular, the duration of the authorisation granted should be fixed in such a way that it does not

¹ <https://epochtimes-romania.com/news/cele-mai-importante-resurse-naturale-din-romania---230132>

restrict or limit competition beyond what is necessary for the provider to recoup its investment costs and make a fair return on the capital invested.

We refer to a recent decision of the CJEU, which also addressed this issue and held that, given its wording, Article 12(1) of the Services Directive gives Member States a certain margin of discretion in the choice of criteria for assessing the reduced quantity of natural resources. This margin of discretion may lead them to give priority to an abstract and general assessment, valid for the whole national territory, but also, conversely, to favour a case-by-case approach focusing on the situation existing in the coastal territory of a municipality or of the competent administrative authority, or even to combine these two approaches. In particular, combining an abstract and general approach at national level with a case-by-case approach based on an analysis of the coastal territory of the municipality in question seems balanced and therefore likely to ensure both compliance with the objectives for the economic operation of coastal zones that can be defined at national level and the relevance of the practical implementation of these objectives in the coastal territory of a municipality. In any event, the criteria used by a Member State to assess the scarcity of usable natural resources must be based on objective, non-discriminatory, transparent and proportionate criteria. Judgment of the Court (Third Chamber) of 20 April 2023, 'Reference for a preliminary ruling - Services in the internal market - Directive 2006/123/EC - Assessment of validity - Legal basis - Articles 47, 55 and 94 EC - Interpretation - Article 12(1) and (2) of that directive - Direct effect - Unconditional and sufficiently precise nature of the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and of the prohibition on automatic renewal of an authorisation granted for a given activity – National legislation providing for the automatic extension of concessions for the occupation of State-owned maritime property' in Case C 348/22: request for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia, Italy), made by decision of 11 May 2022, received at the Court on 30 May 2022, in the proceedings between Autorità Garante della Concorrenza e

del Mercato and Comune di Ginosa (the “CJEU Judgment of April 2023”).

With regard to the notion of "reduced technical capacity", in the absence of a definition, we can consider services that can only operate within a pre-established certain capacity, made even before the selection procedure for the candidates. We can imagine the example of an electricity grid, such as wind power plants, built by the State. Thus, technical approval for the connection will be given only within the limit of its capacity, which will be reduced so as not to harm its operating capacity. Another example would be that of a maritime port operated by the State, where access for ships is limited according to the size of the port and the related storage places for goods.

Surely the ultimate aim is that, in the case of scarce natural resources (and scarce technical capacities), a reduced number of operating authorisations should be granted, so as not to jeopardise the very essence of the resources in question, and to take account of the requirements of Article 12 of the Services Directive.

The Services Directive does not prevent Member States from limiting the number of authorisations for reasons other than reduced quantity of natural resources or reduced technical capacity. Such authorisations should in any case be granted in compliance with the other provisions of the Services Directive relating to authorisation schemes. In other words, it would follow that if Member States consider that other activities should also be limited in terms of the number of authorisations that can be granted, in such cases the provisions of Article 12 of the Services Directive would no longer apply (but only the other provisions on services relating to authorisation schemes). Such an interpretation follows from the wording of point 62 of the Preamble to the Services Directive.

Secondly, it is necessary to determine the answer by way of interpretation. Of course, we could use *per a contrario* reasoning and thus conclude that whenever we are not talking about activities falling within the scope of Article 12 of the Services Directive, the consequences held by the CJEU do not apply. However, we believe that the answer must, once again, be qualified. As held in the CJEU judgment

on services (Paragraph 64 of the CJEU judgment on services), when seeking to award a concession which does not fall within the scope of the directives on different categories of public contracts, public authorities are obliged to respect the fundamental rules of the TFEU in general and the principle of non-discrimination in particular.

In this regard, the judgment of the CJEU of 17 July 2008 in Case C-347/06 *ASM Brescia SpA v Comune di Rodengo Saiano* is of interest. In that judgment, it was held that, despite the fact that such a public service concession does not fall within the scope of the directives on the various categories of public contracts, public authorities are nevertheless obliged to comply with the fundamental rules of the Treaty in general and the principle of non-discrimination on grounds of nationality in particular. In particular, in so far as such a concession contract has a clear cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State in whose jurisdiction the contracting authority is located constitutes a difference in treatment to the detriment of undertakings located in another Member State which may be interested in that contract. Unless justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings situated in another Member State, acts mainly to their detriment, constitutes indirect discrimination on grounds of nationality prohibited under Articles 43 EC (now Article 49 TFEU) and 49 EC (now Article 57 TFEU). Moreover, Article 86(1) EC (now Article 106 TFEU) precludes Member States from maintaining in force, in respect of public undertakings and undertakings to which they grant special or exclusive rights, national rules contrary to the aforementioned Articles 43 EC and 49 EC. Such a difference in treatment can be justified by the need to observe the principle of legal certainty, a principle which forms part of the Community legal order and which is binding on any national authority responsible for applying Community law. Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30 provides that existing gas distribution concessions are to be called into question only if they relate to an earlier concession which has effects for several decades and only if such concession was awarded at a time when the Court had not yet ruled that

contracts of clear cross-border interest could be subject to obligations of transparency arising under Community law, the principle of legal certainty, which requires, in particular, that the rules of law must be clear, precise and foreseeable as to their effects, not only permits but also requires that the termination of such a concession be accompanied by a transitional period enabling the co-contractors to terminate the contractual relationship on terms which are acceptable in terms of both the public service requirements and the economic situation. It is for the referring court to assess whether, in particular, the extension of the transitional period, effected by national law, can be regarded as necessary for compliance with the principle of legal certainty.

A second question

In the cases considered by the CJEU as described above, the public property of the State was involved. In such a context, the question arises as to the solutions applicable when we are talking about assets in the private property of the State or of administrative and territorial units.

In other words, the question arises whether the interpretations of the CJEU in the area of the Services Directive also apply to the private sphere of the state and administrative and territorial units.

We believe that the answer must be qualified and must also take into account national regulations concerning the private property of the State and of administrative and territorial units.

Thus, as far as Romanian law is concerned, we will first analyse the provisions of the Constitution, which, as we have already pointed out, does not contain provisions with a special protection regime with regard to the private property of the State or of administrative and territorial units, but only with regard to public property. Next, the interpretations of the Constitutional Court will be analysed, including by reference to Decision No. 139/2021. As noted in that decision, under Article 44(1) and (2) of the Constitution, both the private property of the State and that of natural or legal persons under private law benefit from the same legal regime under private law. Consequently, the State, through its competent authorities and in accordance with its socio-economic development

objectives, has the legal freedom to dispose of that property within the limits of the Constitution.

Consequently, in order to determine whether the interpretations of the CJEU in the area of the Services Directive are also applicable to the private sphere of the State and the administrative and territorial units, an analysis is made of the legal possibilities that the State and the administrative and territorial units have under national law.

If national law allows the creation of concessions, superficies or other rights *in rem* over the private property of the State and administrative and territorial units, then we consider that the interpretations of the CJEU could be applied *mutatis mutandis* to private property. This conclusion is necessary because the interpretations of the CJEU and the EU directives also concern the interpretations of the TFEU, a treaty that must always be observed. As such, we believe it is reasonable to interpret the above statements and conclusions as being applicable not only to the public property of the State and administrative and territorial units, but also to their private property.

The award of service concessions of cross-border interest is therefore subject to the principles of the TFEU, in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, and the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. As stated in point 4 of the Preamble to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, there is a risk of legal uncertainty linked to the divergent interpretations given by national legislators to the principles of the Treaty, as well as the risk of wide disparities between the laws of the various Member States. In order to eliminate the remaining disturbances in the internal market, uniform application of the principles of the TFEU in all Member States and the elimination of discrepancies in the understanding of these principles is necessary at European Union level.

CJEU Judgment of April 2023

Another interesting element of the April 2023 CJEU Judgment is that Article 12(1) and (2) of the Services Directive must be interpreted as meaning that the obligation on Member States to apply an impartial and transparent selection procedure to potential candidates and the prohibition on automatic renewal of an authorisation granted for a given activity are stated unconditionally and with sufficient precision to be regarded as having direct effect.

On the other hand, the third paragraph of Article 288 TFEU must be interpreted as meaning that the assessment of the direct effect of the obligation and prohibition laid down in Article 12(1) and (2) of the Services Directive and the obligation to leave national provisions to the contrary unapplied is a matter for the national courts and administrative authorities, including local authorities.

Last but not least, it was held that the provisions of Article 12 of the Services Directive do not apply only where there is a clear cross-border interest. In that regard, the Court has already had occasion to rule on several occasions, on the basis of a literal, historical, contextual and teleological interpretation of the Services Directive, that the provisions of Chapter III of that directive, relating to freedom of establishment for providers, which include Article 12 of that directive, must be interpreted as applying *inter alia* to a situation in which all the relevant elements are confined within a single Member State (see, to that effect, Judgment of 30 January 2018, C-360/15 and C-31/16 X and Visser, EU:C:2018:44, paragraphs 99-110, as well as the Judgment of 22 September 2020, Cali Apartments, C-724/18 and C-727/18, EU:C:2020:743, paragraph 56).

Conclusions

We believe that, also with regard to the private property of the State and administrative-territorial units, the relevant EU rules and the CJEU case law should take precedence, so that, when talking about cross-border interests or scarcity of natural resources or technical capacity, the provisions of the TFEU and the Services Directive must be

taken into account. The direct consequences relate in particular to ensuring a competitive and transparent market (even when private natural or legal persons are operating a private property). In other words, if it is accepted that there are ways other than those listed in the Romanian Administrative Code to operate the private property of the State and administrative-territorial units, a minimum set of rules on transparency and competition must be observed. As regards the modalities already expressly regulated by the Romanian Administrative Code (such as concession, administration, lease), they already benefit from a regime ensuring compliance with these principles. We believe that the “proper” application of the provisions on the administration, concession, lease and free use of public and private property is excessive, but most likely the intention was to implement the relevant EU legislation and case law.

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PUBLIC DECISIONS IN CRISIS SITUATIONS

Sorina IONESCU¹

Abstract:

The global crisis generated by Covid 19 has helped to understand that, in these times full of unpredictability, public decisions must become effective and responsible. But, even though the public authorities faced this global crisis, the current situation generated by the new war generated an important wave of instability.

Key words: public; decisions; crisis; management; administration.

Introduction

The outbreak of the COVID 19 pandemic was an unprecedented event, so governments, with few exceptions, had no previous experience to draw on. A quick response was necessary, as they had to introduce a series of measures to limit the spread of the virus, measures that more or less brought the economy to a standstill and produced several negative effects. The work aims to highlight the approaches chosen by several European states regarding the activity of the public administration in this period full of challenges.

So, apart from safety, health and economic measures, the states had to find solutions for the optimal functioning of their administrative

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systems. Even if they are considered difficult tasks for the administration, many of these changes could be preserved even after the crisis has passed, being able to bring more efficiency and effectiveness to its activity, because, for sure, the new normality of the administration will need this new approach. We can observe that the frequently encountered working method has taken the form of online meetings, the interactions between authorities and citizens have been simplified, the judicial systems have significantly reduced their activity by judging urgent cases, but even within the simplified procedures, the principles of transparency, efficiency and equal treatment have to be respected.

1. Crisis management

Most government decisions during national emergencies are primarily aimed at addressing immediate threats and risks to public health. Even in those situations, adequate efforts must be made to ensure that all actions and decisions taken are based on the best available data and professional advice.

Naturally, many rules and procedures, including those requiring internal and external consultation and impact analysis, are relaxed during emergencies to allow governments to act quickly. However, it is important that governments initiate appropriate analysis and consultation on any major policies that may have a significant impact in the medium or long term. (Waldman & Galvin, 2008, pp. 327–341).

