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ARTIFICIAL INTELLIGENCE AND THE NEW LEGAL ORDER: CHALLENGES AND OPPORTUNITIES FOR FUNDAMENTAL RIGHTS

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Abstract: *Artificial intelligence has become part of our lives and has gained a significant role. In this context, the law has a dual task: on the one hand, it must promote technological development, but on the other hand, it must protect against its potential dangers. This is a task for the state, but also for the supra- and international legal system. In relation to the state, there is a constitutional duty to promote technological progress. This follows from the fundamental constitutional idea of protecting and promoting the people in the national community, also from the principle of the social state and also from the duty of protection inherent in fundamental rights. The state's obligation to protect against the dangers of technology can be derived directly from fundamental rights. The guarantee of human dignity as the supreme value of the legal system plays a special role here, precluding the domination of technology over humans. But numerous other fundamental rights (at the national and EU level and based on corresponding guarantees in the European Convention on Human Rights and other documents) are also guarantees against potential threats from artificial intelligence. The fundamental values of the liberal democratic constitution: human dignity, the principle of freedom and equality remain unchanged as the basis for the legally regulated coexistence of people in the state community. However, the constitutional norms must duly integrate the new reality that artificial intelligence creates through its power of influence into their protective function.*

Keywords: *Artificial Intelligence; human dignity; fundamental rights; promotion of technological progress; protection against dangers.*

Introduction

One of the most important topics in today's law is the development of new technologies, especially AI, which on the one hand is a great advance, but on the other hand also entails multiple dangers for people and their freedoms.

The complexity of the subject forces me to limit myself to some basic legal considerations about this new technology, which I find important in the context of the topic: in a first part I will try to explain to what extent the new technology promotes human freedom, in the second part I will then address the threats to freedom posed by AI.

1. On the problem to define AI

A first observation refers to the definition of artificial intelligence. We are familiar with numerous examples, from simple applications to very complex and far-reaching ones. But we do not know exactly how to define natural intelligence: is it the fruit of human thought or of consciousness (Hoeren/Pinelli, 2), is it emotionally conditioned, to what extent does inspiration intervene, all questions still unresolved, as well as: what is artificial and what is human, think of a medical chip implanted in the human brain(Hoeren/Pinelli, 2), to resolve paralysis or a miniature magnetic resonance tomograph to measure signals in neuronal tissue, as the Max Planck Institute for Biological Cybernetics did five years ago. A "neuromorphic computer architecture" is also being developed, inspired by the networks of the human brain (Bimmer, 2022).

Even the definition provided by the latest legislative text (of great importance also for the European space), the EU Regulation on AI, which entered into force three months ago, only partially resolves this issue: The defining elements are, according to the regulation: a machine that has different levels of autonomy, that is adaptive during its operation and that can obtain results from input information, such as predictions, content, recommendations or decisions (Regulation (EU) 2024/1689).

In the English text of the AI Regulation: "AI system" means a machine-based system that is designed to operate with different levels of autonomy and that can show adaptive capability after deployment, and that, for explicit or implicit objectives, infers from the input information it receives how to generate output results, such as predictions, content, recommendations or decisions, which may influence physical or virtual environments" (Art.3 (1) of the Regulation (note5). The same definition is contained in Article 2 of the Council of Europe Treaty on AI (Art.2 of Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law).

2. The spread of AI into all areas of life

We see, then, the difficulty of defining artificial intelligence in an exhaustive manner. And we will see later how difficult it is to understand its internal mechanism of application. Is AI really a "black box", as it is often said, whose application raises serious constitutional questions due to the lack of transparency of its internal mechanism?

We know the many examples of artificial intelligence applications where machines play a specific role instead of humans: "Speech recognition in real time (Walter, O), language processing (Poirier, Shapiro, 2012), image recognition (Kuhanec, 2022), robotics (Singh, 2024), medical diagnostics (Fitch), development of autonomous vehicles (Chukwudozie, 2024), fight against online scams (Lexis Nexis) and much more.

The realities of life make it necessary to enact legal regulations that, on the one hand, enable and encourage the sensible development of this technology and, on the other hand, protect against its dangers.

3. “Open Statehood” und AI Regulation

A further observation from the outset, which is important for the overall understanding of our question: today's state is an open state, i.e. it is not content with its own domestic law, regardless of the subject matter, but also looks outward to the international community. Universal and

regional international law and specially developed specialized areas, such as the supranational law of the European Union, are also decisive for the understanding of domestic law. The open state, as a phenomenon of a free and open society, observes this extra-state law and adapts its internal rules to it; external law essentially characterizes domestic law. The open state acts, as the German Federal Constitutional Court says, in favor of international law (Federal Constitutional Court (FCC) vol. 111, 307, in part. 317, 329) and, in relation to the European Union, in favor of European law (FCC vol. 123, 267, 347,354,401). Both are constitutional principles for the interpretation of domestic law, whether it is constitutional law or simply statutory law.

A special feature is added: the supranational law of the European Union applies to the 27 Member States of the European Union, has a broad scope, is directly applicable in the internal legal sphere of the Member States and, moreover, prevails over national law, including national constitutional law (Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64. European Court Reports English special edition Page 00585; Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. Case 11-70).

This open statehood is not only a European phenomenon, but a universal one, even if global state practice repeatedly restricts, relativizes and even denies this fundamental principle.

For our topic, this means that we cannot analyze our issue solely from the perspective of national law, but must necessarily include non-national law. This already brings us to the important observation that, for the wide area of the EU Member States (and also far beyond), a central legal act concerning artificial intelligence must be included in the consideration, namely the aforementioned EU AI Regulation, a comprehensive set of regulations with 113 articles, 180 recitals and 13 annexes, which occupies an enormous number of pages in the Official Journal of the European Union in small print (Determann, 2024). We will come back to this regulation several times in the following.

However, international law also deals with artificial intelligence in numerous documents, most of them in the form of so-called soft law, i.e. without binding legal force for states, but nevertheless with a great influence on the development of legal convictions and thus also on the emergence of general legal principles, which in turn are an important legal source for international law.

A remarkable peculiarity in regional international law is a recently created international treaty, the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, note7) which is intended for its 46 member states, but also for all interested non-member states: it has already been signed by important states, such as the United States, Great Britain, the European Union also on behalf of the 27 member states, and others (The Framework Convention on Artificial Intelligence). For it to enter into force, 5 signatory states (including 3 members of the Council of Europe) must have ratified this treaty (Art. 30 (3) of the Treaty). This should be achieved soon.

It is the first international treaty to address the issue relevant to our topic, namely the promotion of technological development on the one hand, and the obligation to protect fundamental rights, democracy and the rule of law on the other. It does not contain directly effective (i.e. self-executing) individual rights, but rather obligations of the contracting states to effectively implement these guarantees through their own measures. It is also important that - like the important EU regulation on AI mentioned above - it imposes obligations not only on the state, on the public sector, but also on private actors (Art. 3 (1a) of the Treaty), who have become powerful players alongside the state in the fields of new technologies.

The European Union signed this treaty in September this year, which is fully in line with the EU IA Regulation (Council of Europe, 2024). Although it is less stringent than the EU Regulation itself and leaves considerable leeway for implementation, it is nonetheless of the utmost importance for EU and non-EU members (who are not bound by

the EU Regulation) and has an important stimulating effect on global relations.

4. The duty to promote technological development

The State, the public sector and the international community cannot remain indifferent to technological development. The constitution of the State implicitly contains the duty to promote technological progress in the interest of society, but also in the interest of improving the living conditions of the individual. This duty to promote consists in the creation of technology-open and technology-friendly regulations, support for research, project funding (albeit limited by budgetary possibilities), other regulatory or idealistic measures to stimulate technological innovation, and much more.

This obligation to provide support is undoubtedly important for the quality of life of the individual and is therefore also relevant to fundamental rights. Therefore, this issue is also part of our topic.

The legal question is from what such a state (or, in relation to the European Union legal system, supranational) promoting obligation may derive. There are several approaches to this question:

Good governance encompasses the political obligation to strive for progress, including technological progress, and to achieve it as effectively as possible.

However, this is not only a general duty of the government and the parliamentary majority, but it must be recognized that progress in living conditions is also a fundamental constitutional provision. It has its origin in the state's concern for the individual and the community. These are implicit basic conditions of a state community from the very beginning. This is also a basic idea of the social contract, which represents the ideal and legal basis of a community of persons coming together to form a state community (Rouuseau, 1966). The aim of such a community association is to safeguard, i.e. to protect, the individual who joins the community, but also to promote it, which consists, on the one hand, in maintaining the value of the individual, his/her dignity, freedom and equality, to which the individual is entitled by his/her humanity, and,

on the other hand, in constantly improving his living conditions and adapting them to new developments. On the whole, we can therefore state that the promotion of technological development is also part of the essence of a constitution.

A second aspect comes into consideration: the principle of the welfare (social) state (often written in constitutions, but also existing without being written) (expressed in some constitutions through basic social rights) (Article 20 (1) of the German Basic Law) also requires the promotion of technological development as an indispensable condition for society.

Another approach lies in the fundamental rights themselves. Fundamental rights are not only subjective rights of defense against state interference, but also objective values that constitute the ideal basis of the community, i.e. the state. Based on this idea, constitutional jurisprudence in particular has developed the so-called duty to protect theory (in Germany about 50 years ago, a theory which today has the highest constitutional significance) (FCC vol. 39, 1 ,42 f.; vol. 77, 381, 404; vol. 88, 203 ,251 f.; vol. 96, 56 ,64; vol. 125, 175, 222 f.,vol. 158, 17, 185 f.,199 f.; vol. 149, 12 6 ,142). However, this idea of the duty to protect can also be found in other states and at the non-state level, for example in the European Convention on Human Rights (Babeck, Weber. 2024, p.8). It states that the values protected by fundamental rights, such as life, personality, health, property, etc., must not only not be subject to disproportionate interference by the state, but that the state must actively protect them through its legislation and other measures. This obligation to protect exists with respect to private individuals who interfere with these values, but it also exists with respect to the State itself, which must limit its own interference through legislation. This protection must be effective. This is a functional requirement of protection, although the type of protection is left to the discretion of the legislator, who has a wide margin of appreciation.

New technologies should also be used to achieve effective protection of fundamental rights. This applies whenever AI offers more effective protection than traditional means. Take the example of health protection (a fundamental right under Article 2.2 of the German Basic

Law, often protected by fundamental social rights in other countries). Therefore, it is constitutionally necessary to protect the fundamental right to health as effectively as possible; since AI offers the greatest possible effectiveness (apart from the inherent weaknesses of AI, of course, which I will discuss later), its development and use in the medical field is constitutionally necessary.

And we can also see that great progress has been made in the medical field through AI. Some examples are: tumor analysis through AI, digital pathology as a whole (Treanor, Mair), robotic assistants during operations (Willmer, 2023), quantum computing for diagnostics (Monett, 2023) and also ChatGPT is probably useful in medicine (Nature Medicine, 2023).

In summary, we can say that the State has an obligation to promote new technologies such as AI and to make their benefits available to the general public. In particular, the duty to protect the values enshrined in fundamental rights as effectively as possible also includes the State's obligation to authorize and apply the most technologically advanced means to maximize the effectiveness of this protection. To enable this application, the State is also obliged to promote the development of this technology.

When we speak of state obligation, this should be understood in a broader sense to mean that the supranational community of the European Union also has the same obligation at its level of competence, which is realized in parallel to the state obligation or cumulatively with it.

5. The negative duty to protect: prevention of and defense against the dangers of AI

a) Methodological approach

Let us now turn to the second part of the considerations, which concerns the dangers that may emanate from AI. The state must not use AI in such a way that it impermissibly encroaches on fundamental rights. In addition, the state also has a duty to protect against the dangers of artificial intelligence. These dangers may emanate from the state itself

when it uses AI or from private individuals when they use AI (e.g., insurance companies or private employers making decisions about whether to grant insurance or hire a person). Fundamental questions also arise in this context, namely whether the nature of AI does not give rise to certain uncertainties. Is AI a black box? Does AI only give a statistically probable answer rather than a necessarily correct answer? Does this have implications for the question of fundamental rights?

b) The triad of fundamental constitutional values

Before addressing the specific question of fundamental rights related to AI, we should clarify some basic constitutional issues in this context, albeit with the necessary brevity. I am not focusing on a specific constitutional order (such as the German or the Spanish), but am trying to make a claim of general validity that applies across the board to a genuine and authentic constitutional order. By this I mean a liberal-democratic constitutional order that places people at the center and is anthropocentric.

The basis of such a constitutional order is man, his dignity, which means considering man as a subject and not as an object, as an instrument of public power. The principle of freedom, which is a necessary consequence of human dignity, is derived from this central fundamental value of every authentic constitution, whether or not it is written in the constitution, but in any case it is implicitly present. However, freedom is limited within the community and is subject to the restrictions necessary for the community. It should also be emphasized that the principle of freedom also encompasses political freedom and self-determination, i.e. democracy. The third fundamental value is equality, since the values just mentioned correspond to every human being by virtue of the fact that he or she is a human being.

All other fundamental rights, which are specific manifestations of this triad of values, are derived from these three fundamental values.

While human dignity is absolute and cannot be restricted or bowed to other constitutional values, freedom can be restricted, but only to the extent that it is absolutely necessary for legitimate community

purposes. Here the principle of proportionality applies, which permits only such urgently necessary restrictions and which has also become a worldwide instrument for distinguishing between freedom and restriction of freedom. On the other hand, the essence of a fundamental right must never be eliminated or significantly relativized.

c) The weaknesses of AI

Let's start with the inherent weaknesses of AI, which can also affect fundamental rights:

(1) The black box problem

Decision makers are often unaware of how AI works. This is why AI is often referred to as a black box. For AI to make or participate in legal decisions, there must be transparency to the extent possible. The algorithm system involved must be disclosed.

If a person is the addressee of the decision-making process, he or she must be able to understand the decision-making method. In administrative proceedings, the person concerned is not an object, but, as is often expressed in administrative procedure laws, a subject. This requires the principle of human dignity, which also considers the subject quality of the person as the addressee of state requirements to be indispensable.

If the state communicates with the individual by means of AI, the problem arises of a machine being the interlocutor of a human being. Here, too, doubts ultimately arise due to the highest value of the legal order, human dignity.

It can be argued that simple decision-making processes can be left to AI, but more complicated ones would have to be controlled at least by humans. In these automated processes there is the so-called "human bias". Criminal convictions, for example, or sentencing in particular, could never be carried out by AI.

This requires a person (or a collective of persons as judges) capable of making a comprehensive judgment; a machine that learns from the data

fed into it cannot comprehensively assess the person of the offender in all relevant aspects or the specific circumstances of the crime.

Humans must play a decisive role in the creation and determination of AI functions. If machine autonomy exceeds a certain level, it is no longer legally acceptable and is a violation of human dignity or specific fundamental rights.

It is also a fundamental requirement that the State's incriminating decisions can be reviewed by the courts. Therefore, the judge must also understand the AI decision-making process. Relying solely on the testimony of an AI expert cannot be sufficient for the judge. If the system cannot be explained or is difficult to explain in a particular case, there cannot be sufficient judicial review. This would be a fundamental violation of fundamental rights, both the national Constitution and Article 6 of the European Convention on Human Rights and many other guarantees.

As the addressee of state decisions, the individual has a fundamental right to ensure that these decisions are in accordance with the laws in force. This is a fundamental principle of the rule of law and also underlies the basic idea of the protection of fundamental rights.

However, AI results are statistical probability results that are based on the data entered into the AI. These data must not be out of date and must not be discriminatory, otherwise an objective decision that meets the requirements of the rule of law cannot be expected. The selection of the data entered relativizes the objective accuracy of the result. Irrespective of this, the question arises as to whether there are obstacles to data entry under copyright or data protection law.

(2) Human dignity

The most recent binding normative document, the EU Regulation on Artificial Intelligence, has, by all accounts, comprehensively analyzed the current status of AI use and also divided it into categories. If we want to analyze the threat to fundamental rights on the basis of AI application possibilities, a look at this EU legal act is relevant and also methodologically justified.

Here, too, general statements can be made, especially since the guarantees of fundamental rights in liberal-democratic constitutional states are essentially the same. If it is further assumed that the values guaranteed in a constitution are ultimately derived from the basic principle of an effective and comprehensive guarantee of values, then there are basically no gaps in a constitution with respect to these values.
The core value of human dignity is explicitly guaranteed in Article 1 of the EU Charter of Fundamental Rights, the wording of which is identical to that of the initial article of the German Basic Law. In other constitutions, this core value is more and more often explicitly enshrined (Arnold, 2005, pp.389-397), but it also exists implicitly due to the human-centered nature of the actual constitution, even if it is not written in the text.

In accordance with this supreme value, the EU regulation prohibits AI applications if they affect people's autonomy, their very personal characteristics, manipulate them, mislead or discriminate.
The subliminal exercise of influence over people degrades them to the status of objects and violates their dignity. Exploitation of physical weaknesses, disabilities, age or poor socioeconomic circumstances fundamentally ignores their right to respect and is therefore just as contrary to their dignity (Art. 5 of the AI Regulation of the EU).

Artificial intelligence exploits these vulnerabilities to the detriment of the people concerned, distorting their behavior and causing them considerable harm. This is clearly not compatible with human dignity.

Biometric categorization systems with the possibility of drawing conclusions on sensitive characteristics such as race, political opinions, sexual orientation etc. are also fundamentally inadmissible, as is social scoring to classify people according to their social behavior or personal characteristics, with consequences that these people receive less favorable treatment (Art. 5 (b) of the AI Regulation). The creation of facial recognition databases through the use of facial images from the Internet or video surveillance recordings is also prohibited. Real-time remote biometric identification is also very limited, for example in public access areas for law enforcement purposes (with certain exceptions:

victims of kidnapping, victims of human trafficking and sexual exploitation, search for missing persons or to identify suspects of serious crimes (murder, robbery and arms trafficking, etc.). Moreover, these authorized remote biometric identification measures are subject to special procedural requirements (authorization by a judicial authority,etc.) (Art. 5 (3) of the AI Regulation).

Another case as discussed in particular on the national level in Germany is the infection of computer devices with Trojans to investigate criminal offenses. AI can detect weak points in PCs, which facilitates the undetectable introduction of malware. All this requires intensive security measures and procedural rules. The term "protection of fundamental rights through procedure" (Hufen, 2023, pp.57-60) applies here in particular.

Procedural rules are also important for high-risk artificial intelligence applications classified by the EU Regulation. They are not prohibited across the board, but are only possible with special security precautions and restrictions (eg.Art. 8 ff. of the AI Regulation).

However, numerous personal rights are also threatened by AI: in particular, the protection of personal data, also and in particular with regard to the aforementioned use of data in large quantities to feed algorithms, is problematic, as is the collection and use of large quantities of data by the AI already created, especially if it continues to learn from this data on its own. The right to privacy, which is often characterized as the right to informational self-determination, is threatened, as the German Federal Constitutional Court has pointed out (FCC vol. 65,1,41 ff).

Conclusions

It is not possible to list all the numerous possible applications here. The dynamic development of technology also creates new applications with particular hazards that are not yet known. However, a general rule can be established according to which the protection of fundamental rights and the rule of law must be maintained; these are traditional concepts valid for the area of AI, not a new order. What is

new is the possible intensity of interference in terms of scope and severity, as well as the openness of technological development.

In conclusion, we can say that AI technology should be promoted as much as possible in the interests of the State and society, but that, on the other hand, we must constantly keep in mind the dangers (which already exist and will arise in the future) and defend the fundamental values of the Constitution: human dignity, the principle of freedom, equality and the rule of law. To diminish these values would mean placing technology above people. But this must be avoided.

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CAPACITY AND UNDUE INFLUENCE IN WILLS AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: WHICH HUMAN RIGHT?

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Abstract: *This article considers capacity and undue influence in the Anglo-Australian law of wills and how they might be impacted by Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. The article compares the common law view of capacity, which is transactional but either exists or doesn't exist with the view taken by Article 12 which asks States to protect capacity by supporting decision-making. Undue influence is only pleaded where capacity exists, but it is notoriously difficult to prove and it has been argued that it should be made easier, in part by reference to Article 12. In this article I use the prevalence of elder abuse to illustrate the problems that may be created by using supported decision-making. I argue that supported decision-making is a naïve approach to capacity in view of the level of inheritance impatience and financial elder abuse in existence, and that those who seek to lower the bar for undue influence may be mischaracterizing the relevant human rights and causing rather than alleviating harm. I argue that the relevant human right is not the right not to be unduly influenced, but the right to exercise testamentary capacity. I then argue that the way to protect this right is not by lowering the bar, but by requiring lawyers to take the necessary steps while making wills and other instruments such as enduring powers of attorney or guardianship.*

Keywords: *wills; undue influence; capacity; Convention on the Rights of Persons with Disability.*

Introduction

In 2006 the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was signed. Lawyers specialising in the law of wills in Australia and indeed around the world probably thought it was nothing to do with them. But the world has changed. Two hundred countries have ratified this convention including Australia, Belgium, the United Kingdom, Romania and France. It has become clear that the convention applies not only to physical disability but also to matters such as the lack of capacity, and Article 12 has been regarded in Australia and elsewhere as applying to the law of capacity. In the law of wills as it exists in the common law and similarly, in civil law countries, one must have the relevant capacity to make a will. Not having that capacity will make the will invalid. If one does have capacity and somehow one's will is overborne by someone else this will be regarded as undue influence and it will also invalidate a will to have undue influence exercised over the testator.

In this article I discuss the law of capacity and undue influence as it may be affected by Art 12 alongside the issue of elder abuse. Populations are ageing across the world except possibly for Africa. In much of the western world older people may be discriminated against in various ways, often unconsciously, and they are often subject to elder abuse. An Australian report (Qu et al 2021) found that prevalence was broadly equivalent to that internationally. Prevalence of at least one kind of elder abuse in the Australian sample was 14.8%; within that sample, 11.7% reported psychological abuse, 2.9% reported neglect, 2.1% financial abuse, 1.8% physical abuse and 1% sexual abuse. All of these could be risks to older people who are infirm or lack capacity. A person who lacks capacity is easily abused, and a person who is infirm may be unable to resist undue influence.

In this paper I set out the current law of capacity at common law and how lack of capacity may play out in relation to the law of wills in Australia. I then consider how the CRPD might or might not be used to assist where there is a lack of capacity. I then turn to the law of undue influence in probate which some have argued should be made easier to

prove, and in which the CRPD may be used to support capacity. I discuss which human right is being protected in this area – the right to have testamentary freedom or the right not to be unduly influenced? I argue that implicit in this idea is often the view that the testator or testatrix did not have capacity, when in fact, as a matter of legal doctrine, undue influence is to be found only where capacity existed, but volition was overborne. That is, any rejoicing that undue influence is more often found is premature, because it may reflect an implicit view that the testator's capacity was not very great and therefore was easily overborne. That is, the more frequent finding of undue influence in probate cases may be a problem, rather than the solution it is presumed to be. It may implicitly be based on an ageist assumption that the elderly (who are by far the majority in undue influence cases) are necessarily infirm and do not have proper capacity or resilience against attempts to influence them. The reasons for the increased finding of undue influence may also reflect a new zeitgeist that takes human rights more seriously rather than because of the direct influence of the CRPD itself. Another possibility is that what has really happened is a shift in the treatment of evidence, possibly because the courts are taking the issue of human rights more seriously, and that this shift is making a difference to the outcomes.

In this article I argue that the solution to the problem of undue influence does not lie in changing the probate doctrine to make undue influence easier to prove. The problem of undue influence in probate should be dealt with by making lawyers more responsible for ensuring that they take instructions carefully, assess capacity, and ensure that undue influence is not being exercised – that is, by dealing with the testator while they are still alive and ensuring that their capacity is exercised properly and freely, unrestrained. Taking seriously the human rights of an elderly person to exercise freedom of testation is not supported by making it easier to prove undue influence. That is actually to take away the elderly person's human rights again.

Testamentary Capacity at common law and under the CRPD

In Australia the capacity to make a will is traditionally tested by the *Banks v Goodfellow* test, that the testator must understand the nature and extent of his or her property, of the moral claims on them, and the effect of a will. They also must not have delusions that interfere with their capacity. This test has existed since 1870 and has stood the test of time remarkably well, being accepted by neurologists as a reasonable statement of what is required for the testator to understand the import of the transaction. Before *Banks v Goodfellow* any unsoundness of mind at all could be thought to prevent the testator from having capacity (*Waring v Waring)*. It should be noted that at common law, capacity is understood to be transactional, so that the capacity to make a contract or to marry, for example, has different requirements:

> ‚The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understand the general nature of what he is doing by his participation‘ *(Gibbons v Wright*).

Capacity is normally presumed, unless there is some reason to doubt it (*Re Hodges: Shorter v Hodges).* The test in *Banks v Goodfellow* requires that the testator is aware of and appreciates the significance of a will, that they are aware of the extent and value of the estate (although they would not need to know, for example, fine details such as how many shares there are, or the precise amount held in a bank account.) The testator also is required to be aware of those who would reasonably thought to have a claim on them, including family members, and others, and the basis of their claim, and to be able to evaluate the various claims. And the testator should not have these faculties impaired by some delusion or other interference including some mental illnesses or addiction or the like. Capacity may be intermittent as well.

Article 12 of the CRPD

Article 12 of the convention provides that people with disabilities should have the capacity to exercise legal rights on an equal basis with others in all aspects of life, and that the State should make this happen:
'1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, states parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

To summarise, Article 12 refers to 'capacity' by saying first that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'. It then goes on in the further sections to emphasise that capacity must be supported:

> ,…'to prevent abuse…and …that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence,

are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.'

These are good and right aims. However, the mechanism proposed to fulfil them, which has been implemented in one Australian state, Victoria, is assisted or supported decision-making. So far this has not been extended to testamentary capacity, but it has been provided for in the Guardianship and Administration Act 2019 (Vic). The latter act provides:

(1) For the purposes of this Act, a person has capacity to make a decision in relation to a matter (***decision-making capacity***) if the person is able—

(a) to understand the information relevant to the decision and the effect of the decision; and

(b) to retain that information to the extent necessary to make the decision; and

(c) to use or weigh that information as part of the process of making the decision; and

(d) to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.

(2) For the purposes of subsection (1), a person is presumed to have decision-making capacity unless there is evidence to the contrary.

(3) For the purposes of subsection (1)(a), a person is taken to understand the information relevant to a decision if the person understands an explanation of the information given to the person in a way that is appropriate to the person's circumstances, whether by using modified language, visual aids or any other means.

(4) In determining whether a person has decision-making capacity, regard must be had to the following—

(a) a person may have decision-making capacity in relation to some matters and not others;

(b) if a person does not have decision-making capacity in relation to a matter, it may be temporary;

(c) it should not be assumed that a person does not have decision-making capacity in relation to a matter on the basis of the person's appearance;
(d) it should not be assumed that a person does not have decision-making capacity in relation to a matter merely because the person makes a decision that, in the opinion of others, is unwise;
(e) a person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.

Examples

The following are examples of practicable and appropriate support—
(a) using information or formats tailored to the particular needs of a person;
(b) communicating or assisting a person to communicate the person's decision;
(c) giving a person additional time and discussing the matter with the person;
(d) using technology that alleviates the effects of a person's disability.

Sections 5(1)(a) to (4)(d) are consistent with the common law definition of capacity. Even the idea that a person can make an unwise or 'capricious' decision and not be regarded as lacking capacity if they understand what they are doing is consistent with common law capacity. However, s 5(4) (e) is different. It allows capacity to be made up by 'practicable and appropriate support' and gives examples including using information or formats tailored to the particular needs of a person, assisting with communication, giving additional time and discussing the matter with the person and/or using technology to alleviate the effects of the disability. By contrast, the common law traditionally has not used the concept of assisted decision-making to make up for lack of capacity.