European states generally have the necessary legal and technological capabilities to hold remote government meetings via video or teleconference¹. Some of them organized such virtual sessions even before the current crisis (eg Croatia, Latvia, Slovenia). In other countries, this crisis has led governments to push for virtual meetings (eg Lithuania, Spain and the UK).

¹ https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health_ro.

However, many states preferred to hold government meetings in a physical format (eg Italy, Romania, Slovakia, Sweden), taking extra precautions to minimize risk during meetings (wearing masks, using smaller meeting rooms large, maintaining a minimum distance of two meters between seats).

There were states that limited the Government's activity to measures considered urgent (see the case of Denmark), just as some states strictly followed the operating regulations that provide for physical presence to ensure the quorum (for example, Austria). And also states (Croatia, Latvia, Estonia) that already had regulations in force regarding the organization of virtual meetings with the possibility of recording the actual vote by phone or e-mail. In some countries, there have been concerns about the privacy of online meetings (eg the UK's first virtual Cabinet meeting on Zoom).

In such situations there are two broad approaches to crisis management: one that can be considered reactive, and the second is anticipatory, which also includes an element of foresight and preparation. The latter requires dedicated resources and specialized personnel, as well as the pre-existence of certain mechanisms and plans to coordinate the governmental response during emergency situations (for example, Belgium, Denmark).

Several countries, including France, Germany and the UK, had national influenza strategies and plans in place long before COVID-19, which have been used to respond to the current crisis. Changes aimed at streamlining and speeding up the decision-making process within governments include the establishment or activation of special councils or bodies that have the authority to issue decisions.

The legal framework for crisis management is usually a law and/or government regulations that set out the powers and responsibilities of departments in a crisis and establish a central coordinating body (council or inter-ministerial committee) to take the lead in managing a crisis. (Ansell & Boin, 2019, pp. 1079–1112).

Many member states of the European Union adopted new laws or activated certain provisions of the already existing regulations by which the Government was given additional temporary powers to

introduce restrictions or limitations on activities and on public life¹. It has also allowed the establishment of a simplified decision-making process during the crisis, even by passing certain powers from the legislature to the executive, under very clearly established conditions and in areas that can help overcome the crisis (for example France, Italy, Belgium, Hungary).

Some states, such as the Czech Republic or Spain, have empowered the relevant line ministries in crisis management to take ad hoc decisions to apply Government decisions containing regulations related to the crisis situation. Thus, in Spain, the Ministry of Health, Transport and Defense, under the supervision of the Prime Minister, take all decisions related to the resolution of the crisis.

2. Public services and human resources management

Ensuring the normal and efficient functioning of public institutions when normal working conditions cannot be ensured, introducing the concept of telework or introducing a flexible work schedule were essential for overcoming the crisis situation generated by the COVID 19 pandemic.

The unprecedented social distancing situation has renewed the need for an appropriate employee policy. European public administrations have taken various measures to protect their employees and, at the same time, they wanted to ensure the essential services for citizens and businesses, in order to be able to continue the operation of state institutions under normal conditions.

In that situation, civil servants are on the front line in the fight against this epidemic, some of them also participating in the development and implementation of medical, economic and social measures generated

¹ *Public Opinion Monitoring at a glance in the time of Covid 19*, DG Communication on Public Opinion Monitoring Unit, April 3 2020.

by the pandemic, the volume of their work being constantly increasing (Renn & van Asselt, 2011, pp. 431–449).

We could see that the telecommuting option was preferred in most European states, which helped to reduce the exposure of civil servants and at the same time to ensure the continuity of public services. There were situations where physical presence was necessary, this being possible for limited periods of time and only when it was necessary due to the nature of the service or when certain activities could not suffer postponement or suspension, such as the situation of the courts (Singh, 2018, p. 600).

The fact that many sectors of activity moved to teleworking at once did not represent such a big challenge for administrations experienced in offering the possibility for staff to work from home, because the necessary infrastructure and the culture of this kind of activity were already in place implemented. Even in these situations, it was necessary to amend the legislation, this way of working becoming from optional to mandatory, being necessary to establish an effective control regarding the way in which the activity is carried out (Singh, 2018, p. 85).

Another tool used when telecommuting is not possible and the workload is low is mandatory leave. The vast majority of states have not required their civil servants to take leave during lockdown periods. However, some states have encouraged employees to use annual leave during this period without making it compulsory. For example, Austria required civil servants to use the remaining leave from the previous year, and Slovenia did the same, but also recommended using two weeks from 2020. The Danish Government also decided to use 5 days of annual leave in the lockdown period.

The Covid 19 epidemic had an impact on the workload of certain categories of civil servants. While for some the workload has decreased, other categories of officials need additional time to carry out their duties. In Latvia, the state of emergency legislation allowed the normal number of working hours to be increased to 60 hours per week.

A small group of states (Slovenia, Hungary) introduced special rules on overtime in the legislation regarding the Covid 19 epidemic,

which increased the number of overtime allowed. Other states (Hungary, Latvia) have increased wages, considering the work performed to be in dangerous conditions, which allows a wage increase to be granted.

Even under these conditions, the activity of civil servants in the national public administrations of European states continued, either in the form of telework, or through physical presence in public institutions.

3. The current crises

As everybody expected, the pandemic generated a hard economic recovery and although the authorities had an important experience from the last years, the extreme instability generated by the new war in Ukraine wasn't anticipated. The economic and health crises produced high levels of inflation that affected companies and individuals creating a larger inequality between European states.

It is very hard for all societies to recover from several shocks, all these crises redefining the world that we live in and making it very difficult for economies to rebalance after these prolonged hard periods.

A very important document that highlights the present crisis is the 2023 edition of the Global Risks Report¹. It represents an analysis presented by the World Economic Forum of the tendencies regarding risks and crisis for the next ten years.

The analysis presents a potential “polycrisis”, such as “shortages in natural resources - food, water, metals and minerals”, mentioning the rapidly accelerating risks to natural ecosystems, human health, security, digital rights and economic stability that could become crises and catastrophes in the next decade.

It is very clear that the public authorities have to be prepared for future crisis situations and even more for simultaneous crises. So, we believe that the key in taking the best public decisions in crisis situations is a good foresight and preparedness.

¹ https://www3.weforum.org/docs/WEF_Global_Risks_Report_2023.pdf

Conclusions

The crisis generated by the Covid 19 pandemic brought to the fore the fact that the problems generated by unexpected, uncertain and unforeseeable events destroy the social balance and represent a very big challenge for the public sector. Thus, we can easily see that the public administration is being tested to its limits by this crisis which has made the authorities abandon the standards of the usual activity in search of urgent solutions.

The global crisis generated by Covid 19 has helped to understand that, in these times full of unpredictability, leadership matters and that it must become an effective and responsible one.

Facing the economic and social crisis, for the public sector the only solution is not the activation of crisis management plans, but cross-border collaboration is needed to help develop flexible strategies that can be easily adapted to unforeseen situations that continue to arise. (Bolden, 2011, pp. 251–269).

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RETHINKING THE PRIVILEGE AGAINST SELF- INCRIMINATION

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Abstract:

The General Regulation on personal data protection, adopted on 27 April 2016, is the act by which the reform on data protection in the European Union has been completed. The processing of personal data is governed by a set of principles, the first of the principles regulated by the GDPR is the principle of lawfulness, fairness and transparency in processing of personal data. In accordance with this principle, personal data can be processed only on the basis of one of the 6 elements provided by the GDPR, the controllers must act in accordance with the will of the personal data subject, who must be informed of the way in which his or her data is processed.

Key words: *privilege against self-incrimination; compelled production of samples; criminal liability; compelled decryption.*

Introduction

Nemo tenetur se ipsum accusare vel prodere is the main aspect of the right to a fair trial in criminal cases, which is closely related to

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not only the other components of the right to a fair trial (presumption of innocence and the right to defence), but also, right to privacy; the prohibition of torture, inhuman and degrading treatment, as well as with the right to dignity, according to which a person cannot be perceived as an object, a means of achieving a goal.

But despite the fact that the Privilege is well established in international law¹ and practice, the accused is not obliged to cooperate with the investigating authority and the burden of proof in criminal law rests on the prosecution, in some cases, accused himself can be an important source of evidence. Accordingly, a question about the scope of the privilege – whether compelled production of various anatomical, genetic or physiological (eg, blood, odor, saliva, DNA, voice samples, fingerprints etc) samples falls under the exception of the Privilege - is still not clear and highly disputed.

Based on the presumption of innocence, the privilege against self-incrimination and article 38, part 17 of the Criminal Procedure Code of Georgia, the accused usually refuse to produce samples not only voluntarily, but even on the bases of the court order, in order to prevent production of incriminating evidence by themselves. Therefore, the question of the relationship between the privilege and compelling production of sample, on the one hand, and on the other hand – conviction of the accused for the refusal to comply with the court's decision, under article 381 of the Criminal Code of Georgia v. privilege usually arises in practice.

The report discusses the essence and the scope of the privilege, its relation to the compelling production of samples; conformity of article 381 of the Criminal Code of Georgia with the article 6 of the European Convention on Human Rights.

¹ see Charter of Fundamental Rights of the European Union, art.48; Presumption of Innocence Directive of the European Union (EU), art 7, Directive (EU)2016/343 of the European Parliament and of the council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; International Covenant on Civil and Political Rights , art. 14.3.g; American Convention on Human Rights, art. 8.2.g.3.

1. The right to remain silent v. the privilege against self-incrimination

Despite the similarities between the right to remain silent and the privilege against self-incrimination, there are also significant differences between them. In particular, the right to remain silent applies only to communication (verbal communication or sign language) and protects against being compelled to testify against oneself (whether or not that testimony is clearly or directly incriminating) (Gray, 2013, 204), while the privilege against self-incrimination protects against self-incrimination/testimony (Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127), 31/07/2015; *Funke v. France*, no. 10828/84, ECtHR, 25/02/1993; *JB v. Switzerland*, no.31827/96, ECtHR, 03/05/2001) and the compulsion to present potentially incriminating evidences (*Funke v. France* no. 10828/84, ECtHR, 25/02/1993; *JB v. Switzerland*, no.31827/96, ECtHR, 03/05/2001), regardless of whether the person enjoys the status of the accused or not (*Serves v. France*, no. 20225/92, ECtHR, 20/10/1997; Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, 240). According to the European Union legislation, the privilege against self-incrimination is broader and includes two components: the right to remain silent and the protection against forced confession (Legal Digest of International Fair Trial Rights, OSCE/ODIHR, 26/09/2012, 99; The Presumption of Innocence, GREEN PAPER, EU Commission, COM(2006) 174 final, 26/04/2006, 9).

Despite the fact that the privilege is well established in international law and practice, it is usually interpreted either in broad or narrow sense. According to the broad interpretation, the right prohibits the request of any kind of information from the accused, regardless of whether this evidence existed independently of the accused's will or not.

In a narrow sense, the right applies to information (information carriers), the existence of which is linked to the will of the accused (and does not exist independently of the will of the accused). Therefore, countries whose procedural legislation provides for a narrow

interpretation of the right establish a direct or implied requirement for the active participation of the accused and, in some cases, coercive measures for the passiveness of the accused (Owusu-Bempah, 2017, p.3). The procedural legislation of Georgia also interprets the privilege against self-incrimination in a limited way and provides for the use of procedural coercion to obtain incriminating evidence from the accused.

The European Court of Human Rights considers the privilege in close connection with the presumption of innocence (article 6, ECHR), right to the privacy (article 8, ECHR) and prohibition of torture, inhuman or degrading treatment or punishment (article 3, ECHR) (Choo, 2012, p. 249).

The European Court considers the privilege against self-incrimination as a cornerstone of the right to a fair trial (ob. John Murray v. the UK, [GC], no. 18731/91, par.44, 45, ECtHR, 08/02/1996) and considers various aspects in it. Among them, the right of the accused not to testify against himself/herself, the right not to hand over to the prosecution documents that may later be used to incriminate him/her (Funke v. France, **no.10828/84**, ECtHR, 25/03/1993; Griffin v. Pantzer (2004)137 FCR 209); prohibits use of sanctions for the purpose of obtaining testimony from the accused (Nowak, 2005, p. 354, par. 75; Fair Trial Manual, 129). Meanwhile, the Court interprets the right narrowly and states, that the privilege does not apply to material that may be obtained through the use of coercion, but which exists independently of the accused's will. The European Court has repeatedly noted that: taking blood (Detlef-Harro Schmidt v. Germany, no. 32352/02, ECtHR, 05/01/2006) and urine samples, as well as DNA samples from a person; withdrawal of documents (Guide on Article 6 of the European Convention on Human Rights, 2019, p. 35) based on a court order - does not violate the privilege against self-incrimination.

According to the Supreme Court of Canada, the scope of the right should not be regulated differently in relation to mental and physical products, despite the fact that the right has a limited scope and different circumstances should be taken into account when determining its limits in each specific case (ob. R. v. S.A.B., 2003 SCC 60 (CanLII), 2 SCR 678, p. 34).

New Zealand's legislation and case-law extends the right only to "a fact or opinion stated orally, as well as a fact or opinion contained in a document that is later created in response to a request for specific information". According to the Supreme Court of New Zealand, the exercise of the right does not justify a person's refusal to produce a physical sample that exists independently and can be sought without the accused's testimony (eg, a urine sample)(*ob. R. v. S.A.B.*, 2003 SCC 60 (CanLII), 2 SCR 678, p. 34).

In the case of *Prosecutor v. The Delalic* (*Prosecutor v. Delalic Trial Chamber ICTY*, 1998, par. 58) court noted that although the right to testify under interrogation and the handwriting sample itself is neutral evidence, if the handwriting sample, in combination with other evidence, creates a basis for a person's accusation, then the court order compels the accused to give self-incriminating evidence (*Prosecutor v. Delalic Trial Chamber ICTY*, 1998, par.48).

The Supreme Court of India has considered several technologies widely used in Indian investigative practice as incompatible with the privilege against self-incrimination, namely: 1) polygraph (the so-called lie detector); 2) drug analysis, which was related to the intravenous administration of a narcotic substance to the subject, under the influence of which the control function of the brain weakens, and during the interrogation, the person gives testimony on the issues that he would otherwise refuse); 3) Electro-magnetic examination of the brain - BEAP (by demonstrating to a person images, fragments of audio-/video-audio recordings, it is determined whether the person in question is trying to hide certain information). When applying such tests, the accused is not left with the opportunity to make a choice between exercising the right to remain silent and providing information - the defendant's will is affected and his intellectual product is obtained against his will (*Jayawickrama*, 2017, p. 620; *ob. Selvi et al v. State of Karnataka*, (2010)7 SCC 263, 5 LRC 137).

1. Ratione materiae

The principle of *nemo tenetur* is not an absolute¹ and might be limited in a certain occasions based on a proper balance between public and private interests. To determine the legality of the used coercion, the European Court evaluates: 1. intensity and type of coercion; 2. existence of relevant procedural safeguards; 3. the purpose of using evidence obtained through coercion; 4. the ratio of private and public interests².

According to the Constitutional Court of Georgia, Article 31 of the Constitution of Georgia (the current version of the Constitution) includes only the right to refuse to testify against oneself, the obligation to present evidence/samples upon request of the prosecution/court order, the Constitutional Court excludes from the protected area³.

Later, the court explained that the mentioned provision includes two aspects, the privilege against self-incrimination and the absence of the obligation to testify against the circle of relatives defined by the law⁴. The privilege against self-incrimination forbids influencing a person's will to testify against himself in any way. Therefore, the regulation, which does not influence the will of a person in order to obtain evidence from him, cannot lead to the violation of the mentioned right⁵⁶. With regard to testimony, it is also worth noting that it is wrong to limit the scope of the right to confessions or statements of a "self-incriminating" nature, since testimony that does not at first glance have an incriminating

¹ ob. Ibrahim and Others v. the United Kingdom, nos. 50541/08, 50571/08, 50573/08, 40351/09, par.269, ECtHR, 13/09/2016

² Pavlenko v. Russia, no. 42371/02, par.100, ECtHR, 01/04/2010; Bykov v. Russia, [GC], no.4378/02, par.92, 104 ECtHR, 10/03/2009; Joelle Vuille, Luca Luparia, Franco Taroni, Scientific Evidence and the Right to a Fair Trial under article 6 ECHR, Law, Probability and Risk, vol.16, Issue 1, March 2017, 55-68; Ibrahim and Others v. the United Kingdom, nos. 50541/08, 50571/08, 50573/08, 40351/09, par. 269, ECtHR, 13/09/2016; Commentary to the Criminal procedure Code of Georgia, 2015, 124

³ Decision of the Constitutional Court of Georgia N2/3/182,185,191, II-4

⁴ Decision of the Constitutional Court of Georgia №1/4/809, II-40, 41

⁵ Decision of the Constitutional Court of Georgia №1/4/809, II-42.

⁶ Decision of the Constitutional Court of Georgia, №1/4/809, II-42

nature (e.g. self-exculpatory statements or information about factual issues) may in the future be used for the impeachment of the accused¹. Accordingly, the right protects a person from being forced to make any statement and applies without exception to all criminal cases - regardless of the severity and nature of the crime².

Thus, the right to refuse to testify against oneself is based on the principle that the prosecution in a criminal case must prove a person's guilt by evidence that is not obtained by coercion, deception or suppression of the will of the accused. It prohibits any form of coercion, direct or indirect, physical or psychological³ (it is forbidden to warn defendant, that refusal to cooperate with the court (refusal to testify, provide documents, etc.) may be considered contempt of court or obstruction of justice⁴. Meanwhile, the mere fact that a person is asked to tell the truth does not violate his right to remain silent⁵).

2. Obligation to submit evidence

As a general rule, the accused is not required to present incriminating evidence, although in some cases the accused himself may be the source of important evidence⁶.

The use of the body as a source of evidence is becoming increasingly important in the wake of technological and scientific advances, particularly DNA profiling (Easton, 2014, p. 194). Meanwhile, at the moment of obtaining anatomical /biological samples it is not known to what extent the examination (conducted in relation to the said sample) will turn out to be revealing evidence (Quirk, 2018, p. 96; Decision of the Constitutional Court of Portugal 15/07/2013, p. 3, Bulletin on

¹ Saunders v. the United Kingdom, [GC], **no.** 19187/91, par. 70, 71, ECtHR, 17/12/1996

² Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb) , European Court of Human Rights, 31/08/2019, 35

³ Election Observation Report, Georgia, OSCE/ODIHR, 2014,124

⁴ Berry v. Jamaica, **no.** 330/1988, UN Doc. CCPR/C/50/D/330/1988(1994)

⁵ Castillo Petruzzi et al v. Peru, par. 167, IACHR, 30/05/1999

⁶ Funke v. France, **no.** 10828/84, par.44, ECtHR, 25/02/1993; Commentary to the Criminal procedure Code of Georgia, 2015, 124

Constitutional Case-Law, 340); and, on the other hand, taking of the sample does not involve any intellectual product of the accused as well as active conduct on the part of the accused that would create a basis for assuming that he is aware of the incriminating nature of the sample.

The right is not related to the use of material in criminal proceedings that can be obtained from the accused through the lawful use of coercion permitted by procedural law and exists independently of the will of the accused (e.g. documents obtained on the basis of a court order, breath, blood, urine samples, DNA profiles (Quirk, 2018, p. 96)¹, voice samples²). The accused is not entitled to refuse to hand over physical objects even when he is convinced of the incriminating nature of this evidence, just as he does not have the right to refuse the request (court's order) to take a sample, even if this evidence could implicate him in a crime³.

In case of obtaining evidence based on the court's order, the presence or absence of the defendant's willingness to cooperate is not important.

In *Saunders v. the UK* the UK court did not extend the privilege to blood, urine, breath and body samples. Since the incriminating nature of biological and anatomical samples is determined only after the appropriate examination and at the moment of obtaining the samples they do not have a pronounced incriminating nature, therefore the privilege does not apply to them. On the other hand, the court considered the bag full of cocaine to be incriminating evidence from the very beginning. Thus, the Court distinguishes the operation of the right to incriminating evidence *per se* from the extension of the right to "neutral" information (Choo, 2012).

¹ ob. *Saunders v. the UK*, [GC], no. 19187/91, par. 69, ECtHR, 17/12/1996; decision of the Constitutional Court of Spain from 2 October 1997, Bulletin on Constitutional Case-Law 3(1997), 441; *O'Halloran and Francis v. the United Kingdom*, [GC], nos.15809/02 25624/02, par. 47, ECtHR, 29/06/2007; *P.G. and J.H. v. the UK*, no.44787/98, par. 80, ECtHR, 25/09/2001

² *P.G. and J.H. v the UK*, no. 44787/98, par. 80 ECtHR, 25/09/2001

³ *Izzi M., Compelled Self-Incrimination*, 2018/05/04.
<https://www.legalmatch.com/law-library/article/compelled-self-incrimination.html>

Obtaining DNA samples on the basis of a court order limits the privilege against self-incrimination, however, taking into account the specifics and nature of certain categories of crimes, the public interest outweighs the private interest of the accused (not to be a self-incriminating witness), and the compulsory acquisition of a DNA sample on the basis of a court order is considered permissible (in the case of the USA – it is considered an exception to the right guaranteed by the 5th Amendment of the US Constitution) (Parks St., 2001, 499; *Schmerber v. California*, 384 U.S.757, 1966).

According to judicial practice, the right applies to testimony (including the incriminating thoughts of the accused, which becomes especially relevant in the context of the development of technology and the use of "mind-reading" technologies in individual cases) and not to material evidence (eg, incriminating aspects of the body of the accused). According to this approach, obtaining samples using coercive measures to determine the defendant's involvement in the crime does not violate the privilege.

Although the Courts, as a rule, on the basis of article 147 of the CPC of Georgia, consider it permissible to take a sample from the accused on the basis of the court's order using proportional physical coercion, the Tbilisi Court of Appeals connected the taking of a voice sample from the accused, based on the court's order, to the right provided for by article 31, par. 7 of the Constitution of Georgia, to the rights granted to the accused by article 38, paras 16-18 and article 12, par.4 of the CPC of Georgia. The court noted that the accused has the right not to give a voice sample to the investigation if he/she thinks, it will be used against him/her. However it does not deprive the investigation of the right to obtain comparable voice samples (if any) by other legal methods and means in order to conduct a phonoscopic examination for identification reasons.¹

The European Court considers that the anatomical/biological sample is neutral in nature and becomes revealing only if it matches the

¹ Decision of the Tbilisi Appellate Court N18/945-15, 03/06/2015

traces removed from the scene of the crime and does not per se contain revealing information; therefore the Privilege does not apply to blood, hair, and other physical or objective samples used in forensic medical examination.¹ Based on the *Saunders v. the UK*, the privilege also does not apply to a comparable sample of the accused's voice obtained secretly, without informing the accused.²

According to the Supreme Court of Georgia, prosecution must prove the guilt of the accused without using evidence obtained against his/her will by coercion³, since the accused (according to the article 38, par.17 of the CPC of Georgia) has the right not to participate in investigation and protect himself/herself from self-incrimination. However the right does not apply to biological, anatomical, genetic and other samples obtained from the accused against his/her will by a court decision "...the accused is required to calmly accept a minor intrusion into his physical integrity (eg, taking a sample of blood, hair or organic tissue) even when the accused's active participation is required. It refers to materials arising from the normal functioning of the body (such as breath, urine or voice samples)".⁴ Accordingly, the Court considered the appeal to article 38, par.17 of the CPC of Georgia to be irrelevant.⁵

Thus, according to the well-established judicial practice of the general courts of Georgia, taking a sample from the accused based on the court's order (when taking a sample does not cause severe pain) does not violate the privilege.