Section 9 of the Guardianship and Administration Act 2019 (Vic) provides for persons making decisions for represented persons:
(1) A person making a decision for a represented person must have regard to the following principles—
(a) the person should give all practicable and appropriate effect to the represented person's will and preferences, if known;

(b) if the person is not able to determine the represented person's will and preferences, the person should give effect as far as practicable in the circumstances to what the person believes the represented person's will and preferences are likely to be, based on all the information available, including information obtained by consulting the represented person's relatives, close friends and carers;
(c) if the person is not able to determine the represented person's likely will and preferences, the person should act in a manner which promotes the represented person's personal and social wellbeing;
(e) the represented person's will and preferences should only be overridden if it is necessary to do so to prevent serious harm to the represented person.

All this is very well meant, and in the ideal situation these provisions will work to create a situation where the represented person has their preferences followed by the guardian. However, despite penalties for dishonesty, it is clear that where people lack capacity as elders, or are frail, assisted decision-making will only be as safe as the persons assisting.

The evidence is that the persons most likely to be assisting with capacity will be family members. However, we also have evidence of significant financial abuse of older people by their family members. The Australian study (Qu et al, p.72) showed that children were the largest group of perpetrators of financial abuse at 33% and sons were twice as likely as daughters to commit financial abuse (22% cf 11%). The next largest group was friends (9%), then siblings (7%) and lastly service providers (6%).

This means that family members and friends are the most likely persons to perpetrate financial abuse on elders, and professionals are relatively unlikely to do so. This is one reason I argue that the way to prevent financial abuse in the form of inappropriate exercise of an enduring power of attorney or unduly influencing a will, may well be through the use of the lawyer, rather than relying on family members' probity.

Undue Influence in Common Law Probate Law

In at least the Anglo-Australian law, the doctrine of undue influence in testamentary transactions or probate law must be distinguished from the equitable doctrine of undue influence in inter vivos transactions (Tyson, 1997, De Mestre and Kha, 2024). In inter vivos situations equity will set aside a transaction on the basis that a presumption of undue influence arises because of a particular relationship between the parties (normally within families such as husband and wife, parent and child, and also in relationships such as solicitor or banker and client), although undue influence can arise in other relationships besides these. In the latter case we refer to 'actual' undue influence because no presumption arises (*Johnson v Buttress*.) In that case it must be shown that the defendant used their influence to make the transaction happen. In these cases the influenced person has usually made a disposition of valuable property which otherwise they would use (and need) for themselves (Ridge, 2003, Parkinson, 2003, Heydon et al, 2015). Where presumed undue influence is at issue the presumption can be rebutted if the benefiting party can show that the transaction resulted from the exercise of free will. Where inter vivos or equitable undue influence is found the contract or other transaction is set aside as void. Examples of undue influence like this include that in *Farmers Co-operative Executors and Trustees Ltd v Perks* where the evidence showed that the husband had exercised a special relationship of dominance and control over his wife due to a long history of violence associated with the fact that they lived in an extremely isolated place. As a marriage relationship this is an example of the kind of relationship which traditionally gives rise to a presumption of undue influence, although here there was also strong evidence of actual undue influence.

Equitable or inter vivos undue influence as described above must be distinguished from the doctrine of undue influence which applies in probate law. This doctrine grew out of the English ecclesiastical courts' jurisdiction over wills and intestacy. In probate law there is no presumption that certain relationships will give rise to undue influence (*Parfitt v Lawless*). The reason for this is that the very people to whom

the presumption might apply are also the people most likely to be the proper objects of testamentary provision, namely close family members. Rather than presuming undue influence, coercion which overbears the exercise of the person's will must be proved. This has often been extremely difficult, not least because the best witness is dead. As Campbell JA observed in *Tobin v Ezekiel*, 'certainly one, and sometimes more, of the people best able to inform the Court about facts relevant to the drafting and execution of the will are not available to give evidence'. A further difficulty is that the evidence was in his or her mind. This has led the Victorian Law Reform Commission (2013) and others to seek to reform the law to make it easier to prove,

The classic statement of undue influence in probate law was made by Sir J. P. Wilde in *Hall v Hall* (p. 432):

> ‚Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened.'

He noted there that persuasion, pleas and arguments may all be used by a beneficiary without it amounting to undue influence, so it is very difficult to establish that the line between legitimate persuasion and coercion has been crossed. What is required is that the volition of the testator has been overpowered in such a way that the act is not truly the act of the testator. He went on:

> 'On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be

> the offspring of his own volition, and not the record of someone else's' (pp. 481-482).

Fiona Burns' (2006) excellent article explains the changes to undue influence in probate law from the eighteenth century. She points out that in the proceedings in *Boyse v Rossborough*, the seminal case in this area, the court did not refer to coercion per se. 'Rather, it was necessary to show that the will did not constitute the genuine testamentary intention of the testator.' However when the judgment was handed down, the House of Lords

> 'distinguished mere influence or importunity from undue influence which constituted coercion. In order to prove coercion it was not necessary to show actual violence towards the testator. It was sufficient to excite terror or imaginary terror in the testator so that he signed a will he would not have otherwise executed.' (Burns 2006, p. 148).

In *Boyse v Rossborough*, the evidence was that the testator had married in 1818 and four years after he died his widow married Mr Boyse. The allegation by the testator's heiress-at-law was that the wife had immediately after her marriage 'formed, and continually persevered in, a systematic plan to separate and estrange [Testator] from all his family, and had acquired not only undue influence, but complete command and control over [him]'(p. 1194). The testator made a will in 1824 which gave his wife an annuity during widowhood of £500 and left the residue to other relatives. In 1842 a new will was made while he was ill which left a much greater annuity of £4500 to the wife; this was re-executed the next day, and the day after that another will was made which left her his whole estate and made her executor. He died two weeks later. The heiress-at-law, Rossborough, challenged the passing of the real estate on a complicated set of bases in equity, which we will not go into.

The Lord Chancellor noted that the testator had been married for 24 years, and had no children and did not get on with his relatives. Making a will in favour of his wife did not seem unreasonable. The question to be determined was whether there was undue influence from

his wife, and the onus of proof was on the respondent to produce evidence to prove it:

'Now, my Lord, I look in vain for any such evidence. The most I can find, if indeed that can be found, is evidence to show that the act done was consistent with the hypothesis of undue influence… It must be shown that [the circumstances] are inconsistent with a contrary hypothesis…' (p. 1212).

He noted that there was no evidence that the wife knew the testator was making a will although several servants said her conduct was violent and overbearing towards him. He did not think this evidence was strong and rejected evidence from the relatives that his hostility to them was 'artfully instilled' into his mind by his wife. 'The suggestion that all these causes of aversion had no foundation in fact, but owed their existence to the artful contrivances of Mrs Colclough, is a suggestion in support of which there is not, in my opinion, a tittle of evidence' (p. 1214).

As Burns (2006) points out (p. 149) the House of Lords said that undue influence must be proved directly. Their standard of proof was that the evidence for undue influence had to be that it was inconsistent with a contrary hypothesis. Although this very high, almost criminal standard was set, the view of what would amount to circumstantial evidence was, as always, based on the facts which might be seen as amounting to circumstantial evidence of coercion. Sir James Hannen in *Wingrove v Wingrove* said:

> 'The coercion may be of different kinds, it may be in the grossest form, such as acutal confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result… that the sick person may be induced, for quietness' sake, to do anything' (pp. 82-83).

It thus became, 'theoretically speaking …possible to rely on proof of relatively minimal pressure where an elder was suffering severe illness or the medical effects of ageing' (Burns, 2006, p.150).

However, in Australia, in cases like *Winter v Crichton,* it was made clear that where circumstantial evidence is used, the evidence still

must be inconsistent with the contrary hypothesis, so that despite allowing circumstantial evidence, the hurdle to prove undue influence remained very high. In *Winter v Crichton* the testator executed a will leaving the residue of his estate to one Allam. The testator's sister, who was given minor legacies, alleged that Allam had unduly influenced the testator. Allam had worked on the testator's farm looking after his cows. Clause 5 of the will said:

> 'I declare that the reason for my bequest to [Allam]is due to his efforts in caring for and looking after myself, my property and my beloved cows during my lifetime. It is my wish that [he] does not dispose of my cows and that he properly agists them and looks after them'.

The previous will, 15 years before, had left the whole estate to the sister. It was alleged that Allam introduced the testator to his own solicitor, who drafted the will, and that the testator was schizophrenic, and received no independent legal advice. Powell J, after making some acerbic comments about the legal profession's understanding of this topic, ('[W]hat is involved [in this case] is, as it seems to me, a matter of substance in respect of which there is considerable misapprehension on the part of members of the legal profession,') (p. 117) referred to *Wingrove v Wingrove*, and *Boyse v Rossborough* and noted that to establish undue influence in a will, coercion must be proved. Here there was a purely circumstantial case (the evidence lay only in the fact of the change in the will and the introduction to the solicitor who drafted the will) and in such a case the defendant must show the following:

- That the circumstances alleged existed
- That power existed to overbear the will
- That the power was exercised to overbear the will (' the influence which must be shown to avoid a will must amount to force or coercion destroying free agency'(p. 121))
- That that exercise affected the will

And

- that the evidence excludes any other hypothesis as to how the deceased came to execute that will.

This latter point means that if only circumstantial evidence is available, the threshold for undue influence continues to be extremely high. In *Winter v Crichton*, the deceased had made the will fifteen years before and not changed it. There was also no evidence put forward that he was unduly influenced during that fifteen years. Powell JA said of the evidence put forward (p.121):

> '[N]ot only do those facts, matters and circumstances not justify it being inferred that the will sought to be propounded was procured by undue influence, in the relevant sense, on the part of Mr Allam, but they fall far short of excluding any other hypothesis as to the circumstances in which the deceased came to execute that will.'

He went on to say that

> ' at most…they might justify an inference that someone – who may, but need not, have been Mr Allam – persuaded the deceased that for the reasons alleged in cl 5 of the will he ought to make the provision contained in cl 4 of the will'.

He held that undue influence could not be proved and the allegation of undue influence should be struck out. Another explanation than undue influence could not be excluded.

This high level requirement for undue influence has recently been reduced somewhat, as we shall see, but undue influence remains difficult to prove. The fact that the threshold for proving undue influence is very high may not be the bad thing it is sometimes claimed to be. Deciding that undue influence has been proved means rejecting the will that testator made. This should not be done lightly where the testator is not available to be questioned about the circumstances.

Undue influence is pleaded in two main ways in the probate court. Once the propounder has proved due execution by an apparently capable and free testator, the burden of proving undue influence shifts to the challenger of the will. However, where there are suspicious circumstances the propounder of the will must remove the suspicion by proving that the testator had knowledge and approval of the contents of the will. Where there are suspicious circumstances they may be proved even if there has been no pleading of undue influence or fraud – if they

appear from the scrutiny of the court that is sufficient (*Re Herbert Brothers*). Suspicious circumstances may arise where the beneficiary who drafted the will gains a significant benefit from it (*Barry v Butlin)* or the testator is illiterate or very weak (*Wintle v Nye; Kenny v Wilson).* To prove undue influence it must be proved not only that the person under scrutiny *could* have influenced the person, but that they *did* coerce them - that is that the power to overbear the testator's will was used and that the power affected the will which was made (*Wingrove v Wingrove*). This complex process of determining undue influence in probate law created a situation where claims of undue influence were rarely successful.

Burns' article shows that the Australian cases usually raised undue influence as a secondary issue along with capacity, and that the cases were mostly determined on the basis of capacity rather than undue influence. (Burns, 2006). Further, Burns suggests that the Australian courts were flexible about capacity but strict about undue influence. Kerridge also noted that the English courts have often allowed the concepts of undue influence and capacity to merge into each other (p. 329). This confusion creates a situation where despite the law ostensibly presuming capacity, there develops a presumption of *lack* of capacity in the elderly and consequential likelihood of undue influence. In my opinion this link in the chain is highly problematic, and risks undermining the elderly person's right to testamentary freedom.

The issue of testamentary freedom as a human right plays a part in this story. Characterising a human right is always significant. Do we characterize the right here as the right not to be unduly influenced or as the right to testamentary freedom? The consequences of these two characterisations seem not to be the same in relation to the doctrine of undue influence in probate law. A different intervention appears to arise if the right is not to be unduly influenced – this may lead to a situation where the proper thing is to strike down a will if there is any evidence which might lead to satisfaction that there was undue influence of some kind perpetrated on the testator. If we characterize the right as the right of testamentary freedom we may be less likely to intervene by striking down a will as this necessarily destroys the exercise of testamentary purpose. This is not a mere semantic difference.

Breaking the drought

In 1992 it was noted that for over 50 years in New South Wales there had been no successful plea of undue influence in probate (Hallen 1992). The drought for successful undue influence cases was broken in New South Wales, 19 years after Hallen's article, in a case judged by Hallen J himself: *Petrovski v Nasiv; Estate of Janakievska*. A break in a similar Victorian drought predated *Estate of Petrovski v Nasiv* by two years.

The case which broke the drought in Victoria was *Nicholson v Knaggs*. In that case, among other things, Vickery J argued that Australian law should take account of the CRPD which at that time had entered into force internationally for Australia but had not been legislated. However, of course, international instruments may be considered in determining the law.

Nicholson v Knaggs concerned the will of Miss D. Miss D was 84 when she died, having made her last will the year before in 2001. She left a large estate and left gifts to charities with the remainder to three couples, one of whom was Denise and Tim Knaggs. In her later years she had become very dependent on her neighbours, especially Denise Knaggs. In 1999 two years before her death she had made a similar will, and 14 years before she had made a will giving most of her estate to charities and $20,000 to Denise Knaggs. All the wills and a codicil made in March 2000 which also included gifts to Denise and Tim Knaggs, were challenged by family members and charities on the basis that Miss D lacked testamentary capacity, did not know and approve of the contents of the wills and was unduly influenced in the making of them. There was evidence that Denise Knaggs' husband Tim was actually disliked by Miss D, and in her 1999 will there was originally a gift to Denise but not to Tim, which was later changed to include him. Vickery J held that the evidence showed that Miss D had capacity when she made her 1999 will and the codicil in March 2000. He held that she had mild dementia by late 2000, which progressed to severe dementia in 2002. However, he held that Denise Knaggs exercised undue influence over Miss D in respect of the gift to Tim K in the 1999 will and that having

done that it became very difficult for Miss D to remove him. From 2000 Denise Knaggs had become Miss D's almost constant caregiver and Tim Knaggs had taken over management of many of her affairs. The evidence was that Tim Knaggs had tried to influence the making of the will in his favour and that the change made in the 1999 will was the result of a phone call to the solicitor by Denise Knaggs. At no time did Miss D give an instruction that Tim Knaggs was to be included in the will.

Vickery J rejected the approach of *Boyse v Rossborough* and *Wingrove v Wingrove*, which required that for circumstantial cases there be no other explanation than undue influence:

> 'The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.' (at [121]).
>
> This slightly lowered the bar to finding undue influence.

In his view the standard of proof for undue influence differed according to whether there was direct or circumstantial evidence. Where there is direct evidence he thought the plaintiff should prove to the civil standard whether the will of the testator was overborne by the conduct proven by direct evidence. Where there is circumstantial evidence he thought the test should be whether the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence has been evaluated as a whole. He also said:

> 'The key concept is that of 'influence'. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle.'

This would be enough to determine the case, but Vickery J wished to consider the case in the light of the CRPD as well.

Using the CRPD to deal with capacity and undue influence – an invitation to elder abuse?

In *Nicholson v Knaggs,* Vickery J said:

> 'The Concept of 'Legal Capacity', as it is employed in Article 12 of the CRPD has a particular meaning which is distinct from the commonly used concept which endows a person with recognition in the legal order. The common law traditionally recognises that a person with legal capacity is a person who possesses rights and obligations, and in such capacity may, for example, sue or be sued or enter into legally binding contracts. On the other hand, the idea of 'legal capacity', as it is used in Article 12 of the CRPD, is a wider concept which entails the capacity to exercise rights and undertake duties in the course of individual conduct.'

In his judgment in *Nicholson v Knaggs,* Vickery J noted that international law could be 'used by the courts as a legitimate guide in developing the common law' (at [70]). He noted that there were limits to this but held that the obligations in Article 12(2) included the state's obligation to ensure the capacity to 'exercise relevant legal rights on a basis with others.' (at [74]). He concluded:

> 'The effect of Article 12(2) in the present context is to provide for an obligation on Australia to recognise that persons with disabilities enjoy the exercise of the right to freedom of testamentary disposition on an equal basis with all other persons. Undue influence in the will making process may impose a significant barrier to the free expression of the testator's preferences. *Persons with disabilities, including the elderly who suffer from disabilities, are uniquely vulnerable to the exercise of undue influence on the part of others*. Accordingly the common law protection provided by the concept of undue influence, as it has developed in this country, may legitimately be engaged by the CRPD.' (author's italics)

The italicised sentence comes very close to presuming that elderly persons are disabled. This will be discussed further, later. Despite the use

of the CRPD in *Nicholson v Knaggs,* later Australian cases did not follow Vickery J's lead on this.

Two years later, in *Petrovski v Nasiv* in New South Wales, Hallen J decided that the deceased was so affected by the demands of her brother-in-law that she succumbed and '[a]s a result, the deceased's mind was, in effect, a mere channel through which what Alek [the brother-in-law] wanted, operated… the deceased was not led but driven'. The brother-in-law had constantly demanded that he be given a particular house in her will, organised his own solicitor to draft the will, and the testator was old, frail and frightened. This made her more easily unduly influenced than a younger person would have been. Hallen J found that undue influence had been exercised.

Since then there have been several more successful undue influence claims in Australian and UK courts. In New South Wales, *Dickman v Holley* concerned Mrs S who had a very long connection to a younger man (Mr D) whom she thought of as her son and in whose favour she made a will in 1993. When she went into a Salvation Army hostel Mr D looked after her affairs using an enduring power of attorney, visited her often and spoke to her on the phone every day. In 1999 Some of Mrs S's neighbours were suspicious of this relationship, claimed incorrectly that Mr D had a pattern of preying on old ladies, and asked the hostel to arrange her a new will. By this time she was 95 and practically blind. The Salvation Army solicitor who prepared the will, did not make notes and apparently had his own test for capacity [48]. Mrs S could not read it nor was it read out to her so there was a substantial question about whether she knew and approved of the contents of the will. The solicitor also, at the instigation of the neighbours, prepared an enduring power of attorney document for them which Mrs S signed. Mrs S had developed the belief that the hostel wanted her to move because her fees were not being paid by Mr D (they were) and over several court and tribunal cases a battle between the neighbours and Mr D played out. A psychiatrist specialising in geriatric care said that Mrs S may have understood her estate and what a will did, but she could not have differentiated between the beneficiaries' claims. Since suspicious circumstances were raised by the procuring of the will by people other

than the testatrix, careful scrutiny was applied and the court held that the suspicion could not be dismissed, nor could the conflict that the Salvation Army solicitor was under be denied. Undue influence was proved. There was no mention of human rights at all.

In Western Australia, undue influence was also found in *Brown vWade*. There was no discussion of human rights. The position appears to be similar in *Schrader v Schrader* and *Rea v Rea*. It is therefore unlikely that the increasing number of successful cases directly reflects the CRPD.

In most cases, the traditional rules continued to be used. In *Re Theodoulou:Ligidakis v Karatjas,* McMillan J found a prima facie case of undue influence had been established in circumstances where the plaintiff had moved the deceased into her home. This was unusual because the two had been estranged for twelve years. The deceased, who was very ill and feeble, was admitted to hospital and the plaintiff prevented him from having private conversations with other family members. She then discharged him from hospital without the family's knowledge and took the deceased to his solicitor who refused to make a new will for the deceased. She then took the deceased to another solicitor who prepared and witnessed a new will which was significantly different from the previous will. The deceased died two days later.

In *Tobin v Ezekiel,* the opponents of the will argued that the doctrine of suspicious circumstances applied so as to require the evidentiary burden of proving there was no undue influence to be shifted to the propounders of the will. This argument was rejected. Meagher JA, with whom the other judges agreed, referred approvingly to a statement in a Canadian case which discussed the interaction of suspicious circumstances, knowledge and approval, and undue influence (quoting *Riach v Ferris* at [54]):

> "Assuming that in the case in behalf of a plaintiff seeking to establish the validity of a will, there may be such circumstances of apparent coercion or fraud disclosed as, coupled with the testator's physical and mental debility, raise a well-grounded suspicion in the mind of the court that the testator did not really comprehend what he was doing when he executed the will, and that in such a case it is for the plaintiff to remove that suspicion

> by affirmatively proving that the testator did in truth appreciate the effect of what he was doing. There is no question that, once this latter fact is proved, the onus entirely lies upon those impugning the will to affirmatively prove that its execution was procured by the practice of some undue influence or fraud upon the testator."

No undue influence was found.

Is there something implicit in the CRPD which has also appeared in the undue influence cases? Article 12 refers to 'capacity' by saying first that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life' (Art 12(2)). It then goes on in the further sections to emphasise that capacity must be supported…

> 'to prevent abuse'…and …that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. '

As Vickery J said, Article 12 differs from the common law consideration of capacity by treating capacity not as a simple fact, but as a right or achievement which attaches to any person regardless of any disability. The common law, by contrast, treats capacity as a question of fact about a person which, if not present, may prevent that person from having certain legal rights, including the right to make a will. This is a substantial difference. Although the common law does have a presumption of capacity, the presumption may be rebutted, leaving the person without the right to make a will, or to sue or to enter into a contract etc. The CRPD thus creates a fundamentally different construct of capacity. It has been said that 'By distinguishing between impairment (a person's underlying condition) and disability (the social construction of impairment)' the CRPD drew on the social model of communication which 'draws attention to the ways in which societal actions can reduce or remove the impact of disability' (Donnelly, 2017, p.319). However, the first General Comment by the Committee of the Rights of Persons

with Disabilities was explicit that substituted decision-making regimes must be abolished and replaced with supported decision-making regimes. It is quite arguable that it is consistent with this view of capacity to allow statutory wills which give people who lack capacity at common law the ability to make a will (as occurs under the Wills Acts and Succession Acts of most Australian jurisdictions) and that the introduction of statutory wills is precisely the kind of measure the CRPD contemplates. This is an opportunity for supported- or scaffolded- decision-making, if done carefully. But this is only possible because in the case of statutory wills, the testator is still alive, even though they lack capacity, and a court determines the will of the person by considering their preferences had they had capacity. For the court to deal with possible undue influence affecting capacity is extremely difficult when the decision-maker is dead. How should we conceive of the rights underlying the CRPD in respect of capacity? Is there a human right not to have one's capacity interfered with? If this is the case it may be reasonable to have a more easily proved form of undue influence. If one's capacity has been interfered with an undue influence has been found, a will will be invalid. But another way of conceiving of the rights underlying the CRPD is that in common law systems there is a right to testamentary freedom which the capacity construct supports. In that case, the right to testamentary freedom is the major right and and allowing undue influence to be easily proved will strike down wills which may actually be the proper exercise of testamentary freedom.

There are some concerns about the approach taken by Vickery J in *Nicholson v Knaggs.* The treatment of being elderly as being disabled is problematic. He says of undue influence 'the modern testamentary undue influence, when compared with equitable undue influence, has in most cases been difficult to prove, rendering it questionable as an adequate safeguard.' (at [105]). The fact that it is difficult to prove is treated as evidence that it is not adequate as a safeguard. This does not necessarily follow. It is harder to prove than equitable undue influence, but the situation is quite different – the testator is dead and therefore unable to give evidence. Despite the fact that occasionally inter vivos undue influence is argued after death (as in *Bridgewater v Leahy*, in

which an attempt to challenge the validity of a will for undue influence was lost, as was a family provision claim, and instead an attack on an earlier transaction which affected the value of the estate was made using the inter vivos equitable doctrines), the fact remains that it is based on the idea that both parties are still alive. Further, equitable undue influence is often based on the idea that a person has unaccountably given away property which he or she will need. This does not apply to probate undue influence.

And there seems to be a presumption that being old is likely to mean there is either a lack of capacity or it will be easy to coerce and that therefore implicitly being old makes one especially susceptible to having one's will overborne so that the will does not reflect the desires of the testator. In my view this means that there is an 'undue influence paradox' in that the doctrine 'can, and frequently does, occasion a disregard of testators' freedom of testation when it is judicially utilized in an unorthodox manner to quash testamentary dispositions.'(Du Toit 2013, p. 518). That is, it is possible that in a probate court, a judge deciding that undue influence has been exercised runs a serious risk of setting aside a person's true will. This is argued by a number of US writers: (Frolik 2001, Madoff 1997, Spivack, 2010). Du Toit (2013) notes that the US doctrine of undue influence in probate law is presumption based and therefore less like the probate doctrine in Australia and the UK which at present is less likely to affect testamentary freedom.

The context of many undue influence cases: elder law, elders and ageism

The context in which undue influence cases are brought includes the requirements of testamentary capacity (*Banks v Goodfellow*), the requirement of knowledge and approval of the contents of the will and the evidentiary rules about how these actions are brought. Undue influence should only be regarded as arising where the testator does have capacity. Where there is a lack of testamentary capacity, it is unnecessary to discuss undue influence as the will is invalid for lack of capacity.

Where the testator has capacity, the next requirement is that the testator had knowledge and approval of the terms of the will. If this is shown, there may still be concern about undue influence, particularly where the beneficiary has been involved in procuring the will in which case the doctrine of suspicious circumstances will arise. The doctrine of suspicious circumstances can also be raised by other matters. The fact that suspicious circumstances exist means the court is required to exercise extra vigilance in scrutinising the case.

The statement in the above paragraph states the law but it ignores one of the most important aspects of context in undue influence cases. That is the fact that many of these cases arise *after the death of very old people*. In this paper I want to argue that ageism is a real factor in the treatment of undue influence and that this is implicit in the way many undue influence cases in probate law are decided.

In the first paragraph of his article on undue influence Kerridge (2000) characterises the testator as vulnerable:

> ‚The standard vulnerable testator is old and frail. He is generally single, childless and not in close contact with his next-of-kin. He owns property of which he is free to dispose when he dies. People are now living longer than ever before and a higher percentage will reach an age when they lose some part of their mental capacity than would have been the case, say, a hundred years ago.'

Apart from the fact that more old people are female than male there are some issues to query in this statement. If a testator is old is he or she necessarily frail both physically and mentally? How many old people should we be thinking of as being vulnerable in this way? Is it so many that we should be removing the presumptionof capacity? It is true that more people will reach an age when they might lose some part of their mental capacity, but what is the proportion of those who reach that age who lose their mental capacity? What I am pointing at is the assumption that all or most elderly people are necessarily lacking in their mental capacity or the resolution to withstand the pressure being put on them by the people around them. In Australia, as the first Human Rights Commissioner for the Aged said,

‘only one in four people 85 years or over lives in care accommodation. [Further]… only 1% of people below 65, less than 2% of people 65-74, 8.4% of people 75-84 and 23% over 85 suffer from dementia. Supporting those figures Dr Roderick McKay, Chair of the Faculty of Psychiatry of Old Age at the Royal Australian and New Zealand College of Psychiatrists, stated in a media release 8 November 2012 that 80% of people will not have dementia at 80. (Ryan, 2012)

These figures show that at its highest dementia (which is not, of course, the only reason for lack of capacity) claims only up to about ¼ of even the oldest people. Presuming that an older person is vulnerable to undue influence on the basis of a lack of capacity caused by dementia is not supported by the facts.

My concern is that in relation to elderly people, society, lawyers and the courts may be abandoning the presumption of capacity which is the bedrock of the common law notion of testamentary freedom. Of course lawyers should be concerned about testing for capacity for anyone where there is some suspicion that they do not understand. This should occur for persons of any age, and a lawyer should be alert to possible problems and deal with them when they arise. Lawyers may not be adequately doing this at present (Barry 2017).

But lawyers are dealing with living clients, while the probate court is dealing with a dead testator and in my opinion, at this stage they should be dealing very carefully with allegations of undue influence, precisely because the right of testamentary freedom should not be interfered with unless the evidence is clear.

Nicholson v Knaggs concerned an old lady who had become disabled and very frail. In that case, there was ample evidence of undue influence. It was a case where there was strong evidence of vulnerability and frailty and where the evidence that undue influence had been exercised was quite strong. In that case Vickery J not only referred to international human rights, he also rejected the very high bar created by the test that had been used in *Boyse v Rossborough* and in *Winter v Crichton* requiring that if the evidence was circumstantial what must be shown is that undue influence was the only possible explanation. But he did not need to do this in *Nicholson v Knaggs*. The fact that he

considered international human rights law and rejected the very strict test of undue influence may be the reason later cases have also been able to find undue influence more than they did previously, but it seems more likely that the rejection of the very high level of proof and the return to the civil standard may be the more likely explanation. In *Petrovski v Nasev* this change was not necessary because the case concerned direct evidence of undue influence.

Ageism is real and powerful in our society. Butler (1969) coined the term 'ageism' and said 'Ageism describes the subjective experience implied with popular notions of the generation gap. Prejudice of the middle-aged against the old…is a serious national problem. Ageism reflects a deep-seated uneasiness on the part of the young and middle-aged – a personal revulsion to and distaste for growing old, disease, disability; and a fear of powerlessness, 'uselessness', and death' (at p. 243).

There is clear evidence of discrimination on the basis of age in western countries. The Australian Human Rights Commission (2016) noted age discrimination against employees as young as 50. It also exists in health care (Courtney et al 2000, and Ouchida and Lachs 2015) and in society generally. We must be careful not to let it influence our law.

The evidence from the cases suggests that the merger of lack of capacity and undue influence (actually quite different concepts) contributes to the idea that older people may automatically lack capacity. This is exacerbated by the general societal view of 'old' people (vaguely defined) as not to be respected, not to be regarded as capable of judgment and so on.

At a time when we have initiatives focused on preventing elder abuse, it is important to ensure that the law does not inadvertently add to the problem (Australian Law Reform Commission, 2017; Australian Medical Association, 2017; Capacity Australia 2016; Kaspiew et al 2016; NSW Legislative Council 2016).

Proposals for reform

A number of law reform proposals in the last few years (Ridge 2004, Burns 2006, Kerridge 2000, De Mestra and Kha 2024) have argued that the law of undue influence in probate law should move away from the coercion requirement because it is too difficult to prove. I disagree.

Ridge has proposed, for example, that the rules applying to equitable and inter vivos gifts in respect of undue influence ought to be the same. She argues that when a gift by will is made to a person in a position of trust and is not easily explained by the normal motives for giving testamentary gifts, that a factual inference of undue influence should be raised, making the beneficiary responsible to demonstrate that the testator made it freely and without the influence. The problem with this proposal is that the beneficiary may well have absolutely no idea of the circumstances in which the gift by will was made, and therefore be completely unable to discharge this burden, even where there is no undue influence.

Kerridge (2000, p.329) also notes, like Burns (2006), and as I have earlier outlined, that the courts have often allowed the concepts of undue influence and capacity to merge into each other. He also thinks undue influence is too difficult to prove. He considers the possibility of using presumptions but notes the difficulty of determining on which groups of people the presumptions should lie. He suggests throwing the onus firmly on the beneficiary to prove that the testator was 'independent of him, under no pressure and in no way misled' (p.331). The problem with this is that it has always been regarded as permissible to beg and pressure a testator. And many completely appropriate beneficiaries are those on whom the testator depends. This would be a significant shift and, it might be argued, ignores the exigencies of ordinary relationships which may involve arguing, nagging and so on. I would reject this approach.

Burns considers both these proposals and finds them wanting. Her preference would be to have a strict legislative regime in respect of execution of wills of very old testators, and to modify the doctrine of testamentary undue influence so that it is less about coercion and more

about whether the testator has exercised his or her independent judgment. I would object to a strict legislative regime in respect of execution of wills of very old testators for the reasons first of all that 'very old' testators as a population are not necessarily all lacking in capacity. A person of any age can lack capacity, just as a person of old age can. However, a stricter regime for dealing with the testator while alive may be a valuable. I would reject her second proposal for the reason given above, that it should be hard to prove undue influence, because the right of freedom of testation should be difficult to challenge. Here I disagree with the approach of Vickery J. He takes the view that undue influence breaches the human right of testamentary freedom and that therefore it should be easier to prove. The problem with that is that we are then effectively presuming undue influence, and that prevents the testamentary intentions expressed by a testator from coming into force. This creates something of an impasse which is difficult to deal with. But all the problems created by undue influence arise because it is so extremely difficult *after the death* of the testator to get good evidence of how freely the testator was exercising his or her testamentary capacity.

Kerridge makes one suggestion which seems to me to be really useful.

He suggests that lawyers' duty to protect testators should be taken more seriously. The obvious example is the position of notaries in European countries whose duty to ensure that the testator's capacity is intact, unimpeded by fraud or undue influence etc is taken very seriously indeed. The great advantage of this approach is that it would be capable of taking the risk of undue influence extremely seriously *while the testator is alive.* This is the point at which Article 12 of the CRPD can do real work (Croucher, 2016). Capacity could be ascertained, scaffolded if it seemed weak, and the possibilities of undue influence operating regardless of capacity could be warded against because the lawyer/notary in this situation would have the power to investigate in such a way that one could then have a presumption not only that there was a capacity in the testator who made such a will, but also that there was no undue influence. This would involve using a professional rather than a family member or friend to make the assessment of whether undue influence

existed, which is in line with the empirical evidence of who are the most likely perpetrators of financial elder abuse. It should be noted that Australian probate judges have begun to require lawyers making wills to make extensive contemporaneous notes about capacity and undue influence at the time of taking instructions. Again, this evidence is about people while they are alive, and can be called on by the court if the issue arises after they are dead.

Conclusion: which human right?

This paper began as an exploration of whether human rights analysis had infiltrated the doctrine of undue influence in probate law. It has ended by attempting to counter the proposals of those who wish to change the probate doctrine of undue influence. Although the first case to break the drought did discuss a human rights analysis, the later cases have not, and even in that first case the human rights analysis was used largely to reinforce a view that undue influence had traditionally been too difficult to prove.

Taking the right of free testation seriously is important, but it does not require the rejection of the doctrine of undue influence in probate law in its difficult to prove form. The apparent slightly lowered burden of proof in circumstantial cases may not be problematic if safeguards firmly directed at the living testator are put in place. The right of testamentary freedom needs to be protected during the life of the testator rather than afterwards, in order for the protection to be real. It is dangerously easy to see the old as automatically frail or lacking in cognitive power. Allowing such views is simply another way of removing the recognition of capacity which the CRPD requires. But taking the CRPD's view that this right should be protected is important and the best way to do that may be to enhance the lawyer's role in common law countries in protecting testators' capacity by modelling it on the requirements of the civil law notary. Similarly where capacity has been lost the statutory will is now a way to attempt to support the testamentary intention of the testator. The statutory will as provided for in the various Australian Wills and Succession Acts has the advantage

that even where there is a lack of capacity there is a possibility of determining some testamentary intention. But rather than allowing ageism to infect the treatment of testamentary freedom, the probate doctrine of undue influence should remain difficult to prove.

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SEVERAL LANDMARKS REGARDING THE HISTORICAL FOUNDATIONS OF ROMANIAN CIVIL LAW

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Abstract: *Civil law is the foundation of the entire private law legislation. Therefore, at present, the autonomy of other special matters, such as family law, commercial law, labour law, private international law and so on is never total, their concepts maintaining a strong connection with the fundamental notions of civil law.*

In view of this aspect, without the pretence of an exhaustive analysis, this article seeks to show that the whole "greatness" of civil law is justified primarily by its historical foundations. Starting from Roman law, passing through the old Romanian law and culminating in the elaboration of the Romanian Civil Code of 1864 we find a model of reasoning, technique and procedure that forms the nucleus around which the current civil law developed.

Keywords: *Historical foundation, Roman law, civil law, old Romanian law, Romanian Civil Code of 1864.*

Introduction

To question the foundations of civil law means to relate to its origins, to the essence, to the reason to be, at its foundations. Without their discovery it would not be possible to understand the finality of this branch of law. We are not keen to assert a novelty, but rather to invite

reflection because, as Heidegger said, "*a thinker should never crave the pleasure of saying something new*" whereas "*essential thinking must constantly utter (...) just one and the same thing, that is, what is old, what is oldest, what is incipient*" (Heidegger, 2001, p. 148).

Studying law institutions without analysing them from a historical perspective is tantamount to reducing ourselves to a study that may have some practical significance, but which cannot form the mind of the true jurist (Djuvara, 1995, p. 101). Most civil legal institutions today are the result of the evolution of law over the centuries. History, "mistress of law", refined them. Before being a social or political phenomenon, law is a historical phenomenon. It is certain that history remains the witness and the determining factor of law (Malaurie & Morvan, 2011, p. 11).

1. Roman law – foundation of Romanian civil law

From an etymological perspective, the expression "civil law" comes from Roman law, more precisely from the Latin Jus civile, *ius* meaning law, and *civitas* city, town. *Ius civile* was the law applicable in the Roman city, that is, the totality of the legal rules, of the laws that regulated the relations between its inhabitants, in opposition to *ius gentium*, the law of the gens, which comprised the rules common to all peoples of the Roman Empire. This law served as a model for many legal systems. Roman law thus presents itself as the main historical foundation and of Romanian civil law.

1.1. The Law of the Twelve Tables - the foundation of Roman civil law

The originality of Roman law does not come from the fact that it is a set of rules, but from the fact that it constituted the source of a certain type of analysis and interpretation.

The most important Roman law remains the Law of the Twelve Tables, dated by specialists around 449 BC. Although it is not a systematized work, but an amalgam of civil, criminal or even religious provisions, representing only a written transposition of the customs that dominated Rome, it constitutes the "foundation of Roman civil law"

(Bob, 2015, p. 15; Chelaru & Duminică, 2024, p. 4). At the same time, it is considered by historians to be the source of both private law and Roman public law and the first codification, in the sense of a written law.

By the Law of the Twelve Tables were defined *legis actiones* (old actions of the Roman law). The procedure of *legis actiones* is the oldest court procedure in Rome and refers to the possibility for a citizen to refer a request to a judge and be able to obtain a solution that ends their problem. They were actions that could be aimed at the nullity of a donation, a loan, a sale, obtaining compensation or resolving conflicts in matters of inheritance and so on. In the *procedure of legis actiones*, subjective rights could only be defended by using one of the five procedures recognized by law: *actio sacramenti (sacramentum), judicis postulatio, condictio, manus injectio, pignoris capio*. The first three *legis actiones* were for trial, and the last two were for enforcement and were used for the purpose of enforcing a judgment of conviction or a right recognized by law (Iancu & Gălăţeanu, 2009; Chelaru & Duminică, 2024, pp. 4-5).

This text is memorable for the time in which it was adopted and for the fact that through its provisions a first secularization of law was achieved. Law is no longer the word of God, finding a new transcendence and thus beginning to lay the foundations of a new conception of society and law.

1.2. *Corpus iuris civilis – "scholarly" source of civil law*

The codification of Justinian began in 528 our era more than 100 years after the exposition in the forum of the twelve tables, also known as *Corpus iuris civilis* (literally "the written body of civil law") or the Codex of civil law and comprising the Digest, the Code, the Institutes and the Novels - became the source of inspiration and the classic model for theorists and practitioners of law in the centuries that followed (Hanga, 2001, p. 51; Duminică & Iancu, 2013).

Digest, also known as Pandecte[1], in force since 30 December 533, during the time of Justinian, Emperor of the Eastern Roman Empire, is a collection made up of the opinions of the great Roman jurists. The Digest represents the "heart" of Roman law and civil law. This part of *Corpus iuris civilis* laid the foundations of Roman law as a scholarly law, that is, as "law resulting essentially from the discussion, interpretation and argumentation on texts, of the nature of creating new categories. The opposite of a scholarly law is a law based on power, a law imposed by a political force or power. In this sense, Hammurabi's Code seems to fall more into the latter category" (Rouvière, 2022, pp. 75-76).

By the fact that *Corpus iuris civilis* is the scholarly source of civil law it is understood that although the content of civil law necessarily evolved at the same time as society (filiation, marriage, contracts and property today clearly differ from Roman rules), the categories and classifications of civil law, its conceptual structure, some meanings of fundamental notions have spanned the centuries and participated in the structuring of ancient law and even the French Civil Code of 1804 (Rouvière, 2022, pp. 75-76).

Like French law, Romanian law also finds its "scholarly" source in *corpus iuris civilis*. Thus, Justinian's Digest contributed to the birth of the Romanian civil law system, through the influences that can be identified in the Romanian Teaching Book of Vasile Lupu (1646) or in the Correction of the Law (1652)[2], as well as through the influences found in the Calimach Code and in the Romanian Civil Code of 1864, inspired by the French Civil Code of 1804.

The history of interpretation of *Corpus iuris civilis* is marked by three main stages: the stage of glosses, the stage of legal humanism and the mathematical vision (Samuel, 2018; Rouvière, 2022, pp. 79-81).

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[1] The word "Digeste" is of Latin origin and means "gathering", while the word "Pandecte" is of Greek origin and means "containing everything".

[2] The Romanian Teaching Book of Vasile Lupu and the Correction of the Law had as a starting point the work of Prosper Ferinaccius, whose thinking was based on *Corpus iuris civilis*.

The stage of glosses, which appeared in Italy, had as its main representative Bartole (or Barthole), in Latin Bartolus of Saxoferrato (1313-1356), Italian jurisconsult, professor of law, specialist in Roman law. In Greek, the term "gloss" means "word" or "language". Until his commentaries were made, there were only brief notes, simple paraphrases of the texts of the *Corpus iuris civilis.* The method implemented by Bartole involves explaining the meaning of the words present in the Roman text. Initially, this method consisted in demonstrating that seemingly contradictory texts become compatible by distinguishing the cases to which they apply. Subsequently, the method will aim to adapt the Roman text to the new life situations of the time.

A second stage of the interpretation of *Corpus iuris civilis* is that of legal humanism, whose outstanding representative was the French jurist Jacques Cujas (for developments, see: Gottely, Mantovani & Prévost, 2024). His method focused on establishing the correct meaning and social context of the text, returning to the sources of Roman law and giving a new depth to the interpretation of Justinian's *Corpus iuris civilis*. This return of Cujas to the sources will determine the emergence of the historical method that will try to overcome the contradictions and obscurities of Roman civil law.

The last stage of the interpretation of *Corpus iuris civilis* is marked by the use of *mos geometricus* (Gordley, 2013), a mathematical approach to law, whose promoter was Jean Domat (Gilles, 2019; Gilles, 2023). The idea from which he started was to find, as in mathematics, axioms, that is, non-demonstrable but safe starting points for reasoning. By such a method he will create principles that will be included in the French Civil Code of 1804 (Rouvière, 2022, p. 81). These are also found in the Romanian Civil Code of 1864, as well as in the current civil regulations. Such a principle is that of the consensualism of the conclusion of civil legal deeds.

All these methods of interpretation of *Roman corpus* will reach their peak in the work of Robert-Joseph Pothier (1699-1772), considered as "the father of the French Civil Code of 1804". Pothier was one of the most influential of modern civil jurists who carried out a rational reconstruction of civil law on the basis of which the transition was made

from law based on custom to law as a product of legislative rational will (MacCormick, 1998). Pothier proposed a simple and easily accessible version of civil law by "cleaning" it from all doctrinal debate. His contribution is reflected in the rendering of short definitions, supplemented with examples. Its synthesis was a precious source for the creation of the French Civil Code of 1804 (Rouvière, 2022, p. 81).

2. The first civil rules in ancient Romanian law

Until the beginning of the 19th century, the rules of Romanian civil law did not have a specific designation. These were found, without being so named, in the rules of the time of Alexandru cel Bun (1401-1433), in the laws of the 17th century and in church law.

In the feudal period, the first laws written with the value of codes whose existence cannot be challenged are: "Romanian Teaching Book" and "Correction of law". The Romanian Teaching Book is considered to be the first legislative codification with a secular character in the history of our law, being prepared by the logothete Eustratie, by order of Prince Vasile Lupu and printed in 1646. The Correction of Law was printed in 1652 in Târgovişte, at the order of Prince Matei Basarab, under the name of "Pravila cea Mare" (Duminică & Iancu, 2013; Danciu, 2020).

The Code of Moldova included 104 chapters and consisted mainly of agricultural and criminal law rules. Civil rules were present in a small number and mainly concerned family and marriage. The Code of Muntenia was mostly a manual of canon law and included a takeover of the rules contained in Vasile Lupu's Pravila (Duțu, 2013, pp. 18-19.).

Another important moment in the history of Romanian law both in terms of systematization and legal regulation technique, as well as in terms of evolution of civil law rules is marked by the codifications made until 1821. Thus, in Wallachia, a landmark in the history of Romanian law remains Pravilneceasca condică. This code is implemented by order of Alexandru Ipsilanti in 1775 and also includes rules of civil law relating to family, successions, etc. In Moldova, laws were developed equally important for the history of Romanian law: Sobornicescul Hrisov, which appeared on 28 December 1785, under the reign of

Alexandru Mavrocordat, followed by the Calimach Code (Civil Code of Moldova) developed since 1813 on the initiative of Scarlat Calimach and implemented on 1 September 1817 (Duminică & Iancu; Iancu, 2010; Ene-Dinu, 2024).

The Calimach Code was written in Greek, had three parts and was translated at the end of 1831, being considered as "*the greatest civil law in our past*". Its sources were Roman, Greco-Roman law, some parts of the previous law of the country and certain provisions of the European laws of the respective times (Rădulescu, 1970, p. 177; Cercel, 2020).

In turn, Legiuirea Caragea in Wallachia consisted of six parts. The first four parts contained provisions of civil law and of commercial law, Part 5 included criminal law rules, and Part 6 rules of criminal procedure and civil procedure. It was implemented on 1 September 1818, one year after the Calimach Code of Moldova, and had as its sources the Roman, Greco-Roman law, some rules of country law and, to a small extent, rules of Western law.

Both codes were applied, with amendments and additions, until the State unification of the two Romanian Principalities in 1859. From the perspective of the historical foundations of Romanian civil law, the value of these codes is undeniable, "the era of Calimach and Caragea laws", as Andrei Rădulescu called it, being "the legislative preparation period of the adoption of the Civil Code of 1864" (Cercel, 2020, pp. 144-145).

3. Adoption of the Romanian Civil Code of 1864 - essential moment in the birth of modern civil law

The Romanian Civil Code of "Alexandru Ioan Cuza" was adopted in 1864, entered into force in 1865 and was applied, with subsequent amendments and additions, until 1 October 2011, the date of entry into force of the current Civil Code. It included a preliminary title - "On the effects and application of laws in general" (art. l-5) - and three books: Book I – "On persons", Book II – "On goods and on special property rights" (art. 461-643) and Book III – "On the different ways in which property is acquired" (art. 644-1914).

The main source of inspiration for its elaboration was the French Civil Code of 1804, supplemented by a series of rules taken from Pisanelli's draft of Italian Civil Code of 1860, in the case of the matter of obligations, and the Belgian law on privileges and mortgages of 1851.

This moment in the elaboration of the Civil Code plays an essential, crucial role in the birth and development of Romanian civil law. Although it has not been without criticism, its value is undeniable, the main proof being its survival, with inherent amendments and additions, over the course of 146 years.

The criticisms mainly referred to the lack of a methodical plan in its elaboration, the rapidity of its introduction and the fact that it lacked the Romanian spirit, being considered a simple takeover of the French Code of 1804. As has been argued at the doctrinal level, given the way it was conceived, it had few qualities or defects that are specific to it, but they belonged to the original model (Hamangiu, Rosetti-Bălănescu & Băicoianu, 2002, p. 23).

However, time has shown its value. For good reason, quoting Portalis, the contemporary doctrine reiterates that the Civil Code constitutes a factor of civilization, it is an act of wisdom, justice and reason. The current Civil Code is a continuer of the Civil Code from 1864. Although there are large differences in the structure of positive law, imposed by the evolution of society, there is continuity regarding its natural law infrastructure (Stoica, 2021).

Conclusions

This foray into the history of law reaffirms first of all that Roman law constitutes the main foundation of civil law. The principles of interpretation of legal rules, as well as a number of concepts specific to civil law such as servitude, guarantee of hidden vices in matters of sale, adoption, creation and extinguishment of obligations by novation, prescription, etc. are just a few examples that prove the fact that "*Roman law was the cradle of civil law, it gave birth to it and brought it to maturity through centuries of experience*" (Rouvière, 2022, p. 76).

Morover, the analysis of the main legislative documents that make up the old Romanian law allowed us to identify other landmarks that marked the emergence and development of Romanian civil law. For the first time the term "civil" is used in Pravilniceasca Condică of 1780, where a classification of disputes appears in "criminal" matters and "all judgments of those who are on trial". This second category included civil cases. In turn, they were divided into "works disputes" and "property and contract disputes". From this moment on, the term civil is used more and more often in the legislative acts of the time, for example in Legiuirea Caragea, in the Organic Regulations, as well as in the Romanian edition of the Calimach Code where the term "civil" appears in the title itself (Codica civilă a Principatului Moldovei) [Civil Codex of the Principality of Moldova).

However, the reference moment of the emergence of Romanian civil law remains that of the adoption of the Civil Code in 1864, thus constituting, in general, the modern civil law system, which placed Romania among the countries with the most progressive legislation.

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COMMUNICATION WITH NEUROLOGICAL PATIENTS: A PUBLIC POLICY PERSPECTIVE

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Abstract: *Medical communication is an important element in the doctor-patient relationship. Special attention must be paid to neurological patients and how they are communicated with. They often feel vulnerable due to health problems and unfamiliar people, frequently having poor memory and confused thinking. Particularly, emphasis must be placed on obtaining informed consent and respecting their confidentiality. Effective medical communication will help the doctor achieve their goals in dialogue with the patient and improve the outcomes of their professional activity.*

Keywords: *Public policy, medical communication, neurological patients, informed consent, confidentiality.*

Introduction

Medical communication is an essential element in medical practice and in the doctor-patient relationship. This process is complex and involves multiple actors, such as doctors, patients, and healthcare institutions. By recognizing the importance of communication, medical workers can achieve their goals of promoting valuable ideas beneficial to society. Effective treatment, resulting from coordinated dialogue, will support a good relationship between doctor and patient. All forms of communication, whether verbal, nonverbal, paraverbal, or extraverbal, are useful and truly beneficial, contributing to the accurate diagnosis of

the patient and the selection of an appropriate treatment. Similarly, ongoing communication among medical workers from different medical specialties should not be overlooked, as active collaboration and effective communication also serve the patient's interests. In this context, public institutions play a significant role, as they are responsible for managing ethical and communication issues that may arise in the relationships between doctors and patients, or between medical institutions and society. Collaboration between medical staff and public institutions would be advantageous for the development and promotion of effective health policies, which would prevent, monitor, and resolve ethical dilemmas, and protect the rights of patients as well as those of medical workers.

Building on what has been said, in this article we aim to study the specifics of medical communication in neurology, with a focus on obtaining informed consent and protecting the confidentiality of neurological patients.

1. Medical communication: informed consent and confidentiality as core elements

In the specialized literature, we note several interpretations of the concept of *medical communication*:

- ✓ E. Phillips Polack and Theodore A. Avtgis define it is a „pragmatic method used by healthcare providers and their patients in daily interactions" (Polack, 2010, p.125).
- ✓ Robert C. Smith argues that „medical communication refers to the exchange of information related to health and medicine between health professionals, patients, and other interested parties, including a wide range of activities such as the dissemination of scientific research, patient education, and care coordination among medical teams" (Smith, 2012).
- ✓ Oana Atomei concludes that edical communication plays an important role in developing a trusting relationship, and the patient's trust in the doctor is one of the most important aspects when it correlates with the outcome of care" (Atomei, 2018, p.177).

Referring to *neurological medical communication*, we emphasize that it includes interactions between neurologists, patients, and their families. It aids in the accurate diagnosis of the patient, the development of a personalized medical treatment plan, continuous monitoring of disease progression, and medication adjustment.

In dialogue with neurological patients, it is essential for the doctor to be not only an excellent speaker but also an attentive listener. They should demonstrate a range of professional skills, which include obtaining the patient's informed consent and maintaining the patient's confidentiality.

1.1. The concept of informed consent

Informed consent represents the patient's agreement with the treatment proposed by the doctor. It involves informing the patient about all aspects of the treatment, including the benefits and potential risks involved. It can only be obtained in the context of a constructive, coherent, and empathetic dialogue, with the doctor ensuring that the patient maintains their autonomy and the right to make the final decision regarding their treatment.

During the dialogue, the principles of bioethics are respected. According to the principle of autonomy, the patient must be thoroughly informed about their health issues, know all possible treatments, be aware of their benefits and risks, and independently decide the best option for themselves. Follwing the principles of non-maleficence and beneficence, the patient should not be harmed and must be satisfied with the outcomes achieved. Consistent with the principle of justice, all rights of the patient and the doctor must be respected.

In the process of doctor-patient communication, it is essential for the doctor to demonstrate honesty and empathy. Being honest is not difficult when the doctor deeply understands the challenges the patient is facing and collaborates with them to overcome these challenges together. An honest doctor will earn the patient's full trust, which will contribute to better treatment adherence and increased patient satisfaction. Therefore, obtaining informed consent is essential in medical practice and can only

be achieved through a transparent, honest dialogue in accordance with ethical and professional standards.

1.2. The confidentiality in healthcare

The concept of confidentiality involves the responsibility to protect patients' personal and medical information so that it is not accessed, disclosed, or used improperly. In neurology, respecting confidentiality is fundamental to maintaining a trust relationship between patients and doctors. Patients are often required to share sensitive personal information with their doctors, trusting that it will not be used against them. Being assured of the doctor's confidentiality, the patient will be honest and not omit details. Maintaining confidentiality is essential not only for legal compliance but also for fostering a respectful approach towards the individual dignity of each patient.

The disclosure of information regarding a patient's health condition, private life, or family life can only occur in exceptional cases, such as the risk of spreading communicable diseases, at the justified request of law enforcement agencies or judicial authorities. Information that constitutes professional secrecy may only be shared with other parties with the explicit consent of the patients or their legal representatives, or if the disclosure does not harm their condition.

2. Obtaining Informed Consent and Protecting Patient Confidentiality

2.1. Regarding informed consent

The challenges that can arise in obtaining informed consent require rigorous ethical approaches, often involving personalized solutions for each individual case. It is essential for doctors to collaborate with medical ethics teams and to engage in ongoing dialogue with patients and their families to obtain informed consent.

To support and guide the physicians in their practice, various regulations have been adopted and implemented that aim to protect

patients' rights, including the necessity of informed consent. Among these are: *the Health Law, the Code of Ethics for Medical and Pharmaceutical Workers, the Law on Patients' Rights and Responsibilities*, etc.