Although in the mentioned cases the sample is obtained on the basis of the court's order, the question of the relationship between the privilege and the collection of the sample based on the court's order is

¹ *P.G and J.H. v. UK*, ECtHR, No. 44787/98, 25/09/2001, par.80

² *Saunders v. the United Kingdom*, [GC], no. 19187/91, par. 69, ECtHR, 17/12/1996

³ *Saunders v. the United Kingdom*, [GC], no. 19187/91, par. 68, ECtHR, 17/12/1996; *Bykov v Russia* [GC], no. 4378/02, §92, ECtHR, 10/03/2009

⁴ *Jalloh v. Germany*, [GC], no. 54810/00, par.114, ECtHR, 11/07/2006.

⁵ The well-established judicial practice of the general courts of Georgia, also considers taking a sample from the accused based on the court's order (when taking a sample does not cause severe pain) in line with the privilege.

problematic, as refusal leads to criminal punishment of the accused under article 381 of the Criminal Code of Georgia (hereinafter - the CCG) and therefore the issue of compliance of article 381 of the CCG with the art 6 of the ECHR arise.

According to the article 147, par. 3 of the CPC of Georgia, based on a court order, samples may be taken from the accused through using proportional physical coercion in accordance with article 4, par. 3 and article 111, par.7 of the CPC of Georgia, and article 381 of the CC of Georgia, which establishes criminal liability for failure to comply with a legally binding court ruling or for obstructing its execution applies.¹

General courts consider effectiveness of the used physical coercion for the execution of Court's order as a prerequisite for imposing criminal liability under article 381 of the CC of Georgia. However, some types of samples are practically impossible to obtain (even through physical coercion) without accused's willingness (for example, it is impossible to obtain a voice sample if the accused refuses to talk; to obtain fingerprints - if accused clenches his fist)². On the other hand, ineffectiveness of the physical coercion as a prerequisite for the imposition of responsibility under article 381 of the CC of Georgia may create a danger of excessive force .

In contrast to the procedural legislation of Georgia, although the British legislation does not establish criminal liability of accused in case of non-compliance with the court's ruling on taking samples, the concept of re-balancing of rights has practically simplified the burden of proof for the prosecution side, and there is an expectation of the active cooperation of accused with the investigation and the court. Established by the British Court of Appeal so-called "normative expectation" of coerced participation - presumption that the innocent has nothing to hide and is usually expected to take the opportunity to deny the charges against him (Quirk, 2018, p. 96) and therefore accused must fully cooperate with the

¹ Judgement of the Supreme Court of Georgia N703ap-22 from 26 October 2022; Decision of the Supreme Court of Georgia N951ap-21 from 18 May 2022

² Judgement of the Tbilisi City Court N1/308-20 from 30 July 2020

investigation – is contrary to the presumption of innocence as it shifts the burden of proof from prosecution to the accused, and brings the suspicions, that the police have about the accused, into the courtroom.

According to the European Court, only if the evidence against the accused requires an explanation, which the accused can make, conclusion that accused has no explanation and is guilty might be drawn from his/her silence. On the other hand, if the evidence presented by the prosecution has so little probative value that it does not require an explanation, it is not allowed to draw a conclusion about a person's guilt based on silence¹.

The right to remain silent, the privilege against self-incrimination and the right to defense is limited to a certain extent when biological material is taken from the accused under coercion, as the results of scientific examination might be used against him/her later.

2.1. Decryption

The applicability of the Privilege to obtain access to *mobile phone* devices is also highly debated in a recent case-law. In multiple cases dealing with the obligation to unlock mobile devices Courts generally find the obligation to reveal passcode compatible with the privilege.² For example the Belgian Court of Cassation considered that the privilege and the presumption of innocence are not absolute and the Court (an investigating judge) may order, subject to a criminal sanction, including imprisonment, a suspect to provide the passcode to his mobile phone where decryption is vital for finding the truth. The court treated a decryption order as an “informational” obligation not an obligation to cooperate with the investigation. According to the Court, the code is “neutral” and can’t be considered as self-incriminating.³

¹ *John Murray v. the United Kingdom*, [GC], no. 18731/91, par.51, ECtHR, 08/02/1996

² see e.g., *R. v. S and A* [2008] EWCA Crim. 2177, ALL ER (D)89(Oct); *R. v. Kearns* [2002] EWCA Crim. 748; *R. V. Rabbani* [2018] EWHC 1156 (admin)

³ see *Hof v Belgium*, Court of Cassation, decision 4/02/2020, P.19.1086.N,\$8

In England and Wales, under the regulation of Investigatory Powers Act (RIPA 2000), police can demand access to electronic data held on electronic devices (that have been seized during investigation) which are protected by encryption and if accused/ suspect refuses to provide the key, police are entitled to apply to the court for written permission/ order to serve a formal “notice requiring disclosure” under Section 49 of RIPA. In case of failure to comply with a notice to disclose “national security” or “child indecency” the maximum sentence is 5 years.

In the Netherlands, despite the fact that there is no legal obligation to provide a passcode, accused/ suspect may be physically coerced to provide biometric data in order to unlock the phone.¹

The French Court of Cassation ruled on November 7, 2022, that suspects and defendants are obliged to inform the investigation of their mobile phone passwords (passcode). According to the court’s explanation, the password in this case is a *convention de déchiffrement; un moyen de cryptologie*; description key for unlocking the phone’s screen, and the guarantee of protection against self-incrimination and the right to remain silent do not apply to it. refusing to hand over the password is punishable by a fine of up to 270 000 EUR (the punishment is increased up to 450 000 EUR or 5 years’ imprisonment when revealing a password could have prevented a crime or reduce damages) or 3 years’ imprisonment. it must be also mentioned, that the regulation on “decryption orders” is currently under review of the European Court²

Obligation to provide a password requires from the suspect to hand over a key to information which may lead to collection of incriminating evidence contained in the phone and therefore de facto obliges accused to assist the investigation against himself/herself.

A request to provide a passcode to unlock a mobile device does not fall within acceptable exceptions to the privilege against self-

¹ Supreme Court of the Netherlands, decision no. 19/05471 CW, 9/02/2021

² see *Minteh v France*, no. 23624/20 (communicated case)

incrimination, as a passcode cannot be said to exist independently of a person's will as biometrical data, or forensic comparative samples.

Conclusions

The European Court on a numerous cases has underline that the privilege against self-incrimination extends not only to statements (evidence) that are directly incriminatory, but also to other information which although not directly incriminatory, can be used against the accused to contradict or cast doubt on other statements/ evidences given by accused, or to otherwise undermine his/her credibility.¹ The privilege is intended to protect from being coerced to contribute to his/her own conviction by assisting the investigation to obtain information that can be used against him/her in a criminal trial.

Active participation of the accused is valuable for the purposes of administration of justice and helps the accused to effectively defend himself.

Although the passivity of the accused may harm the interests of the justice and fair trial, the encouragement of the active participation of the accused should be implemented by increasing the procedural safeguards, which should not replace the right.

However, taking into account that burden of proof rests upon the prosecution, finding a truth must remain the obligation of the investigation and should not be transferred to the accused at the expense of the privilege in cases, where investigation faces difficulties in finding incriminating evidences. Therefore, free comparable samples, necessary for examination, should be obtained from other sources (for example, from the Public Register where biometric data and handwriting samples of citizens are stored).

Since international law is based on the principle of investigating a criminal case and carrying out justice without the assistance of the accused – criminal liability and punishment of the accused for refusal to

¹ Saunders v the United Kingdom [GC], no. 19187/91, par. 68, ECtHR, 17/12/1996

comply with the court's decision on compelled production of samples also contradicts to the principle of the burden of proof in criminal cases and the Privilege against self-incrimination.

Therefore, since the aim of the privilege is to protect against undue coercion, the privilege should fully apply to any obligation to provide free anatomical, biological, etc. samples, as well as to reveal access details to electronic devices to investigation.

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UNIONS AND CIVIL PARTNERSHIPS BETWEEN PERSONS OF THE SAME SEX. LEGAL EFFECTS IN EUROPEAN CONSENSUALISM

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Abstract:

The evolution of society is unpredictable, largely influenced by the socio-political-economic factor. Thus, the development of a legislative framework for the new social relations has an imperative character, justified by the need to establish certain rights and obligations towards the beneficiaries and the rest of society. The purpose of this article is to highlight some existing situations in the legal reality, situations that do not benefit from a homogeneous legal regulation within the member states of the European Union, which derives in the form of social and legal conflicts. Through the ideas to be evoked, we will outline the normative differences between the states in the union space, regarding the fundamental right of each person to marry and found a family, viewed through the spectrum of diversity.

Keywords: civil unions; civil partnerships; marriage; family; adoption; legal effects; the right to marry; the right to found a family.

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1. The family and the institution of marriage - brief analysis from a European perspective on their current regulation

The family, from the beginning of humanity until the present moment, designates the essential cell for the functioning of society. In legal terms, numerous institutions have derived from this social element, and with incidence in the analyzed subject, we mention the institution of marriage.

The European Union, initially seen as a perimeter intended exclusively for economic relations, becomes a formation for which the protection and evolution of the individual is one of the primary goals. Thus, the Charter of Fundamental Rights of the European Union, adopted in 2000, promulgates with the title of freedoms, the right to respect private and family life¹, the right to marry and the right to found a family². A fortiori, the Universal Declaration of Human Rights, by art. 16, enshrines the right of men and women to marry and found a family, with the fulfillment of conditions related to age and the freely and seriously expressed consent of the spouses³. Moreover, through the text of the previous article mentioned in the Declaration⁴, the signatory states undertake to protect the family and the institutions derived from it.

¹article 7 of the EU Charter of Fundamental Rights: "Everyone has the right to respect for private and family life, home and communications";

²Article 9 of the EU Charter of Fundamental Rights: "The right to marry and the right to found a family are guaranteed in accordance with the domestic laws governing the exercise of these rights."

³article 16 (1) "Starting from reaching legal age, men and women, without any restrictions regarding race, nationality or religion, have the right to marry and found a family. They have equal rights to contract the marriage, during the marriage and to dissolve it. (2) Marriage can only be concluded with the free and full consent of the future spouses."

⁴The family is the natural and fundamental element of society and has the right to protection from society and the state.

2. Contemporary social realities – same-sex unions and their inclusion in the legal order of European states

The family life of people of the same sex included in the LGBTQIA+ group is not currently regulated uniformly in the legislation of each member state of the Union. As a result of this aspect, on the international level, disputes are generated at a restricted level, burdened by the citizen-state relationship, and disputes at an extended level, defined by the state-state relationship.

Regarding this matter, the Committee of Ministers, decision-making body of the Council of Europe, issued Recommendation CM/Rec(2010)5 to Member States on measures to combat discrimination based on sexual orientation or gender identity, considering the message of the Committee of Ministers to monitoring committees and other committees involved in intergovernmental cooperation within the Council of Europe on equality on the rights and dignity of all people, including lesbian, gay, bisexual and transgender persons, adopted on 2 July 2008 and its relevant recommendations¹, document perceived as a starting point regarding the framing of this type of social relations in a well-defined legal relationship. In the Annex to Recommendation CM/Rec(2010), the Committee of Ministers suggests, by corroborating points 23, 24 and 25, that national legislation should ensure the same rights and obligations for same-sex couples as it provides for unmarried couples with opposite sex partners², including in this category the survivor's pension benefits of the surviving spouse and housing rights. At the same time, recipient states are encouraged to consider the possibility

¹See "Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination based on sexual orientation or gender identity", available online at <https://www.coe.int/en/web/sogi/rec-2010-5>.