- ✓ In Article 23 of the Health Law of the Republic of Moldova from March 28, 1995, it is stipulated that: "(1) Patient consent is required for any proposed medical service (preventive, diagnostic, therapeutic, rehabilitative); (2) In the absence of opposition, consent is assumed for any service that does not present significant risks to the patient or that is not likely to harm their privacy; (3) Consent for a patient under judicial protection is given by the person responsible for the protection; in their absence, by the closest relative; (4) Consent for a patient under judicial protection is presumed in cases of imminent danger of death or serious health threat; (5) Provisions of paragraphs (1), (2), (3), (4) apply to patients who have reached the age of 16; (6) If the patient is under 16 years old, consent is given by their legal representative. In cases of imminent danger of death or serious health threat, medical services may be carried out without the consent of the legal representative; (7) Patient consent or refusal, or that of their legal representative, is certified in writing, by the signature of the attending physician or the on-call team in exceptional cases, or by the signature of the management of the medical institution".
- ✓ The Patients' Rights and Responsibilities Act of October 27, 2005, establishes a comprehensive framework outlining patients' rights, including their right to provide informed consent. Article 13 stipulates: „(1) A mandatory condition prior to any medical intervention is the patient's consent, except in cases provided by this law. (2) The patient's consent to medical intervention may be oral or written and is formalized by entering it into the patient's medical documentation, with mandatory signing by the patient or their legal representative (close relative) and the attending physician. For medical interventions with increased risk (invasive or surgical), consent must be in written form, by filling out a special form from the medical documentation, called informed consent. The list of

medical interventions requiring the completion of informed consent in written form and the model of the respective form are developed by the Ministry of Health, Labor, and Social Protection".

- ✓ Section three of the Code of Ethics for Medical Workers and Pharmacists (dated March 24, 2017) describes the methods and conditions under which patient consent must be obtained within the medical act, emphasizing the importance of fully and correctly informing patients about the proposed treatment.

Therefore, these regulations, along with many others, are fundamental for patients, guaranteeing an ethical dialogue, supporting transparency, and patient rights.

2.2. Protecting confidentiality

In Moldova, public regulations regarding patient data confidentiality ensure the protection of personal information and the maintenance of professional secrecy. Next, we will present some fundamental aspects of current legislation and ethical standards:

- ✓ „The Health Law No. 411-XIII of March 28, 1995 establishes norms regarding the confidentiality of information related to the patient´s health status. According to this law, all health professionals are required to maintain the confidentiality of all information obtained in the exercise of their profession".
- ✓ In the „Criminal Code of the Republic of Moldova," adopted on April 18, 2002, includes „provisions that penalize the unlawful collection of personal data and the unauthorized disclosure of confidential information".
- ✓ „Law No. 182 of July 10, 2008, which approves the Regulation of the National Center for Personal Data Protection", outlines the legislative acts that establish the special protection regime for personal data.
- ✓ „Law No. 133 of July 8, 2011, on personal data protection", „regulates the processing of personal data, including in the health sector, ensuring that processing is carried out in a manner that

respects the fundamental rights and freedoms of individuals, especially the right to privacy."

- ✓ „The Code of Ethics for Physicians and Pharmacists" (2016) emphasizes the importance of maintaining professional secrecy and confidential information obtained within the doctor-patient relationship. Physicians are obligated not to disclose information about patients, except in cases provided by law.

Through these and other regulations, a balance is ensured between the need to protect both public health and the individual rights of patients, adhering to international ethical and legal standards. Referring to the support that public administration could provide in this context, we emphasize:

(1) He needs to develop new standards that would dictate the professional conduct of medical personnel; (2) funding and promoting education and training programs in bioethics for health professionals; (3) allocating funds for research in bioethics to analyze new ethical dilemmas and issues in medical communication; (4) facilitating dialogue between different public sectors for a comprehensive approach to bioethical issues.

In conclusion, through legislative and regulatory interventions, public institutions could ensure the protection of patient confidentiality and promote European standards in the healthcare sector.

Conclusions

In neurology, where the details of the interaction between the doctor and the patient are crucial, effective medical communication is vital for establishing an accurate diagnosis and implementing appropriate treatment. By obtaining informed consent, it is ensured that the patient is fully informed about treatment options, benefits, risks, and associated uncertainties, while respecting the bioethical principles of autonomy, non-maleficence, beneficence, and justice. Protecting confidentiality is another cornerstone of proper medical communication, essential for building and maintaining trust between patients and professionals. Revised public policies could regulate both informed consent and

confidentiality, ensuring the protection of patients' rights in medical or legal emergencies. As future recommendations, the need for close collaboration between healthcare professionals, patients, and public authorities stands out to adequately address new ethical and communication challenges.

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DEFINITION OF USUFRUCT AND ITS IMPORTANCE IN CIVIL LAW

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Abstract: *Usufructuary is a general way of acquiring the property right, but it also constitutes an indirect sanction directed against the former owner of the building, who, showing negligence, left it in possession for a long time another person, allowing him through his passivity to behave publicly as an owner.*

Therefore, the active procedural capacity in the request to establish the right to ownership through usufruct can only be owned by the former owner of the building and by since the plaintiff did not prove the ownership of the land in dispute, and the defendant constantly testified to the court that the plaintiff never had the respective land in his patrimony, it is obvious that the plaintiff has no standing active process.

Keywords: *usufruct, property right, possession.*

Introduction

Usufruct, also known as "acquisitive prescription," is a legal institution by which a person acquires ownership of real estate through long-term, continuous, and uninterrupted possession of it.

In specialized literature, usufruct is considered a means of acquiring ownership of an asset as an effect of possession exercised within a time period determined by law (Stoica, 2004, p.57).

Corneliu Birsan defines usufruct as "a way of acquiring property or other relative rights regarding a thing, through the uninterrupted possession of this thing throughout the time fixed by law."

The regulations of the Civil Code regarding the types and conditions of usufruct apply only in those territories where real estate advertising is carried out through registers of transcriptions and inscriptions. In these regions the importance of usucapion is very special because it represents the ultimate proof of ownership.

Let's explain a little - In the system of the Civil Code, the birth, extinction or transmission of the right of ownership is carried out by agreement of will, the contract having a constitutive nature of real right. Registers of transcriptions and inscriptions are only enforceable against third parties, so they represent a system of real estate advertising. Accordingly, the proof of ownership (or other real right) is done by contract, and in the case of successive transfers, it is necessary to display to all these translation acts, which, in some situations, is almost impossible.

Due to this situation, the usufruct represents the absolute proof of the real right because, instead of proving the uninterrupted series of transferable acts, it is sufficient, and much easier, to prove a state of fact: that is, a useful possession exercised within the term provided by law. In other words, to prove the usufruct.

1. Definition of usufruct

Usufructuary, also known as "acquisitive prescription," is a fundamental legal concept in civil law, by which a person acquires the right of ownership over an immovable or movable asset by possessing it for a long period, according to the terms and conditions provided by law. Usucapion finds its origin in Roman law, where it had the purpose of giving stability to the legal relations of ownership and to protect those who actually owned an asset for a long period of time.

Usufructuary is, therefore, the way of acquiring ownership through long-term, uninterrupted, public and peaceful possession of an asset. The acquisition of property by usufruct does not require a formal title (such as a contract of sale), but is based on the continuous exercise of possession under the conditions required by law. Depending on national law, there

may be some additional requirements, such as the good faith of the possessor or the existence of a defective title.

Usage can be:

- ✓ **Short-term usufruct** is one of the forms by which a person can acquire the right of ownership over an immovable (or in some cases, movable) through a possession exercised for a shorter period than that provided for long-term usufruct. Short usufruct applies when the possessor meets certain conditions, including good faith and the existence of a title (even if it is affected by legal defects) (Ungureanu&Munteanu, 2005, p.65).

A. Conditions of short-term use

For the short-term usufruct to be applicable, the following conditions must be met:

- Long-term possession, but reduced to long-term usufruct

The duration required for short-term usufruct varies according to the legal system. In Romania: The term of short-term usufruct is 5 years for real estate registered in the land register, if the possessor has a defective title and has acted in good faith.

- Public, peaceful and uninterrupted possession

Possession must be exercised in a manner that is visible to the public, not obtained by violence, and must be continuous without interruption.

- Good faith of the possessor

The possessor must be in good faith, that is, reasonably believe that the title by which he possesses the property gives him the right of ownership. Good faith is assessed at the time of commencement of possession and is an essential condition for short-term usufruct.

- Apparent but defective title

It is necessary for the possessor to have an apparent title, that is, a legal document (for example, a contract of sale) that, at first glance, appears to be valid. However, this title is legally flawed – for example, due to a procedural defect or a material error in the drafting of the deed.

B. Effects of short-term use

Through the short-term usufruct, the possessor acquires the right of ownership of the real estate at the end of the term established by law, without the need for an additional deed of transfer of ownership. Acquiring property through short-term usufruct has retroactive effect, strengthening the legal position of the possessor.

C. The advantages of short-term use

- Simplifying the process of acquiring property – In situations where the documents are flawed, but the possessor is in good faith, the short-term usufruct enables the rapid consolidation of ownership.
- Protection of bona fide possessors – Short usufruct rewards bona fide possessors who have exercised possession based on apparent title, thereby avoiding uncertainties related to the legal status of the property.
- Streamlining the procedure – By reducing the necessary possession period, the short-term usufruct accelerates the process of stabilizing property relations.

In conclusion, usufruct plays an important role in civil law, providing a quick and safe way to consolidate property when the possessor has an apparent but imperfect title and acts in good faith. It encourages a stable and responsible use of property and helps to clarify property relations in society by protecting the interests of those who reasonably believed they were the rightful owners of the property.

- ✓ **Long-term usufruct** – applicable to possession exercised without title or without good faith; in this case, the term of possession is longer.

Long-term usufruct is a type of usufruct whereby a person acquires ownership of an immovable (or sometimes movable) asset through continuous possession over a long period of time, in accordance with the terms and conditions established by law. This usually applies in cases where the possessor has no formal title or cannot prove good faith, but possesses the asset publicly and continuously as a true owner.

A. Conditions of long-term use

To benefit from the long-term usufruct, the following general conditions must be met:

1. Long term possession

The term of long-term usufruct varies according to the legislation of each country. In Romania, the long-term usufruct for real estate applies after 10 years if the property is registered in the land register and there is a break in the possession exercised by the original owner, and 30 years if the property is not registered in the land register.

2. Public, peaceful and uninterrupted possession

Public: Possession must be exercised in plain sight, without the intention of concealing the property from possible claimants.

Peaceful: Possession must be acquired and exercised without violence or coercion.

Uninterrupted: Possession must not be interrupted for the duration required by law.

3. Possession under the owner's name

The possessor must act as a true owner of the asset, acting as if the asset were his own, and not as a mere custodian (eg a tenant or custodian).

B. Effects of long-term use

By fulfilling the term of the long-term usufruct, the possessor acquires the right of ownership over the asset, without the existence of a formal title being necessary. The effects of the usufruct are retroactive, that is, at the time the term is fulfilled, the possessor is considered the owner from the beginning of his possession, even if the formalization can take place later through the court or in the land registry, where applicable.

C. Specific cases of long-term use

Long-term use may be applicable in various situations, such as:

- Properties left in the possession of a successor who has not acquired formal title.
- Real estate whose ownership documentation has been lost, but for which possession was exercised by a person who acted as an owner.
- Properties where deeds of sale or other titles have been canceled or have formal deficiencies that prevent immediate recognition of ownership.

In conclusion, usufructuary is an essential mechanism in civil law, ensuring a balance between possession and ownership, clarifying ambiguous legal situations and protecting the interests of possessors who hold property for a long period. By offering a property right after a term established by law, this type of usufruct contributes to legal stability, the efficient use of resources and the avoidance of property conflicts, being an important pillar for the organization and management of real estate in society.

2. The importance of usufruct in civil law

Usufruct plays an essential role in civil law, having multiple functions and contributions in consolidating the legal order of property rights.

a. Legal stability and clarity

Through usucapion, legal stability is ensured over the assets, especially in cases where the formal ownership is uncertain, lacking clear documents or being difficult to prove. This mechanism encourages owners to bring goods into the economic circuit and provides them with legal protection.

b. Protection of bona fide possessors

Usufruct provides protection to those who have exercised possession of the asset for a long time and in good faith. These possessors have the opportunity to obtain ownership in recognition of their efforts to preserve and enhance the property. By this recognition, usufruct contributes to the consolidation of a correct conception of justice by providing a legal reward to these bona fide possessors.

c. Prevention of property conflicts

Usufructuary reduces the risk of ownership conflicts, providing a clear solution for situations of long-term possession of an asset. By completing the term of usufruct and recognizing ownership of the asset, the possessors are no longer vulnerable to subsequent claims by the former owner.

d. Efficiency and capitalization of heritage

Utilization stimulates the efficient use of real estate, discouraging idleness or abandonment. This is particularly relevant for assets that are not maintained by their rightful owners but are used by other owners. Thus, usufruct promotes a model of active property management, which contributes to the economic value and utility of the asset (Nicolae, 2003).

e. Utility in the absence of property deeds

In many cases, usufruct can solve the problems related to the lack of property documents, facilitating the acquisition of ownership rights by the actual owners of the goods. This is particularly useful in rural environments or in the context of historical changes that led to the lack of formal documents (e.g. following agrarian reforms or retrocession situations).

In conclusion, usufructuary is, therefore, an important mechanism for regulating and stabilizing property, which contributes to legal clarity and efficiency in civil law. Through it, not only the protection of bona fide owners is ensured, but also the efficiency of real estate management. As a fundamental institution in civil law, usufruct strengthens the legal system and supports the development of an orderly and secure economy in which property rights are clearly established and recognized over the long term (Nicolae, 2006, p. 72).

Conclusions

Usufruct is a fundamental legal institution in civil law, providing a way to acquire property through continuous, peaceful and public possession. It plays an essential role in stabilizing and clarifying ownership relationships, especially in situations where ownership documents are missing or damaged. Through usufruct, civil law protects bona fide possessors and those who publicly act as true owners, consolidating ownership after a statutory term.

There are two main forms of usufruct – short-duration and long-duration – each having applicability depending on the circumstances of the possession and the quality of the possessor. Short usufruct is intended for bona fide possessors who have apparent but defective title, while long usufruct permits the acquisition of property without title or in good faith after a longer period.

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ARTIFICIAL INTELLIGENCE AND THE TRANSPORT SYSTEM

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Abstract*: In the digital age, artificial intelligence (AI) is intervening in many areas, and the transport industry is no exception. AI has the potential to significantly transform the way this sector operates, bringing significant benefits in terms of efficiency, costs and sustainability. We will explore the different ways in which artificial intelligence can be integrated into transport management and how it can revolutionize this field. Artificial intelligence (AI) represents the next frontier in logistics innovation, with the potential to make transport more efficient by minimizing costs and maximizing profit, but also by ensuring the safety of transport.*

Keywords: *transport system; artificial intelligence; inovations in transport.*

Introduction

The transport system has a strategic character, constituting an integral part of the economic and social system of Romania. The state ensures the conditions for a normal competitive environment between the different modes of transport and categories of transport, supports the development and operation of public transport and guarantees the free

initiative and autonomy of private carriers (Gheoculescu, 2022, pp. 21-22).

At the international level, transport represents a key economic sector. Through transport systems, operators or other economic entities provide transport services at the resafetyquest of customers. Customers, in turn, can be individuals or legal entities.

Transport services can be characterized by the fact that they are intangible, and their quality can only be determined by the quality of the technical base with which the service is provided (vehicles, infrastructure, vehicle comfort) and the effects of the service (comfortable travel, without risks, in the shortest possible time).

I. Transport system in Romania

From the analysis of the evolution, over time, of transport on a certain territory and of the particularities of the current transport networks, their contribution to shaping the current configuration of regional and national settlement systems results.

At the continental level, based on the geographical distribution of air transport systems and highway and high-speed railway networks, true supranational urban systems are taking shape, especially in Central and Western Europe, North America and in some areas of South America and Asia. Of course, when shaping such systems located beyond national borders, other factors also contribute, along with those related to transport.

The impact of transport on the urban system of Romania is an important one (Stănilă, 2019, p. 5). There were old roads that ensured relations between settlements, as well as between Romanian provinces, over time. At the intersection of these old roads, a series of cities emerged, especially in the medieval era, as places where trade exchange points were organized. The appearance of the first railways in the mid-19th century increased the possibilities of achieving closer relations between the components of the connected settlements and also allowed the individualization of railway nodes.

Of the centers with a regional polarization role, only the cities of Bucharest and Timișoara were established as railway nodes in the first stage of development of the Romanian railway system (1856-1879), but the other coordinating centers (Iași, Constanța, Craiova and Cluj-Napoca) also benefited from connection to the railway.

Until 1920, only the cities of Iași and Craiova became railway nodes, the city of Cluj-Napoca being competed with from this point of view (of coordinating railway traffic in the central part of the country) by Brașov. The establishment by 1920 of the Romanian railway network allowed the phased connection of most of the cities existing at that time as well as the localities that would be declared cities in the following years. The category of cities connected to the railway network also includes county capitals, both those that functioned as such in the interwar period and those after 1968. During the interwar period and after the Second World War, cities that mostly have a reduced polarization role were connected to the national railway system.

Road transport, through the current configuration of European and national roads, contributes to shaping the hypertrophy of the capital; increasing the polarization role of urban centers such as: Brașov, Bacău, Suceava, Pitești, Craiova, Sibiu, Cluj-Napoca, Oradea, Timișoara or Arad, as well as most county capital centers (Tălângă, 2015, pp. 43-45).

As is known, the cities of Iași and Galați, due to their geographical position, are located outside the routes of European-level roads. This situation is compensated by the presence of air transport for Iași and, respectively, by naval transport for Galați. The influence of naval transport on local and regional settlement systems has essentially materialized by contributing to the individualization of the city of Constanța as a regional coordination pole, the city of Galați as a possible regional metropolis, and the cities of Brăila and Drobeta Turnu Severin as coordination centers at county level (Tălângă, 2015, pp. 43-45).

Currently, the transport infrastructure in Romania faces several challenges:

• Road Infrastructure: Although the road network has expanded, the quality remains a concern. Many roads were built decades ago and suffer from underinvestment, which leads to poor conditions, congestion and

low average speeds, especially on national roads. Although the motorway network is growing (with 1,217.77 km completed by December 2024), it is still one of the shortest in the EU, resembling a "puzzle with many missing pieces".

• Rail Infrastructure: The rail network is also in a poor state due to significant underinvestment in maintenance. This results in substantial train delays and very low average speeds for both passenger trains (around 40 km/h) and freight trains (around 15 km/h in 2022). Although EU funds are available for modernization, bureaucracy and delays in project execution are hindering progress.

• Intermodal Transport: The development of intermodal transport (combining rail, road, sea and air transport) is still in its early stages in Romania and faces obstacles such as insufficient infrastructure (terminals, specialized wagons), financing limitations, regulatory complexities and lack of coordination between different transport modes.

• E-Transport System Challenges: The RO e-Transport system, designed to monitor road freight transport, has faced operational challenges, including API errors, instability of the mobile application, lack of clear procedures and absence of English language support, causing difficulties for transport companies.

I. The role of Artificial Intelligence in the future of transport

Technological advances and the increasing availability of data will continue to stimulate the development of artificial intelligence. As technology becomes more advanced, we can expect to see more and more means of transport – cars, trucks – with automatic driving on the road, and more and more cities to implement this traffic development management.[1]

[1] Raquel Sánchez Jiménez, Spain's interim Minister for Transport, Mobility and Urban Agenda, said: "Intelligent transport systems can save us time, reduce emissions and congestion, and simplify travel planning. Today's adoption of the new directive is an important step on our path towards smarter, safer and more efficient mobility in

In this regard, Directive 2010/40/EU of the European Parliament and of the Council of July 7, 2010 was adopted on the framework for the implementation of intelligent transport systems in the field of road transport and for interfaces with other modes of transport Text with relevance for the EEA (ITS Directive)[1], for the acceleration and coordination of the implementation and use of ITS applied to road transport and its interfaces with other modes of transport.

Government Ordinance no. 7/2012[2], adopted on 25 January 2012 and approved by Law no. 221/2012, regulates the implementation of intelligent transport systems (ITS) in the field of road transport in Romania, transposing Directive 2010/40/EU into national legislation.

The main objectives of this ordinance are to establish a coherent and coordinated framework for the implementation and use of ITS on the territory of Romania, in accordance with European standards, to identify four priority areas for the development and use of ITS specifications and standards: optimal use of road, traffic and travel data, continuity of ITS traffic and freight management services, ITS applications for road safety and security[3], ensuring the connection of the vehicle with the transport infrastructure. The priority actions are the provision of services at European Union level, such as real-time traffic information, the provision of data and procedures to users, and the implementation of an interoperable eCall system at European Union level.

In view of the major technological developments that have taken place, a radical reform of the legislative framework is needed. In order to accelerate the digital transition and smarter mobility in the EU, the

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Europe." https://www.consilium.europa.eu/ro/press/press-releases/2023/10/23/council-adopts-new-framework-to-boost-the-roll-out-of-intelligent-transport-systems/

[1] https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX%3A32010L0040

[2] Published in Official Gazette no 77 from January 31, 2012, https://legislatie.just.ro/Public/DetaliiDocumentAfis/134877

[3] National Road Safety Strategy for the period 2022 – 2030, published in the Official Gazette of Romania, Part I, No. 535 bis, May 31, 2022

Council adopted a new framework for the implementation of Intelligent Transport Systems (ITS), by revising the 2010 Directive.

The revised Directive aims to take into account technological developments such as connected and automated mobility, on-demand mobility applications and multimodal transport. Another aim is to accelerate the availability and strengthen the interoperability of digital data that powers services such as multimodal journey planning and navigation services. This will allow vehicles and road infrastructure to communicate, for example to warn of unforeseen events such as traffic jams on the route. The revised legislative act is, therefore, an important step towards the realization of the common European data space on mobility.

Artificial Intelligence (AI) is profoundly transforming the road transport system, bringing significant improvements in terms of safety, efficiency and sustainability. Artificial Intelligence (AI) has become a fundamental element in redefining the transport sector, providing innovative solutions to optimize logistics, reduce accidents and increase energy efficiency. However, the use of AI in this field raises significant legal challenges, in particular with regard to establishing legal liability in the event of accidents, the protection of personal data, the regulation of autonomous vehicles and compliance with applicable European regulations.

In the context of the integration of Artificial Intelligence (AI) in the transport sector, the European Union has adopted essential regulations to ensure a safe and ethical framework for the implementation of these technologies.

Regulation (EU) 2024/1689 on Artificial Intelligence[1], which entered into force on August 1, 2024, is the one that establishes a general, harmonized legal framework for the development, marketing and use of artificial intelligence systems in the European Union (Irimia, 2024, p.

[1] Published in Official Journal of European Union from July 12, 2024, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32024R1689

90). The main aim is to ensure the functioning of the internal market, while promoting innovation and protecting fundamental rights, safety and health of individuals.

At the same time, in the field of transport, Regulation (EU) 2024/1679[1], adopted on 29 April 2024, amends Regulation (EC) No 913/2010 on the European multimodal transport network (TEN-T). The changes aim to adapt the network to new economic and technological realities, as well as to improve transport connectivity and efficiency in the European Union, essential changes to achieve the objectives of the European Green Deal[2] and to support the transition to more sustainable and efficient mobility in the European Union. Notable are the updating of the TEN-T corridors[3] (revising and expanding existing corridors to better reflect current traffic flows and economic needs), the integration of innovative technologies (including the infrastructure needed for autonomous and electric vehicles, as well as for the digitalization of transport), the promotion of sustainability (encouraging the use of greener modes of transport and reducing carbon emissions).

Another key area where Artificial Intelligence (AI) is making a significant impact is urban traffic management. Intelligent traffic management systems, based on AI, allow for the continuous optimization of traffic flows and the reduction of congestion through real-time data analysis. Machine learning algorithms are able to adjust traffic lights and redirect vehicles to less congested routes, saving travel time and reducing fuel consumption.

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[1] Published in Official Journal of European Union from June, 28, 2024, https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:32024R1679

[2] https://www.consilium.europa.eu/ro/policies/european-green-deal/

[3] https://www.consilium.europa.eu/ro/press/press-releases/2024/06/13/trans-european-transport-network-ten-t-council-gives-final-green-light-to-new-regulation-ensuring-better-and-sustainable-connectivity-in-europe/

Many of the world's major cities have already begun implementing innovative traffic management solutions[1] that combine machine learning techniques with dynamic traffic simulation models. For example, the PTV Optima program is used to provide accurate traffic forecasts up to 60 minutes in advance, allowing operators to take proactive measures to manage congestion, road closures, and construction sites[2]. Moreover, AI facilitates the implementation of adaptive traffic signal systems, which continuously optimize traffic flow. Such implemented technologies constantly adjust traffic lights to improve traffic flow, while simultaneously reducing pollutant emissions and vehicle delays (Alamsyah, Chou & Susanto, 2016, pp. 55-66). These technological innovations, properly implemented, have a significant impact on reducing pollution and improving urban mobility, actively supporting global sustainability goals.

In addition to the benefits for private transport, AI is also bringing improvements to public transport management[3]. AI algorithms use data from ticketing systems and automatic passenger counting equipment, thus contributing to a better understanding of passenger flows in public transport networks. This allows traffic coordinators to intervene quickly when significant deviations from normal demand patterns are recorded or when delays or infrastructure failures affect operations. Algorithms can also provide optimal solutions for rapid service recovery, such as substituting trains with buses or adjusting transport schedules to minimize the impact on passengers.

This integrated methodology allows local authorities and traffic planners to anticipate the impact of planned measures on mobility flows, thus facilitating the optimal scheduling of infrastructure works, such as road repairs or the construction of new public transport lines. A considerable advantage of this approach is that the forecasts generated

[1] https://cursdeguvernare.ro/inteligenta-artificiala-in-transport-5-aplicatii-si-beneficiile-lor.html
[2] https://www.ptvgroup.com/en
[3] https://www.ifv.kit.edu/english/26_1848.php

are particularly accurate, which allows traffic coordinators to make informed, data-based decisions to minimize passenger discomfort and reduce operational costs. In this way, periods of low traffic can be identified and infrastructure works can be implemented during those intervals, saving time and resources.

In the context of the accelerated evolution of digital technologies, logistics has become a strategic field in which artificial intelligence (AI) plays an increasingly important role. One of the most relevant applications of AI in this sector is the optimization of transport routes, an essential process for streamlining operations and reducing costs.

Route optimization involves determining the most efficient routes for delivering goods, taking into account a series of dynamic factors such as traffic, distance, time, traffic restrictions or weather conditions[1]. In a classic logistics system, these variables are managed in a rigid or manual manner, which limits the ability to adapt in real time. AI, on the other hand, allows for an adaptive and predictive approach, based on the analysis of large volumes of data and machine learning.

AI algorithms can learn from historical patterns and anticipate recurring problems, such as traffic jams or delays due to weather conditions, while providing optimal solutions to avoid them. This ensures better use of resources, reduces delivery times and minimizes fuel consumption, which also contributes to sustainability goals.

In addition, the integration of artificial intelligence with other technologies, such as the Internet of Things (IoT)[2] and real-time geolocation systems, allows for continuous monitoring of vehicle fleets and delivery conditions. AI can react immediately to unforeseen events — such as accidents, road closures or changes in orders — by automatically and efficiently recalculating routes.

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[1] https://www.packeta.ro/blog/cum-te-poate-ajuta-inteligenta-artificiala-sa-faci-procesele-logistice-mai-durabile

[2] https://www.ibm.com/think/topics/internet-of-things

In the context of road safety[1], the integration of AI-based technologies promises to significantly reduce the risks of accidents by automating and optimizing driving processes, as well as by analyzing the behavior of road users. The use of AI in transportation is an innovative approach, aimed at preventing accidents and improving safety on public roads (NARS, 2021). However, despite significant advances in this field, there are cases where the technology has failed, highlighting the current limits of its implementation.

One of the most prominent examples of the use of AI for accident prevention is the advanced driver assistance system (ADAS), which includes technologies such as automatic emergency braking (AEB), lane keeping assistance (LKA) and pedestrian detection. These technologies have demonstrated considerable effectiveness in preventing accidents, reducing the risks of collisions and automatically intervening when the driver does not react in time. Studies show that vehicles equipped with AEB can reduce accidents by up to 50%, especially in heavy traffic or emergency situations.

Similarly, autonomous vehicles[2], which rely on machine learning algorithms to navigate roads without human intervention, promise to eliminate human error, which is the main cause of road accidents. These vehicles use a combination of sensors, cameras and algorithms to detect obstacles and make decisions in real time, based on traffic conditions. Autonomous vehicles can also help reduce driver fatigue and dangerous behavior, which are responsible for a large proportion of road accidents.

However, the implementation of autonomous technologies is not without controversy and failures. There have been situations in which the vehicle's AI system failed to correctly identify the pedestrian, and the

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[1] Directive (EU) 2019/1936 of the European Parliament and of the Council of 23 October 2019, amending Directive 2008/96/EC on road infrastructure safety management, published in the Official Journal of the European Union from November 26, 2019, https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32019L1936&from=LV

[2] https://www.cdep.ro/intranet/docs_dip/13497_vehiculele%20autonome.pdf

algorithmic decision not to intervene had tragic consequences. It was also found that the vehicle was not programmed to react adequately to an emergency situation, highlighting the current limitations of autonomous technologies. This incident raised questions about the reliability of autonomous vehicles and their ability to make correct decisions in complex situations. There have also been cases in which the Autopilot system did not react appropriately to road conditions. These incidents demonstrated that, although autonomous driving technologies are constantly developing, there are still significant gaps in their safety and reliability.

From a legal perspective, these events have opened a wide debate on legal liability in the event of accidents involving autonomous vehicles. While many argue that the responsibility should be assigned to technology manufacturers, others argue that regulations should focus more on creating clear safety standards that prevent such incidents.

Another key aspect of using artificial intelligence in road safety is preventing dangerous driver behavior. Machine learning algorithms can be used to analyze driver behavior and identify potential risks before they become critical. For example, driver monitoring systems can detect signs of fatigue or distraction and warn drivers or even take control of the vehicle if necessary. AI can also be used to prevent drunk driving by using sensors that detect specific behaviors of drivers under the influence of prohibited substances.

Conclusions

Artificial intelligence plays a key role in transforming the transport sector, bringing significant benefits in terms of efficiency, safety and sustainability. However, a balanced approach is needed that takes into account both technological advantages and ethical and security challenges.

Responsible implementation of AI in transport will contribute to the development of a safer and more efficient mobility system for the future. The integration of AI into road infrastructure, autonomous vehicles and smart logistics promises not only to optimize traffic, but

also to significantly reduce accidents[1] and the impact of transport on the environment.

However, technological progress must be accompanied by clear regulations, ethical responsibility and active collaboration between specialists, authorities and citizens. The future of transport depends on innovations, but also on how society will manage to adopt them in a balanced and responsible way.

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HUMAN RIGHTS IN ARMED CONFLICTS: THE RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

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Abstract: *There is no armed conflict (or even political conflict, in the strict sense of the term) in which the issue of human rights violations does not arise. Moreover, it is absurd to believe that there can be an open conflict that does not affect the rights of the civilian population. As in any debate that is simultaneously sociological, political, legal and international relations, terminology is a key variable. If we talk about war crimes, we theoretically and legally more correctly frame this collective crime in the context of a type of interaction between two states. A concept such as crimes against humanity also covers the situation in which we criminalize, for example, the crime of a political regime against its own population, against a minority, not just a war between two states or a civil war between well-determined parties.*

Keywords: *crime; war; international; humanitarian; human rights.*

Introduction

Given the importance of protecting civilians during armed conflicts and respecting human rights during stability and peacekeeping operations, this article will present the legal framework for the protection of human rights, based on a case study, according to which, both during an armed conflict and subsequently, during the occupation, violations of international conventions occurred, sanctioned by the court empowered

to monitor respect for human rights in the European space. In this regard, the Russian-Georgian war of 2008 led to violations of human rights, as decided by the European Court of Human Rights (ECHR).

The normative and practical value of protecting civilians during armed conflicts, of respecting the exercise of fundamental human rights and freedoms, even in armed conflicts of an international nature, are indisputable. The change in the forms and means used in armed conflicts leads to violations of the provisions of international humanitarian law. The jurisprudence of the European Court of Human Rights has made a connection between fundamental rights, included in the European Convention on Human Rights and Citizens' Rights, and rights protected by the laws of armed conflict, a decision of particular importance in the current international security context.

Respect for human rights is directly related to ensuring international peace and security (U.N. Security Council Resolution No. 688 of 5 April 1991). This is why it is rightly stated that human rights issues are of international concern and do not fall under the internal jurisdiction of states, which legitimizes not only the right of intervention of international bodies, but also their obligation to intervene whenever violations of human rights, which characterize any human community, are discussed (Corsei, Ștefănoaia, 2022, p.73).

The main documents applicable in international humanitarian law are the Hague Conventions on the Laws and Customs of War of 1899 and 1907 and the Geneva Conventions of 1949: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Armed Forces at Sea; Convention relative to the Treatment of Prisoners of War and Convention relative to the Protection of Civilian Persons in Time of War. These documents contain prohibitive clauses, unequivocally prohibiting reprisals against victims of the state of war (civilian population, wounded and sick, prisoners of war or refugees).

1. Protection of fundamental human rights and freedoms during armed conflicts of an international character

As a legal institution of international law, human rights represent a set of legal norms closely connected by their object - the relations between states and other entities with international personality, which are established for the purpose of protecting the human being. The area of concerns in this field and their evolution in recent decades have determined a qualitative leap in the system of public international law and led to the emergence of a new branch within it - international human rights law, a branch that brings together everything that means international legal norm and international legal institutions that protect the most important value recognized today – man (Ștefănoaia, p. 153, https://doi.org/10.5281/zenodo.7870112).

International humanitarian law (IHL), as an expression of a balance between military necessity and humanity, provides important norms for the protection of civilians. IHL states that, for the purpose of armed struggle to defeat the enemy, the choice of means and methods of warfare is not unlimited. In this sense, "the civilian population and civilians enjoy general protection against the dangers resulting from military operations" (Portal Legislativ, no year).

IHL defines principles that govern the conduct of belligerents in combat, including: humanity, distinction, proportionality and precaution. Military decision-makers must analyze all the information at their disposal, before launching an attack, in order to make a tactical decision regarding the means and methods used. Thus, armed attacks must be indiscriminate or proportionate to the intended purpose, taking all necessary precautions to minimize the damage that may be caused to the civilian population.

The international rules governing the conduct of armed conflict also require that effective protection be afforded to civilians and private property, and that non-combatants be treated with dignity and respect for their rights in all circumstances. During armed conflicts, a distinction must be made at all times between the civilian population and combatants, and between civilian and military objectives. Accordingly,

civilians and civilian objectives must be protected against deliberate armed attack (Kokun, 2022, https://doi.org/10.1080/15325024.2022.2136612).

Indiscriminate attacks are prohibited, and they can be of three types: attacks that do not directly target a military objective, attacks that use methods or means of warfare that are not directed against a specific military objective, and attacks that use a method or means of warfare with effects that cannot be limited.

Humanitarian law regulations prohibit attacks that could cause accidental loss of life or injury to civilians and damage to private property.

In order to protect civilians during armed conflicts, we can distinguish several rules resulting from IHL norms, as follows:

- civilians may not be the object of an attack, except in the situation where they are taking a direct part in hostilities;
- a person who surrenders to the enemy will have his life spared;
- no person will be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment;
- the legal personality of each individual will be respected;
- private property is protected and cannot be the target of armed attack, except in the case of use in military action;
- sick persons shall be hospitalized and shall be given the necessary care, according to their medical condition;
- persons shall be treated without discrimination on the grounds of race, sex, nationality, language, social class, wealth, public, philosophical or religious opinions or any other nature;
- reprisals are prohibited in camps with prisoners of war or refugees.

2. Law applicable in times of armed conflict

During armed conflicts, international law provides a legal framework that regulates the protection of individuals and the conduct of hostilities. This includes:

A. International Humanitarian Law

The definition of International Humanitarian Law expressly states that this branch of law is applicable in situations of armed conflict – whether international or internal. Thus, IHL is not applicable in times of peace, or in situations of internal tension or disturbances. The qualification of a situation of armed conflict is an essential preliminary step before any applicability of IHL. The process of qualifying a situation as an "armed conflict" is complicated, due to the fact that neither the Geneva Conventions nor their Additional Protocols explicitly define what this expression encompasses.

The essential criteria in the qualification of a conflict are due to the nature of the parties to the conflict. This is the result, in particular, of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, which states that an armed conflict is international when there is recourse to armed force between states. In this regard, we note that situations of total or partial military occupation are also situations of international armed conflict, even in the absence of any form of resistance on the part of the occupied state. Thus, the official nature of the parties makes it possible to qualify a conflict as international law. On the other hand, one can speak of an internal armed conflict in the presence of a prolonged conflict between government authorities and organized armed groups, or between such groups within a state. Thus, the main difficulty lies in identifying the moment when a situation of internal tension or disturbance evolves to reach the threshold of an armed conflict.

Undoubtedly, the recent jurisprudence of international criminal tribunals, as well as the study on customary law, published in 2005 by the International Committee of the Red Cross, show an exponential growth of the rules of customary law applicable in the situation of an internal armed conflict. As such, certain rules that governed exclusively international armed conflicts now apply to internal armed conflicts as well. However, although there is a tendency towards unification of the law applicable regardless of the nature of the conflict, the dichotomy

between international and internal armed conflicts remains relevant and has important legal consequences.

The qualification is more complex when the armed intervention of the third state is made in favor of non-state actors and against the government of the territorial state. In such a situation, a minority of the doctrine maintains that such a conflict has an international character. However, the majority follows the line of thought according to which such a conflict is divided into various conflict relations. Thus, hostilities between the governmental forces of the territorial state and the armed opposition group remain under the qualification of internal armed conflict, while hostilities between the same governmental forces and those of the third state constitute an international armed conflict. This complex qualification is considered to be logical taking into account the definitions for international and internal armed conflicts, but it insinuates that the applicable law may vary depending on the forces involved in the same armed conflict. The intervention of the third state in favor of the armed opposition group can also be indirect, in the form of economic, financial, strategic, etc. On this basis, the armed conflict could be described as international, since the armed group benefits from this support and can be compared to a de facto organ of the third state. International jurisprudence identifies different standards to characterize an armed group as a de facto organ. In particular, the International Court of Justice evokes the notion of "effective control" in the advisory opinion given in the case of Military and Paramilitary Activities in and near Nicaragua; and the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia speaks of "general control" in the judgment of 15 July 1999 in the Tadic case (Nicaragua v. United States of America). However, in 2007, the International Court of Justice reaffirmed the relevance of the concept of "effective control" (Bosnia and Herzegovina v. Serbia and Montenegro).

B. International Human Rights Law

International human rights law (also known as "human rights") can be defined as the body of rights and fundamentals belonging to every

human being, the observance of which is theoretically imposed by the state. Often, three successive generations of human rights are established. The first generation groups civil and political rights, that is to say, largely the freedoms that oppose power (the right to life, freedom of religion, freedom of expression, etc.). The second generation includes the economic, cultural and social rights that states must protect and guarantee (the right to work, to housing, to education, etc.). Finally, the third generation of rights has emerged recently, and is called solidarity rights (the right to development, to peace, to a healthy environment, etc.). These distinctions are sometimes contested by doctrine. Some academics prefer to emphasize the indivisibility of these rights, considering that there is no difference between them, and that some of them cannot be denied without endangering the others.

Indeed, the main human rights instruments on civil and political rights allow member states to derogate from certain provisions of the treaties in the event of a state of emergency, and only if the strict conditions defined therein are respected. Thus, in article 4, paragraph 1 of the International Covenant on Civil and Political Rights, it is written: "In case of a public emergency threatening the life of the nation and the existence of which is declared, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination on grounds of race, colour, sex, language, religion or social origin." These provisions on the possibility of derogation are not necessarily included in every human rights treaty; for example, they do not appear in the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), or the Convention on the Rights of the Child (1989). Even when these derogations are permitted in a treaty, certain rights (often known as the "core" human rights) cannot be derogated from. These core rights include:

The right to life;

Prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
Prohibition of slavery and servitude;
Freedom of thought, conscience and religion;
Non-retroactivity of criminal laws.

The issue of the interaction between humanitarian law and human rights also arises at the institutional level. Indeed, human rights provide for several implementation mechanisms that entitle victims of violations of these rights to complain to the competent bodies, in order to stop the violation and, possibly, to obtain compensation. However, there is controversy regarding the jurisdiction that these human rights mechanisms have if, during the investigation of alleged human rights violations, violations of international humanitarian law are discovered, committed during an armed conflict.

Part of the doctrine focuses on the gaps in protection that are most likely to arise when the threshold for derogation from human rights obligations is reached, but the threshold for armed conflict has not yet been reached (IHL will therefore not be applicable). In this situation, only the limited rights from which no derogation is possible are applicable. To try to compensate for this situation, certain soft law instruments attempt to specify the fundamental standards of humanity that govern the protection of individuals in these particular situations. In conclusion, the relationship between IHL and human rights remains a controversial one. It is worth noting that the development of humanitarian law has been profoundly influenced by the development of international human rights law, and in particular by the adoption of such landmark legal instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. This influence is clearly seen in Articles 75, 76 and 77 of the First Additional Protocol to the Geneva Conventions, which establish fundamental guarantees and protection for women and children; it also appears in Additional Protocol II in Articles 4, 5 and 6, which reiterate the fundamental guarantees of those who do not or no longer take part in hostilities, the rights of those deprived of their liberty and the guarantees regarding criminal prosecution.

Furthermore, the way in which IHL can influence the protection of human rights during armed conflict remains controversial.

3. The Relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in Armed Conflict

IHL and IHRL are distinct but complementary legal regimes that protect human life and dignity during armed conflict. Their relationship can be understood as follows:

1. Purpose and applicability

• IHL:

o Regulates armed conflicts.

o Applies to the actors involved (states, armed groups) to protect civilians, the wounded, prisoners of war and to limit the methods and means of warfare.

o Example: Geneva Conventions (1949).

• IHRL:

o Applies at all times, including in armed conflict, protecting the fundamental rights of all individuals.

o Allows for temporary derogations in cases of emergency, but intangible rights, such as the prohibition of torture, remain mandatory.

o Example: International Covenant on Civil and Political Rights (1966).

2. Complementarity

• Common rules: Both regimes protect essential rights, such as the right to life, protection from torture and humane treatment of detainees.

• Distinct regimes:

o IHL provides rules specific to armed conflict, setting limits on hostilities.

o IHL has a general approach, applicable even outside of conflicts.

3. Areas of overlap

• Right to life: IHL permits the killing of combatants in hostilities, but prohibits attacks on civilians; IHL protects the right to life, with limited exceptions in case of necessity.

• Treatment of detainees: IHL regulates prisoners of war and detained civilians; IHL prohibits torture and degrading treatment in all circumstances.

• Protection of civilians: IHL imposes strict obligations on the protection of civilians in conflict zones; IHL requires states to protect the population from violations of fundamental rights.

4. Normative conflict and application

• In cases of conflict between IHL and IHL, the principle of specialia generalibus derogant applies (the special norm prevails over the general one).

o Example: IHL allows for the detention of combatants without trial under certain conditions, which might seem to conflict with IHL, but prevails due to its specific applicability in war.

• Supervisory bodies:

o IHL: Supervised by the International Committee of the Red Cross (ICRC).

o IHL: Supervised by UN mechanisms (e.g. Human Rights Committee).

5. Challenges of the relationship

• Terrorism and non-state armed groups: IHL and IHL face difficulties in effectively regulating non-state actors.

• Confluence of norms: In some situations, the simultaneous application of IHL and IHL can generate uncertainties.

• New technologies: Cyberattacks and the use of drones complicate the traditional application of norms.

In conclusion, IHL and IHL complement each other in protecting human rights in armed conflict. IHL is the special norm that regulates war, while IHL provides continuous protection, even in exceptional circumstances. Their respect and application depend on collaboration between states, international bodies and other actors involved.

Conclusions

Of importance, in the light of contemporary security events, is the consideration that jurisdiction under the ECHR is closely linked to the notion of control, whether it is the authority and control of a State agent over individuals or the effective control of a State over a territory. Thus, military operations in the active phase of hostilities in an international armed conflict are outside the jurisdiction of the attacking State and, therefore, do not fall within the scope of the ECHR, which is unable to find human rights violations, which can only be protected by the legal means of IHL.

The importance of protecting civilians and other non-combatants in wartime and its aftermath is underlined by the ratification of legal treaties that delimit the rights of civilians in armed conflict, by political and media actions condemning acts that cause suffering to non-combatants, and by the active supervision, carried out by international institutions, of the legality of conduct in combat. According to the provisions of IHL, the exercise of the fundamental rights of non-combatants must also subsist during armed conflicts.

Despite all the progress made at the international level in the field of respect for human rights, there are still some states in the world that cannot guarantee the right to freedom of expression or the right to life because of certain insecurity factors at the national level. Although the right to life appears to be a sine qua non and a fundamental right for the existence and application of other fundamental human rights, it is

currently not uniformly protected throughout the world (Corsei, Zisu & Țoncu, 2023, p.59).

Therefore, in full agreement with the regulations of IHL, the parties to the conflict must take precautionary measures to avoid or minimize the effects of armed actions on civilians, having the obligation to do everything possible to avoid collateral losses among civilians and damage to private property, considered excessive, in relation to the concrete and directly pursued military advantage. Compliance with the rules of international law applicable in armed conflicts is an obligation that falls on both states and combatants in the theater of operations.

In conclusion, the defense of fundamental human rights in times of conflict, crisis and war is done through the activity of standardization through legal instruments (treaties, conventions, resolutions of international organizations) of international humanitarian law, as a branch of public international law. The customs of ancient wars have found their expression in the texts of international conventions or resolutions of security organizations, forming international humanitarian law.

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THE LEGAL CONTOURS OF ELECTORAL RIGHTS COVERED BY ART 22 TFEU – AN EXTENDED PERSPECTIVE OFFERED BY THE CJEU

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Abstract: *The judgments in Cases C-808/21 and C-814/21 provide a new perspective on the legal contours of the electoral rights covered by Article 22 TFEU. The CJEU, seized in two infringement proceedings, was called upon to determine the content of electoral rights, in the light of the principle of non-discrimination. In other words, does that principle relate solely to the right to vote and to stand as a candidate or to other ancillary measures guaranteeing participation in political life?*

This study aims to shed light on the architecture of the CJEU's legal reasoning in the two cases, emphasizing that the right to participate in the democratic life of the Union is enforceable not only against the European institutions, but also against the Member States, insofar as the latter, through legislative and administrative measures, restrict such a right or diminish its effectiveness.

Key words: *right to vote and to stand as a candidate, Art. 22 TFEU, principle of non- discrimination, political party, European citizenship*

Introduction

The judgments in Cases C-808/21 Commission v. Czech Republic [1] and C-814/21 Commission v. Poland [1] highlight a significant legal

[1] CJEU, European Commission vs. Czech Republic, Judgment of 19 November 2024, ECLI:EU:C:2024:962

challenge for the Court of Justice of the European Union, which has been entrusted with the task of determining the content of the political rights intrinsically attached to the concept of European citizenship.

Case C-808/21 challenged the incompatibility with Article 22 TFEU of Czech legislation reserving exclusively to Czech nationals the right to become members of a political party or to establish a political party. In other words, it was imputed to the Czech Republic that European citizens residing in Czech territory were subject to a discriminatory regime in terms of electoral rights, in comparison with Czech citizens.

A similar situation is to be found in Case C-814/21, in which the incompatibility with Article 22 TFEU of Polish legislation was at issue, which also does not recognize the rights of citizens of the Union who do not hold Polish nationality, but who have their permanent residence in the territory of the Republic of Poland, to form and become members of a political party.

The factual situation in the two cases therefore raises a legitimate question: are the electoral rights of EU citizens, as grafted onto the concept of citizenship, judiciously protected when Member States introduce national legislation that potentially discriminates against EU citizens who are not nationals of those states?

A reading of the two judgments reveals that both the Czech Republic and Poland pleaded in their defences that the Commission's actions were inadmissible on the ground that the alleged failure to fulfil obligations could not be based on Article 22 TFEU. Moreover, in both cases, the governments of the two States argued that the application did not clearly indicate the legal grounds on which the action was based, namely whether the Commission was alleged to have infringed Article 22 TFEU and Article 18 TFEU and Article 12(12) TFEU, in addition to Article 22 TFEU. (1) of the Charter of Fundamental Rights of the European Union.

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[1] CJEU, European Commission vs. Republic of Poland, Judgment of 19 November 2024, ECLI:EU:C:2024:963

Those formal criticisms were, however, rejected, the Court holding that the claims were not formulated ambiguously.

In order to disentangle the substantive reasoning of the Court of Justice of the European Union in the two cases, it is first necessary to briefly review the legal framework giving legal shape to the electoral rights of EU citizens who have exercised their right to free movement (on the exercise of the right to free movement for EU citizens and their family members, see Craig, & De Búrca, 2017, pp. 956-967; Foster, 2016, pp. 355-361;Schütze, 2015, pp.602-605).

The right to vote and to stand as a candidate in local and European Parliament elections is one of the fundamental rights of EU citizens, which is grafted on the very concept of European citizenship, a true polar star in the field of application of the Treaties (on the link between European citizenship and electoral rights, see Kurunczi, 2023). At the risk of presenting notorious information, we reiterate that the legal institution of European citizenship finds its legal foundation in the provisions of Article
20 TFEU, according to which "(1*) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall not replace national citizenship, but shall be additional to it. (2) Citizens of the Union shall have the rights and obligations set out in the Treaties. They shall enjoy, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as a candidate in elections to the European Parliament and in local elections in the Member State in which they reside, under the same conditions as nationals of that State...*".

It can therefore be seen that the legal text cited above, whose direct applicability and direct effect in the national legislation of the Member States cannot be questioned, requires Member States to guarantee European citizens electoral rights, both in local and European parliamentary elections, under the same conditions as those recognized for their own nationals.

Another aspect that should be mentioned is that, although at first sight the right to free movement and electoral rights are two distinct

prerogatives of European citizenship, in reality there is a natural interconnection between the two, because, despite the lack of distinction in the text (Art. 22(1) b) TFEU), the exercise of electoral rights in the State of residence must be recognized without distinction according to whether the residence is in the country of origin or in a host State within the EU, the aim being to integrate the European citizen into the social and political life of the State where he or she is permanently resident.

Equal treatment in matters of electoral rights between mobile European citizens (who have exercised their right to free movement) and nationals of the host state is then taken up by Art. 22 TFEU, and the uniform application throughout the territory of the Member States of the political rights referred to above is ensured by two instruments of secondary legislation, Council Directive 93/109/EC[1] of December 6, 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, respectively Council Directive 94/80/EC[2] of December 19, 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in local elections by citizens of the Union residing in a Member State of which they are not nationals (on the content of the two Directives, see, at length, Juryk A. et all, 2023).

In both Directives, the principle of equal treatment of European citizens in relation to nationals as regards the exercise of electoral rights in the two types of elections mentioned is a real leitmotiv, supported by

[1] Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, published in Of. J. no L 329, 30.12.1993.

[2] Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, ublished in Of. J. no. L 368, 31.12.1994

provisions such as Article 5[1], Article 8 of Directive 93/109/EC [2], Article 4 of Directive 94/80/EC [3], etc.

Returning to the facts of the two cases, the cornerstone of these cases essentially concerns the determination of the content of electoral rights from the perspective of the principle of non-discrimination. In other words, does that principle concern exclusively the right to elect and to be elected or other ancillary measures guaranteeing participation in political life?

The argumentative architecture of the CJEU judgments in Cases C-808/21 and C-814/21.

The conclusion of the legal reasoning in both judgments is that Art. 22 TFEU, interpreted by reference to Art. 20 and 21 TFEU, Art. 10 TEU, and Art. 2 of the Charter of Fundamental Rights of the EU, imposes on Member States the obligation to ensure that mobile EU citizens have

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[1] „*If, in order to vote or to stand as candidates, nationals of the Member State or residence must have spent a certain minimum period as a resident in the electoral territory of that State, Community voters and Community nationals entitled to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States. This provision shall apply without prejudice to any specific conditions as to length of residence in a given constituency or locality*."

[2] *„(1) A Community voter exercises his right to vote in the Member State of residence if he has expressed the wish to do so. (2) If voting is compulsory in the Member State of residence, Community voters who have expressed the wish to do so shall be obliged to vote. "*

[3] *„(1) If, in order to vote or to stand as candidates, nationals of the Member State of residence must have spent a certain minimum period as a resident in the territory of that State, voters and persons entitled to stand as candidates within the scope of Article 3 shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States. (2) If, under the laws of the Member State of residence, its own nationals may vote or stand as candidates only in the basic local government unit in which they have their principal residence, voters and persons entitled to stand as candidates within the scope of Article 3 shall also be subject to this conditio."*

equal access to the means available to nationals of the host Member State, in order to effectively exercise their electoral rights recognized by European law.

As will be explained below, according to the CJEU, electoral rights are not to be seen exclusively in a narrow sense, their content being much broader and encompassing, in addition to the actual right to stand as a candidate or to be elected, other ancillary measures related to elections, including the right to be a member of a political party and even to establish a political party. In fact, the premise of the two cases is the fact that, despite the *expressis verbis* provisions in primary and secondary law of the European Union for the exercise of electoral rights without discrimination between citizens of the host State and mobile citizens residing in the host State, there can be no exhaustive harmonization of national measures to implement and guarantee these rights (for an opinion on the need for harmonization, see Ziegler, 2023).

A comparative analysis of the two judgments shows that they are built on three pillars: the scope of Article 22 TFEU, the principle of non-discrimination on grounds of nationality and the principle of respect for national identity.

A. As regards the scope of application of Article 22 TFEU, the CJEU notes in both cases the absence of an express reference in that article to the conditions for acquiring membership of a political party (para. 92 of the judgment in Case C-814/21 and para. 93 in Case C-808/21). However, having regard to the useful effect of the rule on non-discrimination on grounds of nationality (para. 71 of the judgment in case C-814/21, respectively para. 55 of case C-808/21), the CJEU considers that the absence of expressis verbis provisions in primary and secondary legislation on the involvement of mobile European citizens in political parties cannot lead to the conclusion that in this area, competence lies with the Member States, by reference to Art. 4 para. (1) and Art. (2) TEU (para. 105 of the judgment in case C-814/21, respectively para. 106 of case C-808/21).

We believe that, indeed, to admit the contrary would mean that electoral rights should be protected by Member States only from a

procedural perspective (to stand as a candidate or to vote), without any obligation to guarantee the effectiveness and efficiency of such rights.

Rhetorically, one may wonder how efficient and effective the right to vote in local or European Parliament elections would be in these circumstances for a mobile European citizen who enjoys the mere fact that his or her name appears, as the case may be, either on the ballot paper or on the electoral roll. The advantages of a political party supporting a candidate are well known: from financial resources, campaign logistics and support for the promotion of the candidacy (e.g. advertising campaigns, promotional materials, marketing strategies, etc.), to access to networks of supporters and volunteers, access to public funds, and last but not least political support and strategic alliances with other political parties or actors. From this perspective, the effective exercise of the electoral rights of mobile European nationals imperatively requires equal access to the means recognized and guaranteed to nationals of the host state.

The striking element in these judgments is the link between Article 22 TFEU and Article 10 TEU. Situated at the confluence of constitutional law and political philosophy, Article 10 TEU sets out the key principles of representative democracy within the Union. Thus, in the light of Article 10 TEU, “the functioning of the Union is based on representative democracy” (paragraph 1) and European citizens have the right to be directly represented, at Union level, in the European Parliament (paragraph 2) and, equally, the right to participate in the democratic life of the Union (paragraph 3). The interdependence between citizenship of the Union and representative democracy is therefore indisputable.

It has been rightly asserted in the legal literature that the primary function of voting in a representative democracy is to facilitate the participation of its members, by electing their representatives in the legislature(s) of the society, in major policy decisions that help shape the framework in which they must live their lives (Macleod, 2024).