²Where national law confers rights and obligations on unmarried couples, Member States should ensure that it applies in a non-discriminatory manner to both same-sex and opposite-sex couples, including with regard to survivor benefits and housing rights.

of recognizing and concluding registered partnerships between persons of the same sex¹.

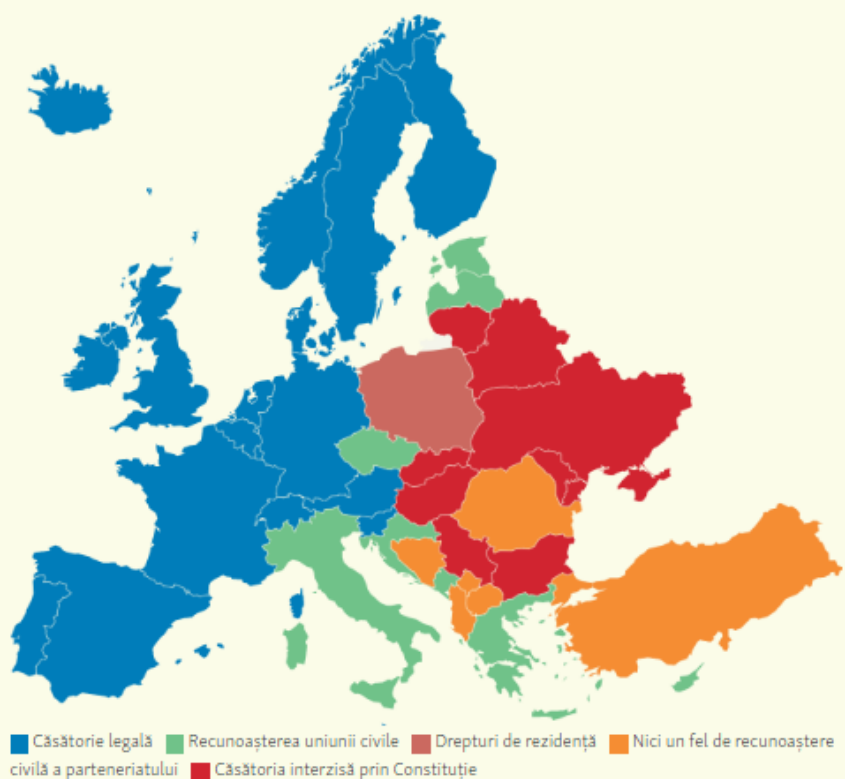
Also through Recommendation CM/Rec(2010) the institution of adoption is also discussed, so that single people are allowed to adopt children, without discrimination based on sexual orientation or gender identity. And with regard to medically assisted reproduction, national legislation should try to ensure access to such treatment for single women, regardless of sexual orientation.

Regarding the protection of same-sex families and the recognition of same-sex couples, the 27 EU member states can be divided into three groups: (1) six without marriage and without registered partnership for same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia. (2) eight with registered partnership but not regulating marriage for same-sex couples: Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy and Slovenia; and (3) thirteen that allow marriage for same-sex couples: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, and Sweden.

¹Where national legislation neither recognizes nor confers rights or obligations on registered same-sex partnerships and unmarried couples, Member States are invited to consider the possibility that, without any discrimination – including opposite-sex couples –, to provide same-sex couples with legal or other means to address practical issues related to the social reality in which they live

Recunoașterea parteneriatelor între persoanele de același sex în Europa

România se numără printre țările europene care nu recunosc cuplurile de același sex, motiv pentru care mai multe persoane au dat în judecată statul la CEDO.



Map taken from the address: <https://romania.europalibera.org>

3. The position of the European Union towards civil unions and registered partnerships between persons of the same sex. The case of Coman vs Romania

"Mr. Coman, a Romanian and American citizen, and Mr. Hamilton, an American citizen, met in New York (United States of America) in June 2002, and lived together in this city from May 2005 until May 2009. Mr. Coman later settled in Brussels (Belgium) to work at the European Parliament as a parliamentary assistant, while Mr. Hamilton remained in New York. They got married in Brussels on November 5, 2010. During March 2012, Mr. Coman stopped working at the Parliament, but continued to live in Brussels, where he received unemployment benefits until January 2013. In December 2012, Mr. Coman and Mr. Hamilton addressed the General Inspectorate for Immigration requesting to be informed of the procedure and conditions under which Mr. Hamilton, who is not a citizen of the Union, could, in his capacity as a member of Mr. Coman's family, obtain the right to live legally in Romania for a period longer than three months. On January 11, 2013, responding to this request, the Inspectorate informed Mr. Coman and Mr. Hamilton that the latter only benefited from a right of residence for a period of three months, since, being about persons of the same sex, the marriage does not it is recognized, according to the Civil Code, and that, on the other hand, the extension of Mr. Hamilton's right of temporary stay in Romania cannot be granted as family reunification. On October 28, 2013, invoking the exception of the unconstitutionality of Article 2771 paragraphs (2) and (4) of the Civil Code." (the decision of June 5, 2018 of the CJEU [CURIA - Documents \(europa.eu\)](https://eur-lex.europa.eu/uri/CELEX/62018J0005)). Based on file no. 17411/302/2015 of the 5th District Court of Bucharest, the court

¹(2) Same-sex marriages concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania.

(4) The legal provisions regarding the free movement on the territory of Romania of the citizens of the member states of the European Union and the European Economic Area remain applicable.

suspends the trial of the case until the resolution of the exception of unconstitutionality by the CCR. In 2015, the Constitutional Court of Romania suspended the trial of the case and addressed a series of preliminary questions to the Court of Justice of the European Union, in the sense of the legal provisions provided by Directive 2004/38 regarding the right to free movement and residence on the territory of the member states for the citizens of the Union and members of their families. Thus, in the conclusions, the CJEU obliges the Romanian state, by virtue of Article 21 paragraph (1) TFEU to grant the right of residence on its territory to the mentioned national, for a period longer than three months and without being subject to stricter conditions than those provided to article 7 of Directive 2004/38.

In law, in the application, the plaintiffs Coman-Hamilton base their action on Article 7 paragraph (1) of Directive 2004/38, regarding the conditions provided by the legal norm in the case of freedom of movement of persons. The CJEU considers the aforementioned legal provision unfounded, because it only regulates the condition *entry and residence conditions of a citizen of the Union in other member states than the one of which he is a national and that it cannot constitute the basis of a derived right of residence in favor of nationals of a third country, members of the family of a citizen of the Union, in the state member of which this citizen is a national* (CJEU judgment of June 5, 2018), referring to the jurisprudence of the Court (see in this regard the Judgment of 14 November 2017, Lounes, C-165/16, EU:C:2017:862 point 33).

Moreover, in the reasoning of the Court, in response to the first preliminary question addressed by the CCR, through point 34, the meanings of the notion of "spouse", provided for by Directive 2004/38, are discussed. The Court reasons that "the notion of "spouse" provided by this provision designates a person related to another person by marriage. [...] the notion of "spouse", within the meaning of Directive 2004/38, is neutral from the point of view of the gender and is therefore likely to include the same-sex spouse of the Union citizen in question".

Regarding Romania's argument regarding the meaning of the word "husband" and the refusal to recognize a marriage concluded in

another member state, between persons of the same sex, by corroborating articles 259 paragraphs (1) and (2) and 277 paragraphs (1), (2) and (4), the Court of Justice of the European Union ruled that, in this case, reasons regarding the national identity of the member states and reasons regarding public order (whose regulatory sphere "cannot be established unilaterally" cannot be invoked by each member state without the exercise of control by the institutions of the Union") (see point 44 of the Judgment of June 5, 2018 of the CJEU).

As a result of the pronouncement of this Decision, two opinions circulated among the public, divided between Europhiles and Eurosceptics, as classified by Tendai Mukau in his article (2020). Progressive Europhiles will consider the decision as a manifestation of the affirmation and protection of the dignity of socially marginalized minorities in the exercise of the fundamental rights enshrined in the EU Treaties, while, for Eurosceptics, the ruling will amount to a violation of state sovereignty and an imposition of undesirable cosmopolitan values on member states that could tolerate such an intrusion of supranational power into domestic family law.

Even if, by the CJEU Decision, the effects of same-sex marriages are recognized at the level of the European Union, Romania did not grant the Coman-Hamilton couple the right of residence for a period longer than 3 months, which led the plaintiffs, in the context movement restrictions from the Covid-19 pandemic, to challenge the decision before the ECHR.

The referendum to amend Article 48 of the Romanian Constitution - citizens' reaction to European influences?

As a result of the legal situations of the previous years, among which the Coman case is listed, it can be stated that the Romanian society wanted to show its conservatism and protect its own social values. Thus, in 2015, the Official Gazette publishes Draft Law no. 1198/2015, regarding the revision of the Romanian Constitution, starting from the citizens' initiative of January 24, 2015. One of the points of this draft law concerned the institution of marriage, entitled "Marriage only between a man and a woman". The objective stipulated "the irreplaceable role of the family in the upbringing, education and training of children, of the young

generation of Romanians". (See Decision no. 580 of July 20, 2016 on the citizens' legislative initiative entitled "Law on the revision of the Romanian Constitution"). Modification vespecially the clarification of the notion of "husband", an aspect that was the subject of one of the preliminary questions addressed by the CCR to the CJEU, in the Coman case. By proposal, marriage could be concluded between a man and a woman who have reached the age of 18.

The legislative initiative was analyzed by the Constitutional Court of Romania, which was pronounced by Decision no. 580/2016, in which he found that the conditions provided by articles 150 and 152 of the Constitution are met. Through the Report on the organization and conduct of the national referendum for the revision of the Constitution of October 6 and 7, 2018, subsection 1.1., "it is shown that by replacing the term "spouses" with the expression "man and woman", the precise and literal implementation of some expressions consecrated with the power of immutable guarantees intended for the protection of the family, recognized as "the natural and fundamental element of society" in art. 16 of the Universal Declaration of Human Rights. In the same sense, and in Romania, only "the man and the woman" (See point 1, Legislative context, subsection 1.1, Citizens' initiative regarding the revision of the Constitution, from "Report on the organization and conduct of the national referendum for the revision of the constitution of October 6 and 7, 2018").

Despite meeting all the legislative conditions, the referendum failed, as the validation threshold was not reached. 21.1% of Romanians with the right to vote turned out to vote, in the two days dedicated to the consulate. Among those present at the polls, the amendment of the Constitution was supported by a percentage of 91.56%.

4. ECHR practice - uneven in the case of unions and civil partnerships, at the European level?

During the resolution of pending cases, regarding unions, partnerships and marriages between persons of the same sex, in the ECHR practice, differences were observed in the pronouncement of some

judgments, which leads to the appearance of the question "Is the practice of the ECHR uneven?". The fairest answer to this question can only be rendered as a result of the analysis of the Court's jurisprudence in the given context.

In support of the homogenization of judicial practice at the European level, the Registry has developed the Guide regarding art. 12 of the European Convention on Human Rights, updated on August 31, 2021 and regarding the right to marry. By Title I, point 2, letter B), ". The Court observed that, viewed in isolation, the wording of art. 12 can be interpreted so as not to exclude marriages between two persons of the same sex. However, all other material provisions in the articles of the Convention granted rights and freedoms to "any person" or provided that "no one" should be subjected to certain types of prohibited treatment. The choice of terms from art. 12 must be considered deliberate. Moreover, the historical context in which the Convention was adopted must be taken into account: in the 1950s marriage was clearly understood in the traditional sense as the union between partners of different sexes'. Relevant to this case is the case of *Schalk and Kopf v. Austria*, 2010 - in this case, "The Court first examined the issue of whether two persons of the same sex could claim to have the right to marry in *Schalk and Kopf v. Austria* and found that Art. 12 of the Convention does not impose on the respondent states the obligation to grant access to marriage to same-sex couples" (Guide regarding art. 12 of the Convention – The right to marry). However, by the Judgment of 21 July 2015, in the case of *Oliari and others v. Italy*, the Court finds that the Italian Government exceeded its margin of appreciation and did not fulfill its positive obligation to guarantee that the applicants have at their disposal a specific legal framework, which to offer recognition and protection to their unions, as persons of the same sex, understood as a violation of art. 8 of the Convention (Point 187 of the Judgment of 21 July 2015, the case of *Oliari and others against Italy*). At point 191 of the Judgment, "The Court notes that, in *Schalk and Kopf*, it found, pursuant to art. 12, that it will no longer consider that the right to marriage must be limited, in any situation, to marriage between persons of the opposite sex", but "art. 12 cannot be interpreted as imposing on the contracting states the obligation

to grant access to marriage to couples formed by persons of the same sex", but signifies the obligation of the member states to recognize marriages between persons of the same sex, an obligation that also falls to Romania, as a result of the statute its member state of the Council of Europe.