As noted by the Advocate General in case C-808/21, "the guarantee of equality of Union citizens' electoral rights must, without it being necessary to establish an indicative or even exhaustive list of criteria, be

reflected in a general obligation not to discourage participation in elections by various factors" (para. 76 of the Conclusions).[1]

This explains the fact that the Luxembourg court grafted the electoral rights of the mobile European citizen not only on the provisions of Article 22 TFEU, but also on those of Article 10 TEU. The interpretation given by the CJEU to Article 10 TEU in the context of the national measures taken by the Czech and Polish governments emphasizes the right of European citizens to participate in the democratic life of the Union (para. 113 of the judgment in case C-814/21, respectively para. 115 of case C-808/21). Applying the principle of the direct effect of European law, the right to participate in the democratic life of the Union is enforceable not only against the European institutions but also against the Member States, insofar as the latter, by legislative and administrative measures, restrict such a right or reduce its effectiveness (about the dynamics of introducing restrictions on active and passive voting rights, see Rezmer & Filipak, 2024).

In this respect, it has been pointed out in the legal literature (Schuler, 2024) that by way of interpretation, the CJEU operationalizes the citizen's right directly enshrined in Art. 10 para. (3) TEU, in order to give legal shape to legal obligations incumbent on the Member States, grafted onto the provisions of Art. 10(1) and (2) TEU: the Member States are obliged to ensure that European citizens are directly represented in the European Parliament. However, it could not be held that the Member States are adequately fulfilling their obligation to ensure the effective representation of citizens of the Union under Article 10(3) TEU in the event of obstacles to access to political life.

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[1] Opinion of Advocate General Jean Richard de la Tour, delivered on January 11, 2024(1) in Case C-808/21, European Commission v. Czech Republic, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=281160&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=12191527

It cannot also go unnoticed that the CJEU goes further with its reasoning and elliptically holds that "Political parties, whose functions include putting forward candidates for election... thus assume an essential function in the system of representative democracy on which the functioning of the Union is based, in accordance with Article 10(1) TEU". Although the two cases do not call into question the lack of legal protection afforded to political parties or any restriction on their actions in the territory of the Member States, one cannot help but wonder what the reverberations of such a jurisprudential argument are. More specifically, the dilemma is whether Member States are under a positive obligation to protect not only the electoral rights of mobile European citizens, but also political parties, precisely in order to preserve the principle of representative democracy on which the functioning of the European Union is based, but this is beyond the scope of this study.

B. The second argumentative pillar on which the two judgments are built is the principle of non-discrimination on grounds of nationality.

In both cases, the governments sought to establish that national law confers on European citizens residing in the territory of the two States "the possibility of having recourse to all available forms of candidacy, including candidacy on a list proposed by a political party or a coalition of political parties, registration on such a list not being conditional on the person's party affiliation" (para. 127 of the judgment in Case C-814/21 and para. 129 of the judgment in Case C-808/21). In other words, the two States took the view that there could be no interference with electoral rights, since a mobile European citizen has a right to choose whether to stand as a candidate: either as an independent candidate or on the list of a political party or coalition of political parties, without being a member of a party.

This approach, although at first glance it does not appear to restrict the electoral rights of mobile EU citizens, is simplistic and, in essence, in disregard of the principle of non-discrimination. The heart of the problem at issue is not the fact that there is no possibility for mobile European citizens to stand as a candidate in local or European parliamentary elections, but the fact that they are treated in a discriminatory manner in relation to citizens of the two States who may be members of a political

party. Thus, it was held in both judgments that the discriminatory treatment is blatant, since Polish and Czech nationals may stand as candidates either as members of a political party or as independent candidates, whereas citizens of the Union residing in Poland and the Czech Republic respectively, without being nationals of those States, have only the latter possibility (see para. 138 of the judgment in Case C-808/21 and para. 142 of the judgment in Case C-814/21).

Another aspect noted by the CJEU is that the right to stand as a candidate is also grafted on the right to be a member of a political party, to be involved in the party's decision-making processes through which candidates are nominated in the electoral competition (see para. 135 of the judgment in case C-814/21). Furthermore, in the Czech case, the CJEU held that "access to an independent candidacy is subject to the legal obligation to submit a petition signed by voters, the number of signatures being determined by the size of the locality in which the candidate stands, whereas candidates of political parties or political movements are not subject to such an obligation" (para. 150 of the judgment in case C-808/21).

So discriminatory treatment is considered by the CJEU as a real obstacle to the exercise of electoral rights.

C. The third argumentative pillar of the judgments is the principle of respect for national identity. The CJEU held that the argument that admitting that mobile European citizens "*become members of a political party or political movement in their Member State of residence, in order to give full effect to the principles of democracy and equal treatment, is detrimental to the national identity of that Member State*" cannot be accepted. On the other hand, it is undisputed that "*the organization of national political life, to which political parties contribute, is part of the national identity within the meaning of Article 4(2) TEU"* (see para. 154 of the judgment in Case C- 808/21, para. 153 of the judgment in Case C-

814/21)[1]. This is why the CJEU reiterates that Article 22 TFEU does not impose an obligation on Member States to ensure that mobile European citizens have access to national elections, as far as the latter are concerned, national authorities being fully competent to lay down special rules for excluding from the membership of a political party European nationals who are not nationals of the host State (Eroico, 2024, pp. 8).

There is no denying the challenges of such an approach in the context in which the mobile European citizen, once a member of a political party, is entitled to be involved in the decision-making process and in the party's leadership structures. On the other hand, however, even as a party member (possibly also holding a leading position in the party), such a national cannot exercise electoral rights in national elections, but only in those referred to in Article 20 TFEU. It is therefore up to the Member States to determine the ways in which mobile EU citizens who have become party members will be excluded from the decision-making process within the party in relation to national elections.

Conclusions

A grammatical and teleological interpretation of the provisions referred to throughout the study leads to the conclusion that Member States are obliged to allow EU citizens residing on their territory to participate in in local and European Parliament elections under the same conditions as their own nationals. This principle of equal treatment is essential to ensure the full integration of EU citizens into the political life of their host countries.

Consequently, guaranteeing electoral rights for European citizens who have exercised their right to free movement entails certain

[1] It has been emphasized in the legal literature that it is not possible to extend the electoral rights of mobile European citizens to national or state elections, as it would first be necessary to redefine the concepts of state, statehood and sovereignty. See Gyula Fabian, Community Institutional Law, 3rd ed. Sfera Juridică, Cluj-Napoca, 2008, p. 155.

obligations for Member States, including: establishing clear and non-discriminatory eligibility criteria; recognizing political freedom (participation in elections as an independent candidate or as a member of a political party, the right to campaign); equal access to financial, organizational and media resources.

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REGULATING SOCIAL MEDIA: FACEBOOK, TIK-TOK AND GOVERNMENTAL INTERESTS

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Abstract: *Literature of any kind – philosophical, scientific, fictional, etc. – has revealed for thousands of years the human need to live in communities, seeking to establish relationships that are as mutually beneficial as possible with all other members of society. This desire is instinctively understood from the first months of life, and this phenomenon can be observed in any living being – animal or plant – because in the absence of communities of the same species, there is no future; reproduction ceases, leading to inevitable extinction.*

Communities, once formed, have an interest in expanding or improving the quality and well-being of their members. Thus, economic development programs can be created, which will succeed if there is social harmony within the community. Social harmony can be fostered through certain types of policies that encourage not only pragmatic connections between people but also entertainment and coexistence based on mutual support.

The 21st century has brought to the forefront a unique form of community, namely the electronic, transnational one, which allows for human connections at an intensity and scale unprecedented in history. These communities aggregate on social networks, and certain legal situations in recent years compel a response to the question: can these entities be regulated, and if the answer is affirmative, based on what principles? This text will seek to provide an introduction to this debate, in relation to a decision recently adopted by the U.S. judiciary regarding one of the most important social networks, namely TikTok.

Keywords: *Social Media; Regulations; Government; Interests; Facebook; Tik-Tok; Court Decisions.*

Introduction

The human need for contact with other people is a natural one, and based on this, larger and larger groups of people have formed over time. While a few thousand years ago the village was the main form of communal settlement, recent decades have led to a significant increase in urbanization, resulting in a huge number of people living in cities today. In 2023 it was reported that 4.4 billion people lived in cities, meaning 56% of population (World Bank, 2023), with a projected dimension of 68% in 2050 year (United Nations, 2018).

Urbanization is primarily recognized for two characteristics that promote social interaction. The first is the density of residents per square kilometer, which is tens of times – and in some cases hundreds of times – greater than that in rural areas, thereby increasing interaction with other people and, implicitly, the possibility of having friends and shared activities (for example, consider stadiums and the number of spectators they can accommodate). The second aspect relates to the economic dynamics of the residents, who must secure their income from activities other than those specific to agriculture, which is typical of rural environments. In this second characteristic, innovation is what creates goods and services, human actions, and – implicitly – modifies social realities. A broader customer base, inherently brought by cities, means the possibility of faster wealth accumulation compared to the potential of becoming very wealthy in a rural setting.

In this circuit of life and heritage, an important part of the society' engine consists precisely of those goods and services that connect communities more closely – from public transport to the press, from public events to the buildings/institutions that gather people by their very nature (schools, universities, hospitals, stadiums, etc.). In such a perspective, the mediation of relationships between people could not be absent, and this could be done more easily or more difficultly, depending on the available means of communication.

1. The need for communication between people has been addressed in two ways, depending on the distance between those involved. The consequences of this separation by distance and means have been severe for thousands of years, as a greater distance between two individuals made it very difficult for a message to reach its destination. In many situations, distances of over 200 km meant that people almost severed ties with their old social environment, being forced to fully integrate – linguistically included – into another society. This also led to the necessity of adopting the specific typology of the new area of residence.

Long-distance communication was practically available only to the wealthy, who could maintain either carrier pigeons or a team of people and horses to transport letters and goods in one direction or another. However, this did not guarantee that the recipient would receive the messages in a timely manner (and in some cases, the messages did not reach the intended recipient).

For millennia, human communication was generally confined within localities, and the low life expectancy until the early 20th century made it difficult to leave one's place of origin. Thus, most people in rural areas were familiar mainly with their own village and those nearby, occasionally travelling to the nearest town, which were journeys they would remember for many years afterward. Communication was therefore easier, as rural environments had smaller populations, and people knew each other well. In fact, studies reveal that until the 1960s, most marriages occurred between partners who lived predominantly within a distance of no more than three streets from each other, highlighting how closed communities were and the strength of the bonds within them (Ansari and Klinenberg, 2016).

The progress of technologies that ensure a state of mental comfort has brought with it the possibility of listening to favourite melodies without the need to hire orchestras (which was very expensive and only affordable for the wealthy). Subsequently, this will lead to a diversification of leisure activities. Over time, these inventions diversified, being created exclusively in cities – the place where you can find engineers able to create sophisticated tools – which increased the

number of goods aimed at providing a lifestyle as pleasant as possible for those who used them.

Leisure time has always been spent in enjoyable ways, both individually and in groups. In any case, there is an objective limitation to the possibilities of entertainment, but in people's minds, the memories of these pleasant events remain, and they are referenced in conversations with others. Human communication is not strictly based on pragmatic interests, and the differences in the words used daily by various professions (a trial lawyer will speak more than a plumber) do not solely belong to their professional aspects.

The diversification of leisure activities was not the only area where the progress of the human mind made giant strides – by far the most significant being in the field of transportation, which has become cheaper and accessible to almost anyone over very long distances. Clearly, the consequences of this ease in transportation became apparent immediately, and families are gradually beginning to expand, with the distances between their members growing larger. In fact, communities are starting to diversify ethnically, leading to an increasing need for communication among childhood friends, between all family members, among new friends made at school and in the workplace, etc. This need for communication has been somewhat counterbalanced by states through telephone and postal services, but these will eventually lag behind the development of technologies that will reach the critical threshold of what is known as the internet, and subsequently its peak, namely mobile internet access.

2. The internet today is a powerful technological and legal construct, as the legislation of certain countries has come to include a "right to internet access for individuals" – United Nations recognised it in 2016, but also France, Finland, Greece, Spain, Estonia, India etc. It represents both a vast library for study and research (for example, good administrative practices), as well as an extraordinary means of rapid communication between people located thousands of kilometres apart, and it serves as an exceptional space for the dissemination of entertainment.

Clearly, the average person could not help but take advantage of the speed at which messages were transmitted, and from that moment on, it was just a step away from the creation of various groups of people with common interests – first based on electronic messaging. As internet infrastructure developed and people found it easier to connect with friends and colleagues, the next logical step was the emergence of websites aimed strictly at aggregating individuals. Their number is not small, and the competition among them is fierce, with 35 of them having at least 50 million monthly users – and the biggest one having more than 3 billion monthly users (Howarth, 2024).

Equally noticeable was the potential for the aggregation of communities or groups of people with similar interests in the political and commercial spheres, with promotional campaigns on these networks not lagging behind and becoming increasingly sophisticated. As Niall Ferguson pointed out (2008), human networks have always existed; it was merely the distances and the difficulty of communication that made them more limited, in relation to the political and financial power of those who were "network heads," meaning those individuals around whom the interests of multiple people gravitated.

A specific feature has drawn attention, namely the fact that the internet cancels a good part of the world's boundaries, and through it, several important languages impose them globally, overshadowing others. As a result of this new linguistic force, messages in English – which is the most widely used language on the internet (Statista 2024) – can become universally known in a short period of time. Also, the ethnic groups of certain nations can remain connected to their core country, regardless of where they actually reside. As will be seen, at least from the perspective of political life, this has proven decisive in significantly changing the world.

It should not be forgotten that the internet is not just a space for entertainment, but also a very serious one, indispensable today for both the business environment and public administration, politics, education, etc. Moreover, the internet has further facilitated job searches from any point on the globe, constant communication between individuals, as well as certain innovations that were hard to imagine a century ago, among

which we can mention the possibility of electronic voting – both in the political sphere and in that of commercial companies.

The practical aspect of work, economy, and politics makes this dimension of analyzing and regulating human activities on the internet very important, as issues related to entertainment affect the legal sphere to a lesser extent. Thus, entertainment raises questions about copyright – fundamentally, an issue that is impossible to control in the online space (Rustamberkov et all., 2024) – as well as certain psychological consequences, since addiction to various leisure activities can lead to serious outcomes, including the death of those who cannot control these activities (Mishra et all., 2024). It is no coincidence that certain countries, aware of this danger, limit young people's participation in these activities through administrative measures (Chung and Lee, 2023) that automatically disconnect computers from certain websites.

Evidently, issues considered to be "serious" are regulated in various ways, depending on governmental interests and their technological power. However, in this dimension, there cannot be uniform regulation, as the amount of information related to work, the economy, and politics far exceeds the space dedicated to entertainment, and regulations can only be sectoral and national. Clearly, there may be certain common practices – for example, the European Union was established as a result of a desire for administrative regulation that should constitute a confederation – but in each country, there are different politico-economic characteristics that favor domestic legislation rather than legislative harmonization with other nations.

However, as the human population has grown in recent decades, the emergence of ways to aggregate them was inevitable (first), and subsequently the activation of these groups in various political and economic activities began. Economic promotion is ultimately not something unexpected, as it is logical for commercial operators to utilize any available space. However, political issues have always been a source of concern for political leaders, who, from the perspective of legal norms, are also the ones who can regulate these networks. Thus, we can assert that legislators consider it less dangerous to become a billionaire through

massive sales resulting from online promotion than to become a national or local political leader based on the same activities on social networks.

3. Social media was initially designed as a space where people can get life updates from their friends and social contacts, but now it has also organically become one important source for getting public affairs information. About 86% of U.S. adults indicate they often use a digital device to get news while traditional news sources like television (68%), radio (50%), and print news (32%) are much less used for this purpose (de Zúñiga and Cheng, 2024).

Why have social networks almost completely overtaken traditional media (Lätti et all., 2024)? The answer is easy to provide if we objectively analyze the inequality between the methods used by the two dimensions of social information.

Traditional media faces a fundamental obstacle in its ability to influence the public, namely the filtering of messages in terms of content, the time it takes to reach the audience, but – most importantly – the ability to respond to user comments. Thus, a newspaper or television station only allows access to news after following its own procedures, and not all information gets broadcasted by them. Furthermore, an article, a journalist, or a program can be maintained for a long time, even if the audience is low or the comments about them are predominantly negative, depending on various criteria set by the editorial management. Additionally, traditional media cannot respond in real-time to the messages they receive from their users, as they must decide which comments, criticisms, and suggestions to broadcast first, and based on what criteria?

Traditional media also has a characteristic that fundamentally distinguishes it from social networks, namely the operating costs. Owning a television station means broadcasting 7 days a week, 24 hours a day, and the costs for equipping studios and obtaining broadcasting licenses for cable and satellite networks are not cheap either. Additionally, it is necessary to hire people for shows, as well as to acquire information from other newsrooms at various costs, since exclusivity of all news cannot exist in just one place. Newspapers, on the

other hand, have an even greater restriction in their printed format, as their editions must be ready before the evening news – when significant events can occur – in order to have time to be printed and distributed. These costs are not low, and in the absence of profitability – by definition lower where competition is high – this creates a long-term financial problem for many newsrooms, which can be advantageous for governments that can thus finance part of the press, buying favorable coverage and, indirectly, as a consequence of positive news, votes necessary for a new electoral cycle.

In the mirror, we have social networks, which depend on a powerful central server that can host many millions of people, and in some cases, even billions. The server is merely the technical foundation for the typical relationships between people, which primarily rely on their own media behaviors and public sphere interactions to be recognized. These giant servers are hundreds of times larger than any media outlet, which by definition broadcasts in a single language – although there may be channels in multiple languages, there is one that underlies the respective channel/newspaper. From this, a major advantage arises over any other media outlet, based on the dominance of a few universally spoken languages: communication between individuals can be facilitated more easily, crossing borders with reduced costs – this is because it is inherent to a social network to have a very low cost for the user. Additionally, the increasing translation capabilities through browsers give social networks an extra advantage, making them faster in spreading information, as linguistic borders are becoming increasingly permeable today.

All these attributes provide a strong basis for social networks to be more influential than any media institution. However, there is also the supreme attribute: a social network is designed for people to communicate quickly, directly, and unfiltered, which increases the level of superficiality but also enhances the penetration into society, leading to real and difficult-to-control political effects. Thus, a spontaneous protest can become known to an entire country in just a few minutes, even if traditional media does not report any news from there; similarly, events can gain international recognition in the same timeframe, creating even

greater problems for governments that would prefer these events to remain unknown (to organize a harsher and quicker repression).

It is precisely this ability to influence society politically that makes the regulation of social networks necessary. There are two issues here that must be considered, as their regulation cannot be identical. First, it is essential to understand that people do not want their ideas and expressions to be censored in any way. For this reason, the more restrictive a network is regarding expression, the fewer users it will have. At the same time, a network has a harder time controlling what is discussed between individuals – one-on-one – than what is posted to be seen by any user of the network. Thus, within conversation windows, issues of any kind can be discussed – from organizing political actions to the conditions of drug trafficking, for example – and the network settings should not intervene or should be as minimally active as possible (the settings for censoring/blocking messages). At the same time, public posts that may incite illegal or immoral social conduct should be censored, as legal norms generally sanction them.

It will be objected that human life is not pure, and in this sense, various examples of violations of moral or social norms can be given. This is true, but from a legal standpoint, it must be considered that certain violations of moral norms will always constitute crimes – such as killing a person – while others can be carried out with a certain decency in "expression/depravity". Thus, in the first case, we will find "social networks" built from the outset for the violation of legal norms, and their legal status classifies them in what is known as the "dark web". In the second case, we will find various networks that are more or less legal or moral, among which the most well-known are "the betting web system" and pornography.

As a result of the overall success of these social networks, certain extensions with a purely commercial character have emerged, where various individuals pool together goods and/or services that are subsequently used by others based on standardized commercial or civil contracts. Thus, we have transnational hotel booking websites, as well as platforms where ordinary citizens make their own homes available, along with useful sites for passenger transport, usually within large cities. All

of these fall within the realm of established commercial activities – hotel rentals or taxi services – but are impossible to prohibit, as they are based on the dissemination of information about certain offers (for accommodation, transport), and one cannot prohibit a person from choosing their own provider of goods/services, because commercial freedom is itself protected by legal norms of constitutional law.

Thus, the discussion about social networks is not complete if we refer strictly to what we usually designate by this name. A huge increase in population is what provides more interconnections between people – for example, in China, there are over 100 cities with a population of 1 million (Routley, 2020) – and they need each other for both professional and personal connections. As human life becomes even more mobile – the vast population cannot be accommodated in the space of villages, no matter how many there are – the development of personal and impersonal connections in various fields emerges, and even if they have different names, the basic principle is the same as that of social networks. It is precisely for this reason that their regulation becomes necessary, and a few principles of this type of legislation will be mentioned here.

4. Social media platforms mediate a significant fraction of human communication and attention. The impact of social media on society has been under increased scrutiny, and concerns over its effects have motivated varied and sometimes contradictory government regulation around the world. Around 4.9 billion people use social media globally, with a typical user spending roughly 145 minutes each day across an average of seven different platforms (Lubin et all., 2024) – thus, the need to regulate social networks becomes mandatory.

The first issue regarding the regulation of these platforms is whether they are primarily national or international. Clearly, we are not referring to the possibility of access from any point on the planet, but rather to a national dimension of the users. If they predominantly belong to a single nation, there is a greater possibility of effectively regulating a social network, as the majority of revenues come from a single country. Government control may be more effective if the servers are located in

the same country, because at that point, the territoriality of criminal and administrative law can be applied without major obstacles.

Obviously, two discussions will arise here, related to the nature of the political regime in the country where the network operates: if it is one of legality, the control will primarily be of a fiscal nature, and in terms of content, it will primarily focus on ensuring that norms regarding good morals are respected.

An authoritarian regime, however, will not be satisfied with the existence of these networks, but it cannot prevent their existence, because the contemporary demographic dimension – as we emphasized above – is expressed through a close collaboration/cooperation among members of society. Consequently, such a regime will seek to control the network as much as possible if it is within national territory, and this will be coupled with an active policy to block the existence/functioning of networks from other countries, as any of these may be considered unfriendly or at least suspected of political subversion (Schleffer and Miller, 2021). Without detailing the issue of subversion of dictatorial regimes, it must be noted that these are political systems that do not allow competition in the dissemination of news, because only in this way can they enforce the vertical compliance of political orders, regardless of how positive or absurd they may be: as political science emphasizes (Mycielski, 2018), the goal of these regimes is the preservation of power, so any other aspects will be subordinated to this goal.

A different situation arises when there is not a single country that provides the majority of users for a social network, which makes it more like a kind of universal newspaper-television. Clearly, this is an issue that cannot function at a truly international level (linguistically, because in certain areas with common imperial historical characteristics, there may be networks that are both international and not, being in fact part of the former nation that held the empire) unless a very high degree of freedom of expression can be ensured, and only general human decency will be protected by the administrators of the central server.

The high degree of freedom of expression generally attracts new users, which further expands the dimensions of social networks, making them even more interesting for economic and political actors. In both

cases, the phenomenon of the bilateral relationship between users and various economic or political agents is based on a purely objective issue, namely the aging of each user, which makes them more interested in much more practical topics relevant to their own finances as well as to the community in which they live. Thus, while it is difficult to anticipate active economic or political behavior from a 17-year-old social media user, this becomes much more likely if the user is 40 years old or older, typically having a higher income than a 17-year-old and possessing the right to vote, as well as the right to run for political office. Therefore, as the number of users on a social network increases, there will be a noticeable shift in attention towards issues of greater socio-economic impact, viewed strictly through the lens of aging and the changing priorities that come with this "everyday aging."

In this situation, we will face two types of regulation, each with its own legal challenges.

First, economic aspects are very important for any economic agent that would greatly like to have a profile of each potential client for its products (Duhigg, 2014). Therefore, the regulation of this purpose needs to be established in the country where the company has its central server, as all user data is aggregated there. From this perspective, it is necessary for the legislator to provide either a clear, very transparent framework for the sale of certain economically relevant data from the user profile, or to attempt to completely prohibit this operation of data selling. However, in this second case, there is a problem of effective data control, especially since no one prohibits the shareholders of companies operating transnational social networks from associating with various economic partners in many areas of commerce, contributing their own data, over which there cannot be effective and continuous control from regulatory authorities. In any situation where the sale of this data is prohibited, it will not be possible to completely control this phenomenon, as it may occur in discreet forms, sometimes based on contracts negotiated and signed in other countries, with the tacit agreement of the management of these social networks.

The regulation of political aspects within social networks appears to be much more complicated and delicate, especially given their high

degree of freedom of expression. On one hand, there is the relationship between the private messages exchanged by users, where, in the absence of total censorship from central servers, many topics can be discussed, not always of a legal or moral nature. Thus, an attractive profile of a person may conceal involvement in prostitution; a person who frequently posts about a certain profession may actually be a sales agent for a company, etc.

Clearly, people can talk about politics in various forms, and it is not out of the question that the assassination of a politician could be planned through messages transmitted via social networks, especially if certain words are coded. Furthermore, you cannot stop a candidate for a public office from sharing their own messages on social media, and if you do, it constitutes censorship that can only be justified based on violations of legal norms, because – we underline again – freedom of expression is a right enshrined in constitutions. With the possibility of paying for specific campaigns on social media, differences will emerge between candidates and parties, related to their ability to purchase advertisements, but this hierarchy of financial resources does not guarantee that more political ads will lead to victory for those who paid for them.

To a large extent, this was relatively easy to regulate a decade ago, but with the emergence and improvement of Artificial Intelligence (AI) tools, major issues have arisen in the political sphere. The refinement of these tools – bots – has enabled a continuous online campaign on various topics, but what is more important is another fact, derived from the differing economic power of countries around the world. Thus, a country with substantial financial resources and negative intentions towards another can spend large sums of money to conduct campaigns using AI tools to influence the political environment, altering the will of many voters. Such operations must be prevented – if possible – and we believe that regulation is necessary in the country where the central server of a social network exists.

Specifically, these systems are powerful enough to detect what constitutes a human user account and what is operated by an electronic formula, and this second form must be completely eliminated as a result of a mandatory norm. Regardless of the messages they provide, I believe

that by law, these AI accounts must be removed from social networks, and their deletion should be accompanied by a message that remains for at least a year, informing users of the reason for the ban. More specifically, people can compete and argue among themselves in any field without needing the support of AI bots. Furthermore, the necessity of eliminating these AI-operated accounts arises from the fact that an account that today may post content irrelevant to the socio-political environment can, at the request of the programmer, transform into one that plays an active political role, contributing either to the promotion of a specific candidate or to increasing social tension. Clearly, these operations are prepared in advance, and the states that engage in such activities do not have positive goals, but a powerful server knows the general differences in usage patterns among people – determined by normal biological characteristics – and the uninterrupted consistency of AI tools.

Social networks should remain exclusively for people, and this must be ensured through regulatory measures. In fact, given the inevitable use of AI tools within social networks, it is necessary for AI content labeling to be mandatory; otherwise, we will end up in a situation similar to what we previously noted regarding the sale of user profile data to commercial companies.

In practice, the real discussion is related to the transparency of social networks, in order to prevent both malignant interventions and alterations of public morality. In fact, this idea of transparency was the basis for a decision issued in early December 2024 by the Court of Appeals in Washington DC regarding a Chinese company operating the TikTok network (United States Court of Appeals for the District of Columbia Circuit, Decision no 24 – 1113, 6 December 2024).

Analyzing the decision – which was confirmed during the same month by the Supreme Court of Justice – we will find a clear record of the U.S. government's interest in the practices of this company (see pages 11 – 15 of the reasoning), which ultimately means the active role of public administration in defending the public interest, primarily manifested through transparency and the dissemination of relevant data regarding the functioning of a social network. Thus: "The Executive

determined the proposed NSA was insufficient for several reasons. Most fundamentally, certain data of U.S. users would still flow to China and ByteDance would still be able to exert control over TikTok's operations in the United States. The Executive also did not trust that ByteDance and TTUSDS would comply in good faith with the NSA. Nor did the Executive have "sufficient visibility [into] and resources to monitor" compliance. In the Executive's view, divestment was the only solution that would adequately address its national security concerns" (page 15).

Regulation of social networks must primarily be done to maintain people's freedom of expression and to prevent AI intervention in the formulation of ideas and public debates. However, governments are likely to have an interest in limiting their role, precisely because it will be difficult for them to control opposing political opinions. Ultimately, the distinction between good and evil is made within the framework of governance analysis by examining the activities of the political environment, followed by votes that do not always satisfy the interests of various ministers.

Conclusions

Since ancient times, people have resisted and progressed by uniting their interests, which have been expressed either directly or less sincerely, within groups formed strictly for the purpose of harmonizing these goals.

The assertion of interests is made within a framework of rules, and the demographic growth of the 20th century and the early decades of this millennium has contributed to the diversification of relationships among people. Cities and towns – entities that today cover almost 60% of the planet's population (World Bank, 2023), facilitate communication among individuals, and the internet has further aided in maintaining connections between people and creating new ones, both at the national level and internationally.

Electronic social networks have reached an enormous level of penetration today, which gives their administrators a unique position both economically and politically. Not being on a social network means

diminishing the impact of one's own actions, which implies that everyone is interested in their existence and in how they organize the dissemination of messages. Implicitly, this dissemination of messages primarily interests politicians, who also have the constitutional right to create laws to regulate anything, including social networks.

I briefly presented some ideas on how these social networks should be regulated, keeping in mind the most recent court decisions on the matter. However, it must be understood that there is truly no good regulation unless it takes into account that people genuinely want freedom of expression and the ability to choose their own path in life.

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SUPREME COURT RESOLUTIONS AND THE JURISDICTIONAL INDEPENDENCE OF THE COURTS

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Abstract: *The normative positioning of the Supreme Court in Poland entitles one to conduct a twofold analysis. On the one hand, it is possible to look at this court from the functional side, understood as the procedural role of the highest judicial instance in the prism of related tasks. On the other hand, it is also possible to carry out a strictly systemic analysis, understood as a set of legal regulations outlining the position of this Court in the structure of the judiciary and the organisational solutions in force within it. The scope of analysis of this article, due to the narrowly defined nature of the study and the multiplicity of procedural legal constructions, was limited to the sphere of resolutions issued by the Supreme Court. The aim of the article is therefore to analyse a certain section of the functional role of the supreme court in Poland, precisely in the form of these specific rulings. Indeed, the Supreme Court's resolutions are a direct emanation of the essential function entrusted to it by the Polish Basic Law, but they also constitute a break from the principle of jurisdictional independence. They are, however, burdened with certain shortcomings. For this reason, legal views on their nature and the need for their existence in Polish law are sometimes extremely different.*

Keywords: *Supreme Court; judicial oversight; resolutions; uniformity of jurisprudence; organisation of the judiciary.*

Introduction

According to Article 183 of the Constitution of the Republic of Poland, the Supreme Court supervises the activities of the ordinary and

military courts in the field of adjudication, and performs the activities specified in the Basic Law and other laws. This general provision is further specified in the court's constitutional act, that is, the Act of 9 December 2017 on the Supreme Court, which entered into force on 3 April 2018. The powers of the chief justice are defined there relatively broadly, and include the administration of justice by:

1) Ensure the legality and uniformity of the jurisprudence of common courts and military courts by hearing appeals and adopting resolutions resolving legal issues,

2) Extraordinary review of final judicial decisions to ensure their compliance with the principle of a democratic state of law implementing the principles of social justice through the hearing of extraordinary complaints;

3) handling disciplinary cases within the scope of the Act;

4) to recognise election protests and ascertain the validity of elections to the Sejm and Senate, the election of the President of the Republic of Poland, elections to the European Parliament and to recognise protests against the validity of a nationwide referendum and constitutional referendum and ascertain the validity of the referendum;

5) to provide opinions on draft laws and other normative acts on the basis of which the courts adjudicate and function, as well as on other draft laws insofar as they affect matters within the jurisdiction of the Supreme Court;

6) to carry out other activities prescribed by law.

The Supreme Court has therefore been entrusted with two groups of instruments to ensure uniformity of jurisprudence. These are appeals and resolutions resolving legal issues. The most important for ensuring the uniformity of jurisprudence is undoubtedly the consideration of appeals (Sanetra, 2004, p.5-6).

1. The role of judicial oversight

For the sake of ordering further considerations, it should be pointed out that I perceive supervisory powers as a set of various types of legal measures aimed at ensuring a sovereign influence on the activities of the

court. An element of this supervision is also control, i.e. activities consisting in verification of a given state of affairs and extensive analysis of causes and effects of the results thus obtained in the context of appropriate patterns of proper conduct. The supervision of the activity of Polish common courts is itself of a diverse nature, looking from the perspective of the subject of their activity. Pursuant to Article 183(1) of the Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item 483) and Article 7 of the Act of 27 July 2001. Law on the system of common courts (Journal of Laws of 2023, item 217 j.t.), the Supreme Court supervises the activities of common courts in the area of adjudication. This adjudicatory supervision is aimed at ensuring the legality and uniformity of the common courts' jurisprudence, which, by definition, is to be done while respecting judicial independence. The Supreme Court's adjudicatory supervision of the common courts is realised primarily by adjudicating specific appeals in cases of various categories and from various branches of the law and adopting resolutions resolving legal issues (art. 1 item 1a of the Act of 8 December 2017 on the Supreme Court (Journal of Laws 2023, item 1093, i.e.). as for the supervision of the administrative activities of common courts, resulting from Articles 8(1) and 9 of the Law on the System of Common Courts, it concerns a completely different aspect, namely ensuring the proper course of the court's work, which is, after all, related to the court's performance of the tasks entrusted to it with the administration of justice and legal protection. This supervision is exercised by the Minister of Justice, which finds its legitimacy in Section I, Chapter 6 of the Act of 27 August 2009 on Public Finance (Journal of Laws of 2023, item 1270, i.e.). It should be added that Article 9b of the Law on the System of Common Courts clearly stipulates that administrative supervision activities may not encroach on the field in which judges and court assessors are independent. Consequently, activities undertaken in the course of administrative supervision may not have any impact on the judicial sphere of the court or otherwise interfere with decisions made in the course of the court's administration of justice.

The exercise of judicial supervision by the Polish Supreme Court takes place on many levels and through various procedural paths. The

most important practically in terms of ensuring the uniformity of jurisprudence, and at the same time the most frequent, is the path of cassation proceedings. It consists in the recognition by this court of extraordinary appeals in the form of cassation (formerly called extraordinary reviews). The cassation has highly formalised grounds, as it serves to challenge judgments that are already final. For this reason, the most blatant failings, in fact of two types, are included in the circle of cassation grounds. These are absolute grounds of appeal, as defined in Article 439 of the Code of Criminal Procedure, and other, but similar in rank, misconduct, which, apart from that, were of a gross nature and could have had a significant impact on the content of the ruling (Article 523 § 1 of the Code of Criminal Procedure). In order for the cassation plea alleging the occurrence of an infringement of law other than that specified in Article 439 of the Code of Criminal Procedure to be effective, it is therefore required that the author of the cassation at least demonstrate the potential consequences of this infringement, which cannot be any, but must have a qualified form, i.e. be substantial. This means that their existence should be connected with the observation that, had the given infringement not occurred, a different judgment could have been issued.

Against this background, the resolutions of the Supreme Court are of a completely different, and highly specific, nature. In the doctrine of criminal procedure, there are divergent positions already on the nature of these resolutions, and in particular whether they can be regarded as judgments at all (Kwiatkowski, 2020). They may fall in specific cases, generally as a result of questions addressed to the Supreme Court by ordinary courts (acting as appellate courts) asking for an interpretation of the law. However, resolutions may also be passed as a result of questions from the Presidents of the Supreme Court who are in charge of the individual chambers of that court or by the First President of the Supreme Court, arising from perceived discrepancies in the interpretation of a particular provision of law. Thus, there are two modes (Stefański, 2010), in which such rulings may be issued, but which have a common denominator. This is the need to interpret the law. The need for such an interpretation comes into play with respect to unclear or defectively

drafted provisions, as a result of which they are sometimes interpreted in different ways and, consequently, also applied (Boratyńska, 2009). It is worth adding here that the expression "legal question" is not used in legal acts. It is a colloquial term, substituting a request for a resolution resolving divergences in the interpretation of law in case-law, formulated by entities entitled to do so (Pilarska - Gumny, 2013). The first of the above-mentioned modes is provided for in procedural laws (the Code of Criminal Procedure, the Code of Civil Procedure), while the second is provided for in the constitutional law on the Supreme Court. Also, the resolutions of the Supreme Court are intended to ensure uniformity of jurisprudence. This is necessary in the prism of legal certainty, i.e. similar rulings issued on the basis of the same legal norms (Leszczyński, 2015).

2. Supreme Court resolutions issued following questions from the courts

Undoubtedly, in practice, the most common resolutions are those initiated by questions from the appellate courts. The basis for such questions is Article 441 of the Code of Criminal Procedure, which will be the focus of the discussion in this article. However, similar rules also apply in this respect in Polish civil proceedings. It follows from the wording of Article 390 of the Civil Code that if a legal issue giving rise to serious doubts arises during the examination of an appeal, the appellate court may submit the issue to the Supreme Court for resolution, postponing the examination of the case. The Supreme Court has the power to either take the case over for consideration or refer the issue to an enlarged panel of that court for determination. A resolution of the Supreme Court resolving a legal issue is binding in the case.

The aforementioned provisions are addressed directly to the appellate court. As far as criminal proceedings are concerned, the effective referral of a legal issue to the Supreme Court for determination requires the cumulative occurrence of three prerequisites. It must be a "legal issue" that requires a "fundamental interpretation of the law" and will emerge "while the appeal is being heard". A court that is not an

appellate court, on the other hand, can only raise a question of law if a specific provision so provides. The Supreme Court has such a right, for example, when hearing a cassation appeal, as the provisions on appeal proceedings apply accordingly (Article 518 of the Code of Criminal Procedure), as well as when a legal question has been referred to it if it wishes to submit it to the enlarged composition of that court (Article 441 § 2 of the Code of Criminal Procedure). The Supreme Court may also raise a legal question on its own if, when considering a cassation or an appeal in a case taken over for examination from a general court or in military cases, it "raises serious doubts as to the interpretation of the law" (Article 59 of the Supreme Court Act). The role of the Supreme Court cognisant of a legal question under this procedure is not to decide for other courts a particular case or a particular procedural situation. The task of the Supreme Court is to give a 'fundamental interpretation of the law', but not to give legal advice on how a particular case should be decided. The provision of Article 441(1) of the Code of Criminal Procedure, which forms the basis for the appeal court's application to the Supreme Court, concerns a procedural institution that is an exception to the principle of the court's jurisdictional independence. The appellate court is in the first instance itself obliged to interpret the provisions at stake, and if it is unable to clarify the doubts of interpretation, it can only ask the Supreme Court to interpret the law in a fundamental way. The provision of Article 441(1) of the Code of Criminal Procedure is exceptional in nature in relation to Article 8(1) of the same Code, which stipulates the principle of jurisdictional independence of the court hearing the case. It must therefore be interpreted strictly. It is clearly impermissible to resort to this institution if the question is detached from the realities of the case, especially when the appellate court has not sufficiently explored the related, objectively occurring problems of fact or law. Nor may the issues presented to the Supreme Court include, even if extremely important for the functioning of the law in practice, problems of an abstract nature. The Supreme Court is in any case obliged to examine whether the above-mentioned prerequisites for making a fundamental interpretation of a statute by adopting a resolution are met. Against this background, it is a well-established position that the effective submission of a legal question

by a court of second instance requires the cumulative fulfilment of the following conditions:

- an "issue of law", i.e. a significant problem of interpretation, has arisen in the appeal proceedings, i.e. one that concerns a provision that has been interpreted divergently in judicial practice or a provision that is drafted in a defective manner or unclearly worded, giving rise to the possibility of various opposing interpretations,
- this issue requires a 'fundamental interpretation of the law', i.e. to counteract divergences of interpretation which have already arisen in case law or which may arise therefrom, e.g. due to significant differences in doctrinal views; such divergences are detrimental to the proper functioning of the law in practice,
- the issue has arisen "in the course of the determination of an appeal" and is therefore linked to a specific case, and in such a way that the determination of the legal issue depends on the determination of the case (Stefański, 2001, pp.264-299).

Referring more closely to the above-mentioned requirements, it should be noted that this is a "significant interpretative problem, which concerns a provision that is interpreted in a divergent manner or a provision with defective drafting, unclearly formulated, giving rise to the possibility of different, opposing interpretations. This notion should also be understood as validation issues and collision resolutions concerning legal norms derived from a given editorial unit of a legal text" (Świecki, 2022). It should also be emphasised that the object of the institution specified in Article 441 of the Code of Criminal Procedure. may even be the object of the entire Act, a part of it, a set of provisions, as well as the relations of norms, contained in various legal acts. At the basis of the decision to raise a legal question "there must be doubts, which this court is not able to clarify on its own". It is also consistently assumed (Grzegorczyk, 2005, pp.295-297). that, since the content of Article 441 § 1 of the Code of Criminal Procedure assumes that the presented legal issue requiring a fundamental interpretation of the law must emerge "during the recognition of the appeal measure", thus this regulation determines not only the indispensability of the existence of a connection of such an issue with a specific case, but it also means that the resolution

of the issue must have significance for the very case remaining within the competence of the appellate court, i.e. - for the resolution of the appeal measure. The submission of a legal issue is closely linked to the scope of the appellate court's consideration of the case, and the latter is determined by the procedural realities of the specific case. The appellate court, including the Supreme Court, hearing an appeal or an extraordinary appeal, is not entitled to address questions of a hypothetical nature, even if the legal doubts presented are well-founded and concern significant problems of interpretation of the law. The appellate court is not, as a rule, entitled to raise a legal issue in this manner if the fundamental interpretation would concern a question beyond the limits of the appeal. To a broader extent, the formulation of a legal issue is only permissible if the law obliges the appellate court to take into account certain defects beyond the limits of the appeal, and the issue requiring a fundamental interpretation is precisely related to the defects that the court is obliged to take into account ex officio beyond the limits of the appeal (Article 433 § 1 of the Code of Criminal Procedure). On the other hand, the cassation court is not entitled to raise such an issue when the interpretation it seeks would be made outside the limits of the appeal and the charges raised and would not relate to the misconduct obliging the court to exceed those limits (Article 536 of the Code of Criminal Procedure). In particular, it is inadmissible to clarify in this procedure the issues whose resolution could be relevant only if it is assumed that, as a result of the decision of the court of appeal or the court of cassation, there will be a violation of the prohibition of reformationis in peius.

The adjudication of the question posed shall take place at a hearing in which the public prosecutor, defence counsels and attorneys have the right to participate. The right to attend therefore implies an obligation to notify these parties of the place and date on which the hearing will be held. By attending the session of the Supreme Court, the entitled parties have the right to express their views on the legal issue presented and to express their views in this regard.

3. Resolutions delivered following questions from the Presidents of the Supreme Court

A question submitted to the Supreme Court under Article 83(1) of the Supreme Court Act by the Chief Justice of the Supreme Court directing the work of the Chamber or the First President of the Supreme Court is a different type of institution. The request to resolve a legal question in this case is aimed at ensuring uniformity of jurisprudence. It is most closely concerned with the exercise of judicial supervision by the Supreme Court and the associated concern for the uniformity of jurisprudence. It is aptly pointed out that abstract questions (quaestiones in abstracto) are a means of judicial supervision of the Supreme Court exercised over all courts. The clarification of legal provisions in this mode is not carried out in connection with a specific case, but in the abstract, and is mainly aimed at the unification of jurisprudence, including that of the Supreme Court. Although the interpretation made under this procedure does not have a basis in a specific case, the Supreme Court undertakes it because discrepancies in case law have come to light, and the object of the resolution made under this procedure is to clarify the provisions of law whose interpretation (and not their application) has led to discrepancies in case law (Stefański, 2001, p.145). It follows from the provision of Article 83 § 1 of the Supreme Court Act that the possibility of raising an abstract legal question is subject to the following conditions:

1) there must be a discrepancy,

(2) the divergence must exist in the jurisprudence of common courts, military courts or the Supreme Court,

(3) the divergence must emerge in the interpretation of the legal provisions on which they are based.

It is the role of the entity submitting an abstract legal question to demonstrate the existence of all the conditions indicated above. This boils down to pointing to specific judgments treating the same legal issue differently and describing what specifically this divergence consists of and where it stems from (what are its sources and views). On the procedural side, the procedure itself takes place within the framework of

the principles described above. Resolutions of this type are considered to be of an abstract nature, as they are detached from the realities of the specific case. Usually, however, a specific issue is noticed in connection with doubts and dissenting decisions occurring in specific cases (Gora-Blaszczykowska, 2023, pp.208-223).

In the context of the abstract nature of the questions, however, it should be added at this point that the person who has addressed the Supreme Court with the question does not provide a simple answer as to whether the question is an abstract question or not. In other words, the subjective aspect is irrelevant to the question of whether the question is an abstract resolution or not. This is determined by the actual configuration of the case. There are, after all, occasions when the appellate courts ask for clarification of necessary constitutional issues (see, for example, the Supreme Court resolution of 27 September 2024, ref. I KZP 3/24). This, on the other hand, may not affect any situation of a party to the proceedings at all, but may be necessary for its proper resolution, for example in the prism of the principles of a fair trial. Case law of an abstract nature, on the other hand, is always outside the scope of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as it is not relevant to the rights of a party to any proceedings. This perception of this issue is explicitly indicated by the case law of the European Court of Justice of the European Union (see, for example, Order of 9 January 2024, C-658/22, ECLI:EU:C:2024:38).

Having thus outlined the aspect of the rationale and the purposes of the issuance of resolutions by the Supreme Court, it is therefore possible to turn to the issue of the jurisdictional independence of the courts, as the greatest problems arise precisely on this plane. This is because Supreme Court resolutions are an exception to the principle of jurisdictional independence of the criminal court (Boratyńska, Czarnecki, 2023).

4. Context of the court's jurisdictional autonomy

Pursuant to Article 8 § 1 of the Code of Criminal Procedure, the court is obliged to resolve factual and legal issues independently and is not bound by the decision of another court or authority. The assessment

of evidence in another case is therefore of little relevance in relation to the assessment of evidence in the case at hand. The deviation from the principle of jurisdictional independence of the criminal court is manifested in the necessity to respect the constitutive decision of the civil court and the administrative decision. On the other hand, the legal views and indications of the appellate court as to the further conduct of a given criminal case are binding on the court to which the case is referred for retrial. They are therefore of an obligatory nature, and this regardless of whether the retrial court shares them or not. By contrast, the retrial court retains autonomy in its assessment of the evidence, which it verifies in accordance with the requirements of procedure. This is a significant departure from the jurisdictional autonomy of courts, and therefore the provision establishing the principles described above (442 § 3 of the Code of Criminal Procedure) should be interpreted strictly. At the same time, the legal views of the appellate court define the boundaries of the jurisdiction of the court reviewing the case. Indications with respect to further proceedings are mainly recommendations as to the mode and advisability of conducting certain procedural actions in these proceedings. They are expressed by the appellate court so that the future judgment is the result of a correct and comprehensive consideration of all the circumstances of the case. These indications should therefore include an abstract interpretation of the interpreted provisions.

On the other hand, the wording of Article 441 § 3 of the Code of Criminal Procedure provides that a resolution of the Supreme Court is binding in a given case. This rule thus remains coherent with the solution concerning the guidance coming from the appellate court. This is a reasonable regulation, as it is impossible to reasonably assume that a resolution of the Supreme Court issued in a specific case can be ignored in the further course of proceedings. In such a situation, this court would cease to be a supreme court. However, a different solution was adopted on the grounds of the Supreme Court Act. If a panel of 7 judges of the Supreme Court finds that the importance for judicial practice or the seriousness of the doubts justifies it, it may present the legal issue in question or the motion to adopt a resolution to a panel of the entire chamber, whereas a chamber may present it to a panel of 2 or more

joined chambers or to the full panel of the Supreme Court. Resolutions of the full composition of the Supreme Court, of the composition of the combined Chambers and of the composition of the full Chamber shall, upon their adoption, acquire the force of legal principles. In turn, a composition of 7 judges may decide on its own to give the resolution the force of a legal principle. If any formation of the Supreme Court intends to depart from a legal principle, it shall submit the legal issue arising to a formation of the entire Chamber for decision. A departure from a legal principle adopted by a Chamber, the combined Chambers or the full composition of the Supreme Court shall require a new decision by resolution of the relevant Chamber, the combined Chambers or the full composition of the Supreme Court respectively. If the composition of one Chamber of the Supreme Court intends to deviate from a legal rule adopted by another Chamber, the decision shall be made by resolution of both Chambers. The chambers may submit the legal issue to the full composition of the Supreme Court for consideration. It is worth noting that which composition of the court adopted the resolution affects its legal character. Resolutions may become a legal principle and bind the entire Supreme Court, including the formations of the other Chambers of the court. This is the case irrespective of whether the legal principle in question derives directly from the law or whether it derives from a decision of the panel, i.e. in the operative part of the resolution, the panel of 7 judges included an additional statement to that effect. Resolutions with the force of a legal principle are much more significant in their effects than resolutions which do not have the force of a legal principle. Indeed, those resolutions which have not been given the force of a legal principle do not have binding force "laterally".

It should be noted that only a resolution that answers a legal question has binding force. An order refusing to answer a question does not have it. The Supreme Court is in fact entitled to refuse to answer a question if, for example, the issue does not require a fundamental interpretation of the law or did not arise during the consideration of the appeal and does not remain within the limits of the appeal. However, it does happen, and all too often, that a particular legal view is indicated in the reasons for the refusal to answer. It would be an overinterpretation to

say that this becomes binding on the questioning court, although it is usually the view of the highest instance that is adopted in the course of further proceedings. In any event, the court must not lose sight of this view as it is useful.

In other words, the institution of a legal principle was introduced in order to strengthen the scope of a resolution issued on the basis of a constitutional regulation. However, it is still the case that those resolutions which have not been given the force of a legal principle do not have binding force, and this is true even within the framework of the other Supreme Court formations. In this prism, the range of influence of the resolutions is limited. Abstract resolutions affect the jurisprudence of ordinary courts only indirectly, based on a certain authority of the highest court. Against the background of this authority, there is, of course, the risk of a decision being overturned if a concept different from that presented in the Supreme Court's position is adopted. However, this does not create a formal mechanism obliging common courts to respect the views presented in the resolutions (Ochmann, 2017, pp.23-40).

The question must therefore be raised as to whether this type of Supreme Court jurisprudence is needed?

Conclusions

The institution of Supreme Court resolutions, characterised above, is a relatively common tool in practice for resolving potential difficulties in the interpretation and application of the law. However, it is sometimes criticised, and the leading tool of questioning has become their necessity and effectiveness. Of course, we are mainly talking about resolutions issued in specific cases, as resolutions of an abstract nature have much less impact. The actual role of the institution in question, however, seems to be rather weak, as it does not, after all, free the proceedings in question from potential other errors, including those of a gross nature. This role may sometimes be even more diluted if one takes into account that dissenting opinions, presenting a different view than the one adopted in the resolution itself, may come to the resolution. A rational question therefore arises as to the sense and need for the

existence of the institution of Supreme Court resolutions. It tangibly interferes with the independence of jurisdiction of the courts, as it simply limits it. Sometimes very significantly. This is a significant negative factor of the current solution. What is more, taking into account legal views expressed in a resolution does not block a given decision from being subjected to instance review, especially in the context of possible occurrence of other, subsequent defects in the case. These may result from incorrect application of substantive or procedural law, including at the same levels as those addressed in the resolution. These deficiencies can, and must, therefore be remedied at further stages of the proceedings, including before the Supreme Court. The Supreme Court's resolution does not contribute anything against this background other than outlining a certain interpretative scheme for a specific legal problem. Often a similar scheme is outlined in an order refusing to issue a resolution, albeit without being binding. This problem (in both situations presented) can, however, be dealt with by the questioning court itself and take a particular direction. If it turns out to be contested by the parties, the court's view may be clarified at the next stage of the proceedings, in the form of an extraordinary appeal. From this point of view, the institution of Supreme Court resolutions appears unnecessary. Indeed, the role of unification of jurisprudence may be achieved by means of appeals (ordinary and extraordinary). This necessarily forces the appellate courts to be more independent in deciding the issues in question, but this does not come at the expense of interfering with their jurisdictional independence.

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INDEPENDENCE OF THE JUDGE – AS A PRINCIPLE OF CRIMINAL PROCEEDINGS

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Abstract: *The independence of the judge as a principle of criminal procedure is a fundamental element of the rule of law and of guaranteeing a fair trial. This principle ensures that the judge performs his duties without external influences or pressures, being guided exclusively by the law and his own professional conscience.*

The independence of the judge is essential for the respect of the fundamental rights and freedoms of the persons involved in the process. In conclusion, the independence of the judge is not just an abstract principle, but a practical foundation for the proper functioning of the criminal procedure. It ensures the respect of fundamental rights and freedoms, protection against abuses and maintenance of confidence in the justice system.

Keywords: *Independence, judge, criminal trial, fair trial*

Introduction

In the international context, since the beginning of the 1980s, the issue of the independence of judges and the guarantees necessary to ensure it has been examined by the United Nations. The concerns of the UN were initiated in 1980 in Geneva when a study "on the independence and impartiality of the judiciary of judges and assessors and the independence of lawyers" was discussed and examined, a study carried out by L.M. SINGHXI – who held the position of President of the Bar Association attached to the Supreme Court of India. In June 1983, in Montreal, Canada, the first world conference on the independence of the

judiciary was held, with delegates representing 24 national and international organizations from all continents. The Montreal Conference was the first meeting when the judges, with the direct support of the U.N., unanimously approved the Declaration containing a set of principles acceptable to all civilizations (nations), leading to the establishment of an independent judicial system. The act adopted by the delegated judges was entitled: "Universal Declaration on the Independence of the Judiciary" and was submitted to the ONU.

This text was transmitted in 1987 to all participating states and governments for proposals, adaptations and amendments; thus, in 1989 it was submitted for analysis within the Human Rights Committee. Another important stage in the crystallization of the principle of the independence of judges is represented by the 6th Congress of the U.N.U., held in Caracas, Venezuela, dedicated to the priority elaboration of a document that would include the guiding principles necessary for the defense of the independence of judges. From a chronological point of view, we specify that the text of the "Universal Declaration on the Independence of Justice", adopted in Montreal, was included on the agenda of the 7th Congress of the U.N.U. in Milan (Italy), where on 06.09.1985 the resolution entitled: "Fundamental Principles on the Independence of the Judiciary" was adopted, an act subsequently adopted, under the same name and in the same form, by the General Assembly of the U.N.U., on 29.11.1985, which invited governments to respect these principles and to include them in their national laws and jurisprudence.

A distinct moment in the international consecration of the principle of the independence of judges is represented by the date of 31.07.1988, when the Vienna Committee adopted: "procedures for the effective application of the fundamental principles on the independence of the judiciary." In essence, we note that the cited documents reveal the fact that an independent judiciary represents the strongest guarantee of preserving the authority of law and at the same time of guaranteeing and protecting fundamental human rights. The independence of judges can only be ensured if all relevant stakeholders are involved in actively supporting free and democratic institutions. In accordance with Article 3 of the "Fundamental Principles on the Independence of the Judiciary", it

is the judge's responsibility to decide which cases fall within his or her jurisdiction and to establish by interpretation the content of laws (legal norms – positive law).