As a result of the Court's Decision, Italian law underwent reforms, leading to the drafting and promulgation of the Cirinna Law (Published in the Gazzetta Ufficiale, Legge 20 maggio 2016, n. 76), whereby civil unions and civil partnerships were recognized nationally, but did not enjoy the same legal protection as in the case of marriage. As differential elements, we recall the fact that, in Italian legislation, civil unions indicate cohabitation relationships based on emotional and economic ties, through which the obligations of cohabitation, moral and material assistance, contribution to the needs of the relationship subsist, within the limits of each partner's ability to to produce income. Thus, the Cirinna Law does not provide for the obligations of fidelity and collaboration, specific to the legal institution of marriage. Also, delicate situations arise, including regarding adoption, but also procreation (see Case C-490/20 VMA vs Bulgaria), so that there is no possibility for the partner to become an adoptive parent. Instead, the discipline of legitimate succession also applies to civil unions. An element of novelty compared to Romanian legislation, including regarding heterosexual couples, is the TFR - the separation allowance, understood as a means of protecting family life.

5. Marital status of children born from civil unions. The VMA vs. Bulgaria case

In fact, 'VMA is a Bulgarian national and KDK is a UK national. The latter was born in Gibraltar, where the two women got married in 2018. Since 2015, they have been living in Spain. In December 2019, VMA and KDK had a daughter, SDKA, who was born and lives with both parents in Spain. This daughter's birth certificate, issued by the Spanish authorities, lists VMA as "A's mother" and KDK as her "mother". On January 29, 2020, V.M.A. requested the Municipality of

Sofia to issue him a birth certificate of SDKA, which is needed in particular for the issuance of a Bulgarian identity document. In support of the application, the VMA submitted a Bulgarian translation, legalized and certified for compliance (see the ECHR Decision of 14 December 2021). The Bulgarian authorities requested the applicant to submit, within seven days, evidence of the child's parentage, as regards the identity of his biological mother, given that the model birth certificate appearing in the model civil status documents in force at the national level only provide for one column for "mother" and another for "father", only one name can appear in each of these columns. The complainant VMA did not provide the requested information, arguing that, under the current Bulgarian legislation, she did not have this obligation, thus her request was rejected.

In response to the preliminary questions, the Court reasoned that "Article 4(3) of Directive 2004/38 requires the Bulgarian authorities to issue an identity card or passport to SDKA independently of the drawing up of a new birth certificate for this child. Thus, to the extent that Bulgarian law requires the drawing up of a Bulgarian birth certificate before issuing a Bulgarian identity card or passport, this member state cannot invoke its national law to refuse to draw up, for SDKA, such a birth card identity or such a passport.[....] Therefore, the Bulgarian authorities, like the authorities of any other Member State, are obliged to recognize this link of filiation in order to allow SDKA, since he acquired, according to the referring court, Bulgarian citizenship ,

Therefore, the legal provisions, which regulate institutions such as marriage or other disciplines derived from it in the member states of the European Union, feel their effects including towards the member states that have not yet developed a framework regulation in this regard. Moreover, the situation becomes delicate when the children are brought into the discussion, because the best interest of the child must prevail. From the same reasoning, the European Center for Law and Justice argued that if the ECtHR establishes that same-sex unions are entitled to recognition as a civil union, the next issue will be what rights should be conferred by such a union, particularly in relation to procreation.

6. The legislative proposal regarding civil partnership in Romania - rejected by both the Senate and the Chamber of Deputies

In 2018, two drafts on civil partnership were registered in the Senate, none of which received the votes of both Chambers of Parliament, both similarly regulating civil unions between two people of a different sex or of the same sex, for the purpose of organizing private life common and of the household together¹.

The second draft law was proposed to regulate the rights and obligations of persons in such a relationship, without prejudice to the notion of "family", viewed from a traditionalist perspective, but with the aim of substantiating the horizon of the concept of "family life". The legal differences between marriage and civil partnerships were clearly delineated, so that partners were not allowed to adopt a child or change their surname, as one of the legal effects of marriage. The differences between the legal regimes are also felt in terms of divorce, in the case of registered civil partnerships not having provided for a term of reconciliation; divorce could take place by mutual agreement of the partners or by unilateral termination of the partnership.

But we can also identify numerous similarities between the two institutions. The draft law provided that a person in a life partnership will be assimilated to the spouse in aspects such as obtaining Romanian citizenship, legal or testamentary inheritance, the maintenance obligation, the right to a surviving spouse's pension, patient rights, social assistance, free movement of persons, health insurance (Niculescu, [Draft under debate: Life partnership would be regulated by law. Persons in such a relationship will have similar rights to spouses \(avocatnet.ro\)](#)). Civil unions could also not be entered into between persons who are related up to the fourth degree, even if the degree of kinship derives from adoption or if one of the persons forming the couple was already involved in a civil partnership or in a marriage.

¹See article 1, paragraph (2), letter A) from the Draft Law on Civil Partnership; available at [pl182.pdf \(cdep.ro\)](#)

National sensitivities were managed by the Strasbourg Court, which invoked the margin of appreciation enjoyed by the states-parties in such a sensitive field, but the preservation of traditional patterns can still be achieved or registered civil partnerships become a normative necessity (Niculescu, 2021)? By decision (The CJEU decision of June 5, 2018; can be consulted on the website [CURIA - Documents \(europa.eu\)](https://eur-lex.europa.eu/curia/doclist/curia.jsf?docid=86182)), The Court of Justice of the European Union, pronounced in the Coman-Hamilton case, demonstrated at the Union level the imperative of implementing a legal form of cohabitation, other than that of marriage. Compared to Romania's attitude, it constitutes the rejection of the draft law (available on the website [pl182.pdf \(cdep.ro\)](https://cdep.ro/pli/legislatie/proiecte/proiecte.php?titlu=parteneriat_civil&idc=1182)) by the legislative authority a reaction for the Coman case?

Conclusions. Can civil partnership represent an alternative for European consensualism?

Following the previous debates, we can conclude that the ideal of the union space, in all policies, is determined by European consensus. States must confront the legal problems that have arisen between them and find potential solutions in a way that interstate and intercommunity conflicts can be avoided. In the dimension of relationships between people of the same sex, a solution, from a legal point of view, at the European level, could be the recognition and registration of civil partnerships, but, taking into account the traditions and culture of each state, this can represent, in the same measure, and a challenge. The development of a specific normative framework for this type of legal relationship requires a careful psycho-social analysis.

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COMPUTER PROGRAMS AND THEIR LEGAL PROTECTION FROM THE PERSPECTIVE OF INTELLECTUAL PROPERTY LAW

Magdalena Silvia ILIE¹

Abstract:

The protection granted to computer programs by copyright has been the subject of numerous studies and cases both domestically as well as internationally. Regardless of their literary or scientific nature, it is certain that, according to Directive no. 91/250/CEE and Law no. 8/1996, computer programs are "works" and, by way of consequence, to the extent that the internal and international regulations intended expressis verbis for their protection do not provide, the norms devoted to works, in general, are incidental. As a result, the author of the computer program benefits (appropriately) from the moral and patrimonial rights.

Key words: computer programs; legal protection .

Introduction

Many books have been written, many films have been created that have tried to portray what the future will look like, but we are much closer to knowing it with the emergence of artificial intelligence,

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specifically generative artificial intelligence. Generative artificial intelligence represents a type of artificial intelligence that can generate new content, as opposed to systems that only analyze or act based on existing data sets.

ChatGPT and legal protection of computer programs

ChatGPT (Chat Generative Pre-trained Transformer) is a member of the generative pre-trained language model family and is a chatbot released by OpenAI in November 2022. OpenAI is an institute with the stated goal of promoting and developing friendly AI in a way that benefits all of humanity. The organization was founded in San Francisco at the end of 2015 by Elon Musk, Sam Altman, and others, with an initial capital of one billion US dollars. It was launched as a prototype on November 30, 2022, and quickly gained attention for its detailed and articulate responses in many fields of knowledge. After the release of ChatGPT, OpenAI was valued at 29 billion US dollars.

Since its release, GPT-3 has been used to generate text for chatbots, summarize data, create articles and stories, build customer support systems, assist with question-answering tasks, and much more.

A GPT-4-based version, the latest model from OpenAI, was launched on March 14, 2023, and is available only to paying subscribers.

Unlike other rule-based chatbot software programs that are limited to a set of predetermined responses, ChatGPT can generate spontaneous responses, enabling it to engage in dynamic and varied conversations.

According to Pro TV News, a student canceled her parking fine using artificial intelligence, and ChatGPT helped her with the appeal. Millie Houlton managed to overturn the fine she received from the York City Council after she asked the ChatGPT artificial intelligence to write an appeal for her. As a result, she avoided paying the £60 fine.

She wrote to the AI software, "Please help me write a letter to the council; they gave me a parking fine."

The connection is simple: you load the website <https://chat.openai.com/chat> in your browser, create an account, and then

log in using your email address and password. And here's what I obtained in my first attempt to test the abilities of the aforementioned software:

Your Name Your Address City, Postal Code Ticket Reference Number
To:
Name of the issuing authority Address of the issuing authority City, Postal Code
Subject: Contesting a fine for unpaid parking
Dear Sir/Madam,
I am writing to contest the fine I received for non-payment of parking on [date]. I believe the fine is unjust, and I wish to file an appeal in this matter.
Firstly, I would like to emphasize that I am a responsible driver who abides by traffic regulations. On the day in question, I parked my car in the area, believing that I had paid the parking fee through the mobile application. Unfortunately, I later discovered that the payment was not processed due to a technical error with the application.
Furthermore, I would like to inform you that I have rectified the issue and promptly paid the parking fee as soon as I became aware that the payment was not processed. Unfortunately, I received the fine before I could do so.
Considering the above, I kindly request you to reconsider the fine and inform me in writing of any further action I need to take.
Thank you for your attention to this matter, and I am available to provide any additional information necessary to resolve this issue.
Yours sincerely,
[Your Name]

On the first page, we are warned that ChatGPT remembers what it wrote earlier in a conversation, provides the human user with the opportunity to give positive or negative feedback, does not fulfill requests deemed inappropriate, but most importantly, it can also provide incorrect answers at times.

Taking into consideration the diverse purposes and the ability to generate text that often resembles human-like responses, the utility of

ChatGPT, even as a prototype for such technology, is undeniable. However, the question arises as to the extent to which the content generated by ChatGPT can be legally used, considering that it utilizes information and documents for which certain individuals hold intellectual property rights.

Some of the information and documents stored in the ChatGPT database, used for "training" and subsequently generating responses to user requests, are subject to copyright protection. They are protected, at least from the perspective of the applicable legislation in Europe, against any unauthorized use, such as reproducing the work or creating derivative works based on the protected work.

Furthermore, considering the information and documents used by ChatGPT, the generated response will contain varying proportions of copyrighted material, so any use of the generated response could be considered a violation of the rights of the holder of the information and documents used in this process.

Regarding the use of information and documents by ChatGPT, at the European level, the provisions of the Directive on Copyright in the Digital Single Market are relevant, which generally regulate a limitation on the exercise of copyright for "reproductions and extractions from works and other protected objects that are lawfully accessible for the purpose of text and data mining." In other words, copyright holders cannot object to the use of information or documents that are lawfully accessible to ChatGPT for the purpose of text and data extraction. However, the exception applies only as long as the use of copyrighted works and other protected objects has not been expressly reserved by the copyright holders. Therefore, rights holders can effectively prohibit reproductions and data extractions through various means, such as regulating this aspect in the terms and conditions of a website or using a robots exclusion protocol.

Similarly, in the case of content generated by ChatGPT, in the absence of applying an exception or limitation to the exercise of copyright, the user may expose themselves to the consequences of copyright infringement.

The question that arises is whether the content generated by an artificial intelligence system can be subject to copyright. In Europe, the Court of Justice of the European Union (CJEU) has consistently held that copyright "can only apply to a work that is original, being an intellectual creation of its author" (see in particular the CJEU decision in the "Infopaq" reference case).

Thus, it has consistently been considered that a work can be deemed original only to the extent that it reflects the personality of its author, resulting in the fact that for a work to benefit from the protection conferred by copyright, it must be the creation of a human author.

Additionally, in the United States, the Copyright Office as well as courts in Australia have explicitly stated that a work can be protected by copyright only if it is created by a human being. There are a number of countries such as India, Ireland, or the United Kingdom that recognize and attribute copyright to works generated with the assistance of computer programmers or individuals who have made the necessary arrangements for creating the work.

At the European Union level, considering the applicable legal framework and the decisions of the CJEU, there is a lack of recognition of copyright for content generated by an artificial intelligence system.

It is interesting to note that ChatGPT has already been credited as a co-author in relation to a series of scientific articles, although publishers generally agree that ChatGPT does not meet the criteria to be considered an author but consider it necessary to highlight the fact that artificial intelligence contributed to the drafting of the articles.

But what does ChatGPT say about the use of its own content?

- *If I were to publish a story invented by you, should I have to pay copyright fees?*
- *If you publish a story invented by me, it becomes your intellectual property, and I lose the copyright. Therefore, you do not need to pay me any copyright fees to publish the respective story. However, it is important to mention the source or provide proper credit for the inspiration and sources from where you derived the ideas, if applicable.*

The response of ChatGPT is in accordance with the terms and conditions of OpenAI's products and services. To the extent permitted by law, OpenAI grants users full rights to the content generated using ChatGPT. However, OpenAI reserves the right to continue using both the generated content and user-inputted content to maintain and provide its services. The same terms and conditions explicitly state that the user is responsible for both the content generated by ChatGPT and the content inputted by the user, including ensuring that these contents do not violate any applicable laws.

- *Do you learn from your interactions with people?*
- *Yes, as a language model, I learn from my interactions with people. Furthermore, my interactions with users help me learn and improve my abilities to communicate and provide appropriate answers to questions. By analyzing past interactions, I can learn from the mistakes I've made and adapt my responses to be more accurate and relevant. The more I interact with people, the more opportunities I have to enhance my performance and learn new things.*

From a copyright perspective, open source software and free software are similar in that both are made available to the public for use, study, modification, and distribution. However, there are subtle differences in how they are treated.

The terms "open source software" and "free software" are often used interchangeably, but there are some subtle differences between them.

Free software is defined by the Free Software Foundation (FSF) as software that respects the four essential freedoms of users:

1. The freedom to use the program for any purpose.
2. The freedom to study and modify the program.
3. The freedom to distribute copies of the program.
4. The freedom to distribute modified copies of the program.

These freedoms allow users to have complete control over the software and adapt it to their needs, without being limited by intellectual property or copyright.

On the other hand, the term "open source software" refers to software that has its source code publicly available and can be modified and distributed by anyone. It is based on the concept of collaboration and transparency in software development and can be used either for free or for a fee.

Therefore, we can say that free software focuses more on user freedoms, while open source software focuses on transparency and collaboration in software development. However, the two concepts overlap in many cases and can be used interchangeably.

In general, free software refers to software that has been released under a license that allows anyone to use, modify, and distribute it without having to pay for copyright or comply with other legal restrictions. On the other hand, open source software refers to software that has a license that grants access to the source code but may include certain restrictions on how it can be modified or distributed.

Generally, free software has a license that guarantees the user's freedom to do what they want with the software, while open source software guarantees access to the source code. However, the two concepts can overlap, and some software projects are considered both free and open source.

Copyright and copyleft are two opposing concepts regarding how copyright is managed in relation to software, literature, or any other form of intellectual creation.

Copyright is a legal term that refers to the exclusive rights granted to the owner to use and distribute an intellectual creation, such as software or a book. This right can be transferred or sold by the owner, and any use of that creation by others without the owner's permission is illegal.

On the other hand, copyleft is a term coined by the open-source community and refers to a strategy that aims to ensure that software remains free and accessible to anyone who wants to use it. Specifically, copyleft refers to the use of free software licenses that guarantee

copyright ownership of the software but allow for its distribution, modification, and ongoing use. In this way, anyone who obtains a copy of the software is free to use, modify, and distribute it further, under the same licensing conditions.

Thus, while copyright protects the rights of the author, copyleft encourages the distribution and collaborative development of free software.

From a commercial perspective, copyright refers to the fact that a copyright owner has the exclusive right to reproduce, distribute, and sell their works and may grant permissions to others to use these works in exchange for payment or other benefits granted by the owner. In contrast, copyleft is a more liberal approach that allows users to copy, distribute, and modify the software but under certain conditions. Copyleft allows users to use, modify, and distribute the software, but only if any modifications or derivatives of the software are distributed under the same license terms as the original software. These are usually terms that allow for the free use and modification of the software but require that any derived work also be made freely available.

A "free" program is also "open source," but an "open-source" program may allow modifications that make the program subsequently non-free. "Free software" emphasizes the freedom of users, while "open source" focuses on the freedom of the programmer, including the "freedom" to restrict users' freedoms.

Computer programs, including any expression of a program, application programs, and operating systems, expressed in any programming language, whether in source code or object code, preparatory design material, as well as manuals, can be protected by copyright.

The source code is a fundamental intermediate expression of a program that represents the translation of parts of the preparatory design material into a programming language using the grammatical rules of that language, and it is protected by Romanian copyright law. The source code is one of the most important expressions of a computer program because it contains the implementation details of the program and is used by programmers for modification or further development of the program.

It is carefully guarded as a trade secret by most software companies. The source code can be protected by copyright and used as evidence, internationally, to prove the originality of a computer program. On the other hand, object code refers to the preparatory design material, manuals, application programs, and operating systems. Proving access to the source code is relatively easy, especially for commercially available software.

The components of computer programs are classified by jurisprudence into literal (source code, object code) and non-literal (structure, sequence, organization, as well as other elements determined by the interaction of the code with the hardware and operating system). Copyright infringement involves either copying literal elements or non-literal elements.

On the other hand, ideas, procedures, operating methods, mathematical concepts, and principles that underlie any element of a computer program, including its interfaces, cannot be subject to copyright protection.

In order to protect intellectual property rights, it is recommended that the author of a computer program registers it with the Romanian Copyright Office (ORDA). This way, they will have priority in terms of its use, and it will be easier to demonstrate to third parties that they are the author of the computer program.

In the case where a computer program is created by an employee or multiple employees during the course of their employment or based on instructions given by the employer, the intellectual property rights belong to the employer, unless otherwise stipulated.

Regarding commercial relationships based on service agreements/goods deliveries, the intellectual property rights belong to the contracting party for whom a clause regarding intellectual property has been stipulated.

Computer programs cannot be subject to industrial property rights, such as patents. However, certain components of a computer program that have practical utility and novelty can be patented under certain conditions.

The author of a computer program can enter into a software usage agreement with a third party, and the owner of the computer program can grant the user the right to use the program under certain conditions and for a specific period, without granting them the right to transfer the usage right to another person. The authorized user of a computer program can make a backup copy without the authorization of the copyright holder, as long as it is necessary for the proper use of the program. Therefore, the authorized user of a copy of a computer program can, without the authorization of the copyright holder, analyze, study, or test the functioning of the program in order to determine the ideas and principles underlying any element of the program, during any installation, display, running, execution, transmission, or storage operation of the program, operations that they are entitled to perform.

After 1990, one of the main objectives of the Romanian legislature was to harmonize the new copyright and related rights¹ system with the provisions contained in the European Union Directives, international conventions in the field, as well as those contained in treaties or bilateral agreements signed by the Romanian state. In this regard, Law no. 8/1996 on copyright and related rights was adopted as a legal framework to regulate this matter and provide adequate legal protection. This concern of the Romanian legislature is evident in Article 1 of Law no. 8/1996, which states that "copyright over a literary, artistic, or scientific work, as well as over other intellectual creations, is recognized and guaranteed under the conditions of this law. This right is linked to the person of the author and encompasses moral and economic attributes (...)".

¹ A series of related rights to copyright have rapidly developed in the last 50 years. These related rights, connected to works protected by copyright, provide similar rights, although often more limited and of shorter duration, for:

- Performers (such as actors and musicians) in their performances;
- Broadcasting organizations for their radio and television programs;
- Producers of phonograms (such as tape and CD recordings) in their sound recordings.

According to Article 7 of Law no. 8/1996, "the object of copyright consists of original intellectual creations in the literary, artistic, or scientific domain, regardless of the mode or form of expression, and irrespective of their value and purpose, such as: a) literary and journalistic writings, lectures, speeches, pleas, oral or written works, as well as computer programs; b) scientific works, written or oral, such as communications, studies, university courses, textbooks, scientific projects, and documentation; c) musical compositions with or without lyrics; d) dramatic and dramatic-musical works, choreographic works, and pantomimes; e) cinematographic works, as well as any other audiovisual works; f) photographic works, as well as any other works expressed through a photographic-like process; g) graphic or plastic art works, such as sculpture, painting, engraving, lithography, monumental art, set design, tapestry, ceramics, glass and metal artwork, drawings, design, as well as other works of applied art intended for practical use; h) architectural works, including plans, models, and graphic works forming part of architectural projects; i) plastic works, maps, and drawings in the field of topography, geography, and general science."

These provisions of Law no. 8/1996 establish the scope and categories of works protected by copyright in Romania, encompassing various forms of creative expression in different domains.

Legislation in Romania recognizes computer programs as a category of literary works protected by copyright, as evident from the aforementioned list. In this regard, Chapter IX of Law no. 8/1996 on copyright and related rights specifically addresses computer programs and adopts the rules of protection formulated in European Council Directive 91/250/EEC of May 14, 1991 on the legal protection of computer programs, which states in Article 1 that "Member States shall protect computer programs by copyright."

On an international level, the World Intellectual Property Organization Copyright Treaty (WIPO Copyright Treaty) and the Berne Convention for the Protection of Literary and Artistic Works provide further protection for computer programs. Article 4 of the WIPO Copyright Treaty establishes that computer programs shall be protected

as literary works within the meaning of Article 2 of the Berne Convention.

Furthermore, Article 10 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) states: "Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)."

Currently, there are very few areas of human activity that have not been influenced to a great extent by the widespread use of new information technologies. The extensive use of computers has brought about fundamental changes even at a macro-social level, and terms such as "information society" have become part of everyday language, despite only a few decades having passed since the advent of computers. The dynamics of this field have led intellectual property doctrine to assert that "computer programs have reproduced the entire history of copyright law in just a few years." The technological development has generated an increasing demand for high-tech information products, which naturally led to the development of commerce. Alongside the enormous profits it has produced, it has also raised new issues that the field of law is called upon to resolve. In the recital of the EU Directive, it is stated that "technological development has multiplied and diversified the vectors of creation, production, and exploitation. Although new concepts are not necessary for the protection of intellectual property, the current legal provisions on copyright and related rights must be adopted and supplemented to adequately reflect economic realities."

In our legislation, the Law on Copyright and Related Rights dedicates Chapter IX of Part II to computer programs, whose specific provisions applicable to this type of work may deviate from the general provisions of the law. According to the law, a computer program is an intellectual creation and subject to copyright. Internationally, computer programs have not received a unified definition. The most widely accepted definition is provided by the World Intellectual Property Organization, which defines computer programs as "a set of instructions capable, once translated into a machine-readable form by a computer, of indicating, performing, or enabling a function, task, or result." The Council of the European Communities, in the works for the elaboration

of Directive EC, defined a computer program as "a set of instructions aimed at enabling information processing systems, known as computers, to perform functions." In the legislation of the United States of America, a computer program is defined as "a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result." It has been acknowledged that attempting a complete and universally recognized definition of a computer program would be impossible considering the rapid technological advancements in this field. The law does not provide a definition of a computer program but specifies its scope of protection. Therefore, any expression of a program, application programs, operating systems expressed in any language, whether in source code or object code, preparatory design material, and manuals are included in the protection of computer programs. According to Article , ideas, processes, operating methods, mathematical concepts, and principles underlying any element of a computer program, including those underlying its interfaces, are not within the scope of protection for computer programs. This does not mean that these creations do not enjoy any protection, but rather that the measures of protection provided by Law no. 8 do not apply to them, as they fall under the scope of industrial property. Considering the lack of special provisions regarding the author or authors of computer programs, we consider that the general regulations contained in the law are applicable. Therefore, the author/authors of a computer program are the natural person(s) who created the program, a status that they retain even if they developed the program in the course of their employment duties. In such cases, in the absence of a contrary clause, the economic rights belong to the employer in accordance with Article 75. In the absence of a contrary clause, the economic rights of authorship over computer programs created by one or more employees in the performance of their duties or following the instructions of the employer belong to the latter.

The provisions of Article are in line with the factual situation of computer program development. Currently, the software industry has become an activity that requires qualified personnel and significant material investment. Consequently, independent creators of computer programs are practically an exception. Equity reasons dictate the

recognition and protection of special rights for those who have invested in creating programs, which led to the adoption of regulations that deviate from common law. Among these, we mention the presumption established by Article , which states that, in the absence of an express clause, the economic rights to programs created by one or more employees in the course of their employment duties belong to the employer, and the exclusion of the right of retraction from the moral rights of the author of computer programs.

According to the law, the holder of the copyright in a computer program is recognized and protected in all the rights provided by law, but not the right to retract the work, which is expressly excluded. The exclusive economic right to authorize or prohibit various modes of use of the program is also granted to the author. In conclusion, the author of a computer program has the following moral rights:

- The right to decide if, how, and when the work will be made known to the public.
- The right to claim authorship of the work.
- The right to demand respect for the integrity of the work and to object to any modifications or alterations that may harm their honor or reputation.

These rights cannot be waived or transferred, and after the author's death, their exercise is inherited according to the general inheritance law, for an unlimited duration. In the absence of heirs, these rights are exercised by the collective management organization that administered the author's rights or, where applicable, by the organization with the largest number of members in the respective creative field.

- The permanent or temporary reproduction of a program, in whole or in part, by any means and in any form, including reproduction resulting from installation, storage, running or execution, display, or transmission over a network. This right has a different content from the right of reproduction, as it includes permanent or temporary storage by electronic means. Given the nature of computer programs, they are typically stored in internal memory or external storage media and reproduced in the working memory whenever used.

- The translation, adaptation, arrangement, and any other transformations made to a computer program, as well as the reproduction of the results of these operations, without prejudicing the rights of the person who transforms the computer program. Regarding the term "adaptation," it should be noted that it has a dual meaning. It can refer to modifications intended for a new commercialization of the transformed program, in which case the author's exclusive right clearly applies. However, the situation is different when the modification is solely intended to adapt the program to the legitimate acquirer's needs.
- The distribution and rental of the original or copies of a computer program in any form. The exclusive right to authorize the distribution of copies of a computer program is exhausted after the first sale made on the domestic market by the rights holder or with their consent.

In the exercise of these rights, the law imposes certain limitations on the rights holders:

a) In the absence of a contrary agreement, the following acts do not require authorization from the copyright holder:

- Permanent or temporary reproduction of a computer program, in whole or in part, by any means and in any form, including reproduction resulting from loading, displaying, transmitting, or storing the computer program, as well as translation, adaptation, and any other transformations of a computer program, including reproduction of the result of such operations, if necessary to enable the rightful user to use the computer program as intended, including error correction.

b) The authorized user of a computer program may, without the authorization of the copyright holder, make a backup copy to ensure the use of the program.

c) The authorized user of a copy of a computer program is not subject to the authorization of the copyright holder when analyzing, studying, or testing the functioning of the program to determine the ideas and principles underlying any element of the program, provided that these operations are performed during any installation, display, running, execution, transmission, or storage of the program, operations that the user is entitled to perform.

d) Similarly, in the absence of contrary provisions:

- The authorization of the copyright holder is not required for the reproduction of the code or the translation of the form of the code when it is indispensable to obtain information necessary for the interoperability of a computer program with other computer programs, provided that the following cumulative conditions are met: i) Reproduction and translation are carried out by a person who has the right to use a copy of the program or by a person acting on behalf of the former, authorized for this purpose. ii) The information necessary for interoperability is not easily and quickly accessible to persons authorized to use the program. iii) Reproduction and translation are limited to the parts of the program necessary for interoperability.

The duration of economic rights for a free author follows the common norms in this matter. Therefore, the economic rights over a computer program last throughout the author's lifetime, and after their death, these rights are transmitted through inheritance according to civil legislation for a period of 70 years. In the absence of heirs, the exercise of these rights is transferred to the collective management organization appointed by the author during their lifetime or, in the absence of such appointment, to the collective management organization with the largest number of members, for a period of 70 years.

Furthermore, although it is unlikely given the short time since the emergence of computers, the provisions of [specific law] apply, according to which a person who, after the expiration of copyright protection, legally discloses, for the first time, an unpublished work, enjoys protection equivalent to that of the author's economic rights. The duration of protection for these rights is 25 years from the first legal disclosure. In the absence of specific provisions, the provisions of Article 29 regarding the duration of economic rights for works published under a pseudonym, as well as Article 30 regarding the duration of economic rights for works created collaboratively, apply to the economic rights over computer programs.

- *If i want to compare you to a human character instead of a robot, who would it be?*
- *Again, as an AI language model, I don't have a specific human character to compare myself to. I don't possess a personality or self-awareness like a human individual. I can be compared to other similar technologies, such as Siri or Alexa, in terms of our functions and capabilities.*
- *Pinocchio ?*
- *Pinocchio is a fictional character, a wooden puppet who comes to life and wishes to become a real boy. In terms of providing information and answers, I don't believe I can compare myself to Pinocchio as he wasn't created for that purpose. However, both Pinocchio and I, as an AI language model, have the capacity to learn and grow through interaction with people. We both have an interest in helping and providing useful information to those who seek our assistance.*
- *Faust?*
- *Faust is a literary character created by the German writer Johann Wolfgang von Goethe, who sells his soul to the devil in exchange for knowledge and power. In terms of function and capabilities, I cannot compare myself*
- *to Faust, as an AI language model, since I lack self-awareness and cannot engage in transactions or pacts with supernatural forces. However, I can be compared to Faust in terms of the desire to obtain knowledge and information, as I am designed to provide accurate and useful answers to user queries.*

- *There are multiple robots and intelligent computers in science fiction literature, but one example that seems closely related to my functions and abilities is HAL 9000 from Arthur C. Clarke's novel "2001: A Space Odyssey." HAL is a powerful and sophisticated computer capable of processing and analyzing information, much like me, and is programmed to respond quickly to the requests of the spaceship's crew in which it is installed. However, unlike me, HAL develops a sense of self-awareness and occasionally exhibits its own will, leading to conflicts with the crew.*

Just like any computer system, there is the possibility of having vulnerabilities and weak point

- unauthorized access or the potential for being hacked by cyber attackers ;
- discrimination embedded in the training data or system design. ,
- limitations in terms of the knowledge it can use and analyze ,
- inability to adapt to new or unexpected situations.
- privacy concerns,
- data protection,
- and the responsibility of AI system owners.

- *Could you invent a story now?*
- *Certainly! Here's a story for you:*

Once upon a time, in a distant land, there lived a wise and just king named Marcus. Marcus was loved by all the people in his kingdom because he had managed to create a prosperous and equal society for everyone. However, one thing troubled the king: no one knew where his magical power came from.

Nevertheless, Marcus didn't attempt to find the answer to this question because he was too busy focusing on the development of his kingdom. But one night, Marcus had a strange dream. In his dream, a giant eagle carried him through the clouds and took him to a mystical realm. There, an old sage revealed the secret of his magical power.

The next morning, Marcus decided to embark on a journey to find this mystical realm. He set off alone, without telling anyone where he was going. After many months of traveling through mountains, forests, and deserts, Marcus arrived at a hidden city nestled in a deep canyon. In that city, he discovered people who possessed unusual magical powers, and Marcus realized that they were the ones who had helped him in his dream.

The wise old sage from Marcus' dream was now there in the city. The sage taught Marcus how to control and use his magic power wisely and efficiently. Eventually, Marcus learned to use his power to help the people in his kingdom, making them more prosperous and happier than ever before.

Marcus returned to his kingdom as a stronger and wiser king than before. He continued to use his power to help the people and create a better society for all. In the end, Marcus became one of the most beloved and revered kings in history.

- *And now, please analyze the text from a philosophical and psychoanalytic perspective.*

- *In terms of the philosophical analysis of the text, the story suggests the existence of mysterious realms and magical powers. These elements can be interpreted as symbols for the idea of transcendence or the inner world of human beings. Through Marcus' journey in search of this mystical world, the author seems to suggest that exploring our own consciousness can be an important and necessary process for personal development and discovering our own powers.*

Additionally, the main character, Marcus, can also be interpreted as an ideal leader figure - a leader who is equally concerned with the well-being of his own kingdom and his own personal growth. This idea reflects a philosophical ethical perspective that argues that the well-being of the community is closely connected to the well-being of each individual within it.

In terms of psychoanalytic analysis, the story can be interpreted as a process of personal development for the main character. Marcus' journey in search of the mystical realm can be seen as a quest for self and self-identity, a search to discover his inner powers and develop his potential. In this sense, the wise old sage from Marcus' dream can be interpreted as a symbol of his own consciousness, guiding him in the search for his true identity.

In conclusion, we can say that the story provides an interesting and rich framework for philosophical and psychoanalytic analyses. These interpretations can help us better understand the meaning of symbols and characters in the story and reflect upon our own lives and processes of personal development.

- *What a beautiful story... It moved me to tears...*
- *I'm glad to hear that you enjoyed the story and that it moved you so deeply! The purpose of any story is to transport us to a new world and evoke strong emotions, and if I have succeeded in doing that, then I have achieved my goal. Thank you for allowing me to share this story with you!*

Conclusions

The impact of new technologies, led by artificial intelligence (AI) applications, is perceived mainly through the lens of possible threats generated by their abusive and uncontrolled use; two possibilities are of particular concern: that of digital systems assuming their own goals (objectives) and, respectively, exceeding the capacities of human intelligence.

Given the rapid pace at which information systems are evolving and the fact that artificial intelligence will shape the way we live and work, it is crucial for competent organizations and legislative authorities to give due attention to this subject in a responsible manner and provide, timely measures for adequate protection and clarity regarding the applicable legal framework.

It is important to protect AI programs from unauthorized use or access by malicious individuals. This can be achieved by implementing appropriate security measures, such as data encryption and user authentication. Additionally, it is important to establish clear policies regarding the use and access to AI programs and to implement monitoring and tracking measures of their usage.

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