In his capacity as protector of the Constitution and the Law, the judge is obliged to enforce compliance with the law, not to allow its fraud, by resorting to doctrines incompatible with the authority of the law. A particularly important aspect is the shaping of public opinion that supports the independence of judges, a shaping that can be achieved, mainly, through public instruction, through national and international seminars, but especially through the performance of the judiciary to enforce the authority of the law.

1. The notion of INDEPENDENCE of the judge

The notion of the independence of the judge assumes that, when deciding on a case brought to trial, he takes into account only the evidence resulting from the facts of the case (from the pending case), the constitutional and legal provisions, as well as his own sense of justice and fairness from his soul and conscience.

Therefore, it follows that any other internal or external factor that has the ability to influence the solution within the judicial decision must be considered – ab initio – contrary to the principle of the independence of judges.

In principle, we consider that, according to the international documents mentioned above, a judge is not independent in the following situations: - if the legal system obliges him, by his appointment, to judge in favor of the authorities that designated him; - if he is exposed to dismissal from office, as a result of a decision contrary to the interests of other powers constituted in the state or of any other particular body; - if he risks, in the event of a judicial decision being pronounced, being transferred to a lower position within the body of magistrates; - if the promotion of the judge depends exclusively on the discretionary will of other powers in the state; - if financial compensations are subject to other powers in the state, as well as other material or socio-cultural rights.

It is obvious that such situations prevent – de plano – the effective independence of a judge who, when he has to judge a case, will inevitably take into account these factors, which are outside the text of the applicable law, the facts of the case and his sense of justice. Selection represents a true "premise" of the independence of judges, because carried out adequately leads to the reduction of factors external to the act of justice, which can influence the resolution of cases.

Thus, as stated in international documents, the independence of judges can be guaranteed if: - before appointing a judge, the candidate's temperament, his moral strength to overcome situations and his own tendencies in the fields: religious, political, etc., were examined; - during the exercise of his office, the judge would avoid any political engagement, or in any other controversial field, as well as if he would avoid expressing his opinions in public and interfering in issues that are the competence of another power constituted in the state; - a procedure for impeachment or dismissal would be provided for in the Constitutions or in organic laws, in case it is evident that the judge was influenced in the decisions pronounced by prejudices, feelings or interests external to the case brought to trial.

The affirmation of these general principles at the national level is necessary and possible within the constitutional framework in force, because, even if the Romanian legal provisions do not include them or do not encompass all the specified instruments and provisions, we will note that according to the provisions of art. 20 (2) of the Romanian Constitution: "if there is a discrepancy between the international covenants and treaties relating to fundamental human rights, to which Romania is a party, and the internal laws, the international regulations have priority, except in the case where the Constitution or the internal laws contain more favorable provisions."

Moreover, the Committee of Ministers of the Council of Europe, through Recommendation no. R (94) 12 of 13.10.1994, drawn up on the basis of the Fundamental Principles of the Independence of the Magistrate, adopted by the General Assembly of the U.N.U., and with the opinion of the International Union of Magistrates, requested member

states, including Romania, to take measures regarding the protection of the independence, effectiveness and role of judges.

2. The role of independence in criminal proceedings

The role of independence in criminal proceedings is essential to ensure a fair, impartial and efficient justice system. The independence of the judge constitutes a central pillar in guaranteeing the fundamental rights and freedoms of the parties involved, being closely linked to respect for the rule of law and the principle of a fair trial.

A. Ensuring a fair trial

The changes that occurred domestically mainly took into account the changes that appeared in EU law regarding the applicable domestic law, starting from the idea that the legal order applicable at the level of each EU member state is subsumed under the legal order at the European level (Corsei, Ștefănoaia, 2022, p. 98, https://doi.org/10.18662/upalaw/92).

Ensuring a fair trial is a fundamental principle of criminal procedural law and the rule of law. This principle is enshrined in numerous international instruments, such as Article 6 of the European Convention on Human Rights (ECHR), as well as in national legislation, including the Constitution of Romania and the Code of Criminal Procedure.

As a premise of the rule of law, the right under analysis is considered a fundamental right of the human being. Moreover, there are authors who classify it as a principle of the organization and functioning of justice (Damaschin, 2009, p. 15).

Article 47 of the Charter of Fundamental Rights of the European Union is entitled “Right to an effective remedy and to a fair trial”. This article subsumes this right publicity, reasonable time, the independence of the court being also necessary. In addition, the independence of the court is imperative, as is its legal establishment, and the participants must have the possibility of being advised, defended and represented.

Furthermore, in order to comply with the requirements of this right, including effective access to justice, it is also necessary to ensure free legal assistance, when the persons concerned cannot bear the costs. We note that the right to a fair trial is also provided for by art. 10 of the Universal Declaration of Human Rights, providing guarantees similar to those analyzed above. As regards national law, this right is enshrined in art. 21 paragraph (3) of the Romanian Constitution and in Law no. 304/2022 on the judicial organization, in art. 8 paragraph (1) and art. 12^1. At the same time, it is provided in the Code of Criminal Procedure among the fundamental principles of criminal proceedings, expressly distinguishing between fair procedure and reasonable time (Article 8 of the Code of Criminal Procedure, published in the Official Gazette no. 486 of 15 July 2010).

The right to a fair trial is also enshrined in Article 6 of the European Convention on Human Rights. This article is considered one of the core provisions of the Convention, as a democratic society cannot be deprived of an impartial tribunal or fair proceedings, and it is also the article most frequently invoked by applicants in proceedings before the Court (Chiriță, 2008, p. 11).

We believe that it is vital that this right occupies a central place in the system of values existing in a state governed by the rule of law. The guarantees implied by a fair trial represent the way in which other fundamental rights and freedoms become effective and through whose exercise they materialize. This implies that the state must ensure respect for this right, and the judicial authorities are obliged to take into account the requirements implied by a fair trial. We can state that ensuring a fair procedure is one of the main ways in which respect for fundamental

[1] Article 8 paragraph (1) of Law no. 304/2022 on the judicial organization, published in the Official Journal no. 1102 of 16 November 2022: "Any person may address the courts for the defense of his rights, freedoms and legitimate interests in the exercise of his right to a fair trial". Article 12: "all persons have the right to a fair trial and to the resolution of cases within a reasonable time, by an impartial and independent court, established according to law".

rights is ensured for each person. The right to a fair trial contributes decisively to the achievement of justice and can be viewed from a dual perspective, namely the organization of justice and its functioning. The organization of justice presupposes the existence of principles such as the collegiality of the courts, the independence of judges, the continuity of the courts, while the functioning of the courts refers to free access to justice, the dual jurisdiction, publicity, adversarial proceedings (Damaschin, 2009, p. 30).

We can discuss whether the State's obligation to ensure this right is one of means or one of purpose. Although the Court's view is that States have been established through Art. 6 obligations of result, in the doctrine this conception is considered "hazardous", since the right to a fair trial also implies numerous positive obligations on the part of the State, which are, by their nature, obligations of means, so we cannot consider the right to a fair trial, viewed as a whole, as an obligation of result (Chiriță, 2008, p. 13).

However, we can observe, taking into account the complexity of this right, that it is difficult to establish the nature of the obligation and its definition. Another relevant aspect is represented by the premise of this indispensable right. We can consider that this is represented by free access to justice. The right to a fair trial represents a genuine guarantee right, because through it, respect for all other fundamental rights and freedoms is ensured (Ionescu, 2004, pp. 395-418).

At the same time, we can look at the right regulated by art. 6 from another perspective. First, this notion designates the set of procedural guarantees, and secondly, it refers to the existence of the right to a fair trial, which is considered, in doctrine, a guarantee with its own content, which, together with the other recognized guarantees, forms the first meaning of the notion of the right to a fair trial (Bogdan, Selegean, 2005, p. 239).

At the same time, it is considered that the guarantees found in the first paragraph of Article 6 provide the essence of the general right to a fair trial in civil and criminal matters, and those included in Article 6 paragraphs 2 and 3 represent specific guarantees of this right in criminal matters (Bîrsan, 2005, p. 397).

We can see that Article 6 of the Convention provides for both substantive and procedural guarantees. The importance of the latter is highlighted by the fact that more than half of the Strasbourg court's case law is related to the aforementioned article, and the existence of procedural guarantees is a fundamental necessity, as they allow for effective protection of established substantive rights. At the same time, the law under analysis is characterized by several implicit guarantees, such as: equality of arms, adversarial proceedings, and the reasoning of decisions. In order to analyze the guarantees conferred by Article 6 of the Convention and their applicability at the trial stage, it is necessary to define the notion of criminal charge. Based on the case law, three defining criteria can be outlined, namely "the qualification of an act as a crime in national law, the nature of the crime, the nature and severity of the sanction to be applied to its perpetrator".

These criteria also involve the analysis of the legal technique of the state in question, in the sense of establishing whether the legal text defining a certain act falls within the scope of criminal law, it being necessary to take into account the terms used in the national system in question.

B. Protection of fundamental rights

The universality of human rights, as well as the relatively homogeneous nature of the values in European states, have allowed the development of national and international systems for the protection of human rights and fundamental freedoms in the European space. The need to create minimum standards for the protection of human rights, and that of developing a common system of fundamental rights and freedoms, have led to the creation, at European level, of a remarkable legal architecture through the guarantees offered in this matter.

Thus, given that human rights are an integral part of the general principles of law, a European system for their protection has developed, a true European ius communae. In this framework, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention) has not only the role of making European norms compatible with national norms, but also of fulfilling its

own legitimizing function, starting from the set of values that are imposed on both the judge and the legislator, which, having a legal force superior to domestic norms, constitutes a point of reference for them.

As is evident from the preamble to the Charter of Fundamental Rights of the European Union (hereinafter referred to as the Charter), at Community level, it has been shown that fundamental rights have not only a function of protecting the individual, but also a function relating to public order, since they represent common judgments in matters of order and values of a society trying to find a new European identity. Making a brief comparison between the two legal documents – that of the Council of Europe and that of the European Union respectively – it is noted that the former uses the phrase human rights, while the Charter uses the notion of fundamental rights. Comparing the two legal instruments mentioned above, it results that the two phrases have a similar substance.

It should be noted, however, that the European Agency for Fundamental Rights (FRA) has revealed that the phrase fundamental rights is usually used in a constitutional framework, while the term human rights belongs to international law, as is evident from the preamble to the European Convention. In the final analysis, fundamental rights establish minimum standards to ensure that a person is treated with dignity. In this regard, for example, there are also the provisions of Art. 1 of the Charter relating to human dignity, which provide that: "Human dignity is inviolable.

This must be respected and protected." The field of criminal justice has occupied a particularly important place in this architecture, as evidenced by the multitude of conventions, resolutions, recommendations, framework decisions issued in this matter. Relevant in this regard is, for example, the fact that two of the three paragraphs of Art. 6 of the European Convention which guarantees the right of the individual to a fair trial refer to the protection of fundamental rights in criminal proceedings. Also, a large part of the case law of the European Court of Human Rights (hereinafter referred to as the European Court) concerns the protection of human rights in criminal proceedings.

The contribution of the European Court lies, on the one hand, in revealing the weaknesses of national criminal or procedural regulations

and, on the other hand, in confirming a certain European conception in criminal matters. The importance of the protection of human rights in criminal justice is evident in view of the particularly serious consequences that the opening of criminal proceedings can have on certain fundamental rights of the person against whom an accusation is made: personal liberty, the right to private or family life, domicile, personal or professional reputation, etc.

The protection of the rights of victims of crimes in criminal proceedings – by guaranteeing, for example, the right of access to justice, the right to a fair trial, the right to benefit from protection by the State, the right to compensation – is also a constant concern in the field of human rights.

Within these limits, the European trend that emerges in particular from Directive No 29/2012 of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220/JHA, namely the restoration of the necessary balance between the protection of the rights of the defendant and the rights of the victim of crime, is also included, namely, the restoration of the necessary balance between the protection of the rights of the accused and the rights of the victim of crime. Thus, according to points 2, 3 and 4 of the preamble to the above-mentioned directive, this document of secondary EU law establishes minimum standards for the protection of victims of crime that Member States may extend in order to create a broader framework for the protection of their rights.

C. Maintaining trust in the justice system

Maintaining trust in the justice system is a fundamental principle of the rule of law and a fair trial. Public trust in the justice system is essential for the proper functioning of legal institutions and for ensuring respect for the fundamental norms and principles of democracy.

The importance of maintaining trust in the justice system is achieved through:

1. Legitimacy of judicial authorities: Trust in justice is crucial for the legitimacy of courts and judicial authorities. If citizens do not trust

the impartiality and fairness of the judicial system, they may resort to other forms of dispute resolution, which can lead to a crisis of legitimacy of the rule of law.

2. Strengthening the rule of law: Trust in justice contributes to maintaining social order and stability. A justice system that is perceived as fair and efficient is essential for ensuring respect for the law and for preventing corruption or abuse of power.

3. Reducing social conflict: An efficient and reliable judicial system helps to resolve disputes in a fair manner, which reduces social tensions and prevents recourse to extrajudicial solutions such as violence or self-regulation.

4. Preventing corruption and abuse: If citizens have confidence that the justice system functions properly, the transparency and accountability of judicial authorities are greater. This prevents abuses and increases the responsibility of those involved in the administration of justice.

It is also important to highlight the aspect regarding the way to maintain trust in the justice system, which is achieved by:

1. Ensuring the impartiality and independence of the courts: Judges must be independent and make decisions based on the law and evidence, without external influences or pressure. Ensuring fair and objective justice is essential for strengthening trust.

As an example, it is necessary, following the model offered by comparative law, to amplify the role of the courts, which should analyze, on the occasion of each labor conflict, relative to the termination of an individual labor contract, the extent to which such termination could have been avoided by the employer, through various preventive methods (Corsei, Zisu, 2022, p. 152).

2. Transparency of judicial processes: Publicity of trials and judicial decisions contributes to transparency and public trust. Transparency of decisions and their justification are also essential to show that courts apply the law in a consistent and objective manner.

3. Access to justice: It is important that all citizens have equal and unhindered access to justice. If the judicial system is perceived as inaccessible or expensive, public trust may decline.

4. Combating corruption in the judicial system: Ensuring internal and external control mechanisms, such as judicial inspections and independent audits, can help prevent corruption and abuses within the courts and other judicial institutions.

5. Legal education and public information: Legal education for citizens and transparency about how the justice system works contribute to increasing public trust. Knowing legal rights and obligations helps citizens understand the process and have realistic expectations from the judicial system.

In conclusion, maintaining trust in the justice system is essential for the proper functioning of a democratic state. A transparent, impartial and accessible justice system helps to strengthen the rule of law, protect the fundamental rights of citizens and prevent abuses. Trust in justice also plays a crucial role in preventing social tensions and ensuring a climate of security and stability.

D. Prevention of abuses

Prevention of abuses in criminal proceedings is essential for the protection of fundamental rights and the maintenance of a fair justice system. This involves measures and principles designed to ensure the fairness of the process and to avoid violations of the law by the authorities or other parties involved.

Therefore, the mechanisms for preventing abuses are:

1. Independence and impartiality of the courts: Judges must be free from external influences, ensuring fair decisions that comply with the law.

2. Compliance with legal procedures: Judicial bodies must strictly follow legal provisions, avoiding violations of the rights of the parties.

3. Right to defense: Ensuring access to a lawyer and the possibility to challenge evidence contributes to the balance of the process.

4. Transparency and external control: Publicity of trials and oversight mechanisms (e.g. the Superior Council of Magistracy) reduce the risk of abuses.

5. Sanctioning violations: Applying sanctions for corruption, disciplinary offenses or violation of procedural rights.

In conclusion, preventing abuses guarantees respect for fundamental rights, the legitimacy of the justice system and public confidence in the criminal process.

Conclusions

The essence of the principle of judicial independence is the complete freedom of the judge to judge and resolve the cases brought before the court; no outsider – neither the government, nor pressure groups, nor an individual, nor even another judge – should interfere, or attempt to divert the course of justice, when a judge is conducting a case and making a decision. It is essential to find a fair balance between the need to make magistrates more accountable through various legal instruments and the objective of preserving their independence. In this regard, it is essential to create a unified framework for interpreting the constitutive elements of each individual misconduct, so that disciplinary procedures are not used as a means of coercion or induced influence on the courts and that fundamental principles of the administration of justice are not violated: the independence of the judiciary, the security of legal relations and the right to a fair trial.

More than that, in a society, legal provisions are considered the foundation on which a true rule of law can be built. Thus, legal norms will establish, through their coercive and regulatory character, a framework that governs human behavior, maintaining order and ensuring justice. The purpose of establishing these rules is essentially to guide individuals, businesses and state bodies in their interactions and decision-making processes (Zisu, Corsei, 2023, p. 189).

Therefore, in the complex activity of preventing the criminal phenomenon, in the fight waged by judicial bodies to discover crimes and identify perpetrators, the need to resort to increasingly improved means, methods, and procedures is increasingly felt (Ștefănoaia, 2023, p. 109).

As a corollary, the principle of judicial independence was not conceived for the personal benefit of judges themselves, but to protect people against abuses of power. Therefore, independence is not a privilege of judges, but a benefit of citizens.

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SOME REFLECTIONS ON THE EFFECTIVE PROMOTION OF ROMANIAN JUDGES TO THE TRIBUNALS, SPECIALIZED TRIBUNALS AND COURTS OF APPEAL UNDER LAW No. 303/2022

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Abstract: *In modern organizations, whether in the public or private sector, proactivity has become a fundamental element of success. Retaining high-performing employees is a challenge in this era of limitless careers.*

Although Romanian judges enjoy irremovability and independence according to the statute, access to higher courts by promotion is not only a personal desire and a way to facilitate professional development, but also a way for the judicial organization to ensure its performance and consequently confidence in the act of justice. The law adopted by the Romanian legislator in 2022 maintained the two forms of promotion to the higher courts, one effective and one on the spot, but established different ways of carrying out the promotion process.

This article aims to make an analysis of the way in which the process of effective promotion of judges at the Tribunals, Specialized Courts and Courts of Appeal is carried out, not only in relation to the national legislation, but also in relation to the criteria laid down in the international regulations in this field.

Keywords: *judges; legal organization; career management; promotion; promotion criteria; internal law; international documents.*

Introduction

In a democratic society, the judiciary has a fundamental role to play as it is responsible for preserving social order and has the power to decide on conflicts between different subjects of law, natural or legal persons, by applying the law (Craiovan, I., 2009, p.464-465).

Ensuring the rule of law is one of the functions of the judiciary, and judges are obliged to uphold the rule of law in their work, ensuring that every person involved in a judicial proceeding is treated equally and protected by the law regardless of their background or social status.

In this context, the state must provide the legal framework and, consequently, the guarantees that allow judges to carry out their work independently, the independence of judges being the foundation that ensures the continuity and progress of a nation. According to the Venice Commission (CDL-AD(2010)004-e – "Report on the Independence of the Judicial System Part I: The Independence of Judges", adopted by the Venice Commission at its 82nd Plenary Session – Venice, 12-13 March 2010, Study No. 494/2008, Strasbourg, 16 March 2010, § 6.), the independence of judges is neither an end in itself nor a personal privilege of judges, but is justified by the need to enable judges to fulfill their role as guardians of people's rights and freedoms".

Since the Romanian judicial system has to face numerous challenges, the legislator understood the need to adopt new regulations regarding the status of judges and prosecutors, regulations that not only respond to the new needs of society in terms of justice, but also to ensure the protection of the rule of law and the values of the European Union.

In Romania, "justice is carried out by the High Court of Cassation and Justice and by the other courts established by law" according to Art 126 Para 1 of the revised Constitution (the Romanian Constitution has been modified and amended by the Law no 429/2003 revising the Romanian Constitution, published in the Official Gazette of Romania, Part 1, no 758/29 October 2003, republished in the Official Gazette of Romania, Part 1, no 767/31 October 2003 by the Legislative Council based on Art 152 of the Constitution, updating the names and renumbering the texts) and "the judges appointed by the President of

Romania shall be irremovable, under the conditions of the law" according to Art 125 Para 1 of the Fundamental Law.

The status of judges and prosecutors is currently governed by the provisions of Law no 303/2022 (published in the Official Gazette no 1102/16 November 2022), being considered one of the cornerstones of the Romanian judicial system and should meet the European Union's requirements in terms of justice.

1. Career management and the concept of promotion

The independence of Romanian judges is linked not only to the concept of irremovability (according to Art 2 Para 2 of Law no. 303/2022 "judges who cannot be removed from office may be moved by transfer, delegation, secondment or promotion, only with their consent, and may be suspended or dismissed from office under the conditions provided for by this law"), but also the way in which they have the possibility to develop professionally, in relation to their own aspirations and abilities.

In any type of organization, public or private, professional development is closely linked to the idea of career, career development being a significant element of human resource development.

While the responsibility for how individuals plan their careers rests with each individual, it must be subsumed to how each organization understands how to tailor their jobs to meet their own needs for effective performance growth.

Career management, in this context, allows both to meet organizational development needs and to keep the best people in the system by meeting their short- and long-term professional needs (Heneman, H.G. et al., 1989, p.371, Amstrong, M., 1991, p.471, Torrington, D.; Hall, D.T, 1995, p.438).

One of the main elements in career management is promotion. In economic literature, the promotion is defined as the instrument that ensures an employee's upward progress within the organization to a higher position involving new tasks and responsibilities (Ibrir, Yasmine Aya, Çavur, Mahmut 2024, p.76). From the definition it follows that promotion has two fundamental purposes (Baker, G.P. et al., 1988,

p.593-616): the first purpose would be to select people who can carry out activities involving greater responsibility, and the second purpose is to motivate people who are at a certain level to reach the next one (Lazear, E.P.; Rosen, S., 1981, p.841-864).

Several types of promotion systems are used in contemporary organizations (Phelan, S.E.; Zhiang, Lin, 2000, p. 209-2014) namely:

- absolute or relative merit base-system (MBS), this being also the most widely used way of promotion. Under absolute MBS, the candidate must perform so as to exceed an absolute past, present or future performance level, whereas under relative MBS candidates are ranked according to their performance, regardless of their absolute performance level;
- Up-or-Out System, specific to organizations such as university, military, firms offering professional services. This system involves evaluating employees at certain intervals. Those who exceed the performance criteria will be promoted, while those who fail are dismissed from the organization.
- Seniority-based systems – allows the promotion of candidates fulfilling one of the following conditions: 1) have the most experience in the workplace; 2) have the most experience in the organization; 3) have the most experience in the field.

Unlike in private organizations where employees have more autonomy and therefore career patterns are unpredictable and non-linear (Strauss, K.; Griffin, M.A.; Parker, S.K. 2012, p. 580-598), in the judicial organization, the career model and promotion conditions are set by the lawyer, who understands the need to align individual aspirations with organizational needs and opportunities (Myers, D.W., 1986, p.881).

Archetypically, in Europe, judges' careers begin in lower courts, with reasonable expectations of promotion to higher courts, depending on performance (Georgakopoulos, Nicholas, 2000, pp.205-225).

The importance of the promotion process for judges lies in the fact that the multiplicity of tasks that judges currently perform means that decisions on their careers must consequently eliminate any elements that could allow them to be influenced and thus violate the principle of independence.

According to the Venice Commission report (available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2023)019-e), presented in July 2023, "[A] competition should be the rule for all promotions of judges in order to prevent any abuse. Also, there is the risk that the promotion procedure without competition negatively affects the development of regular promotion procedure and of its criteria which should be determined and developed by the High Council". According to the same organism, "Regular evaluations of the performances of a judge are important instruments for the judge to improve his/her work and can also serve as a basis for promotion. It is important that the evaluation is primarily qualitative and focuses on the professional skills, personal competence and social competence of the judge. There should not be any evaluation on the basis of the content of the decisions and verdicts, and in particular, quantitative criteria such".

2. Promotion of judges – international regulations

In view of the importance of the judiciary and of the administration of justice, in order to ensure the independence of the judiciary and of judges, seen individually, and not least to maintain public support and confidence, a number of instruments have been adopted over time by international bodies, including those governing the career and promotion of judges and the criteria on the basis of which they should be promoted.

In this meaning, we mention:

- *Basic Principles on the Independence of the Judiciary adopted on 6 September 1985 the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (available at https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary) which mentions in Art 13 that "Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience";
- *The Universal Charter of the Judge*, adopted by The International Association of Judges – Central Council in Taiwan on 17 November 1999 (available at https://www.unodc.org/res/ji/import/international_standards/the_universa

l_charter_of_the_judge/universal_charter_2017_english.pdf), which states in Art 5-2 regarding the promotion that "When it is not based on seniorship, promotion of a judge must be exclusively based on qualities and merits verified in the performance of judicial duties through objective and contradictory assessments. Decisions on promotions must be pronounced in the framework of transparent procedures provided for by the law. They may occur only at the request of the judge or with his consent. When decisions are taken by the body referred to Article 2-3 of this Charter, the judge, whose application for a promotion has been rejected, should be allowed to challenge the decision".

- *European Charter on the Statute for Judges* (available at https://rm.coe.int/090000168092934f) which in Art 4 contains regulations on the career of judges. According to this article, judges can be promoted either according to the seniority system, whereby judges can be promoted after fulfilling certain seniority conditions in the respective post, or according to the merit system. "When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions on promotion are then pronounced by the authority referred to at paragraph 1.3 [an authority independent of the executive and legislative within which at least one half are judges elected by their peers] hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority".

- *Recommendation CM/REC(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities* (available at https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d) states in Chapter VI, Art 44 that the "Decisions concerning the selection and the career of judges should be based on objective criteria pre – establish by law or by competent authorities. Such decisions should be base by on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity".

- *Recommendation (94)12 of the Committee of Ministers to member states on the independence, efficiency and role of judges*, adopted on 13 October 1994 (available at https://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanunteklifi/recR(94)12e.pdf) states at Principle I, let c) that "All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules".
- *Statement of Principles of the Independence of the Judiciary, adopted during the Conference of Presidents of Supreme Courts in Central and Eastern Europe*, at Brijuni, Croatia on 14 October 2015 (available at https://ceeliinstitute.org/assets/resources/ceeli_brijuni_statement_english.pdf), mentions in Art 15 that the "Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience".

3. Effective promotion of judges at the General, Specialized and Appeal Courts - internal rules – Law no 303/2022 on the statute of judges and prosecutors (published in the Official Gazette no 1102/16 November 2022)

By adopting in 2022 a new law on the status of judges and prosecutors, the Romanian legislator has tried to respond to the needs of the judicial system, but also to the expectations of citizens who still view the Romanian judicial system with distrust.

At present, the procedure for the effective promotion of judges to the Tribunals, Specialized Courts and Courts of Appeal is regulated by the provisions of Articles 127-141 of Law no. 303/2022 and involves a

competition in which both the candidates' work and their conduct are evaluated.

According to Art 127 Para 3 "The competition for the promotion of judges and prosecutors shall be organized annually or whenever necessary by the Superior Council of Magistracy with the support of the National Institute of Magistracy" and according to Para 4 of the same article the "The posts put out to competition for actual promotion (…) shall be determined separately by the Chamber for Judges and the Chamber for Prosecutors of the Superior Council of Magistracy. For effective promotion, posts shall be determined for each court or prosecutor's office, after consultation with the courts/prosecutor's offices, in accordance with human resource requirements, within the limits of existing vacancies".

The **general conditions** which a judge must meet in order to be promoted are set out in Art 128 and are as follows: have passed the last evaluation with a "very good" grade, have not been disciplined in the last 3 years, except in cases where the disciplinary sanction has been cancelled, and meet the following minimum seniority requirements, may participate in the competition for promotion:

a) 7 years of seniority as judge or prosecutor for promotion to the post or, as the case may be, the grade of judge of a tribunal or specialized court;

b) 9 years of seniority as judge or prosecutor for promotion to the post or, as the case may be, the grade of judge of the court of appeal.

With regard to seniority, the legislator has clearly stated that "The seniority must be completed by the date corresponding to the last day inclusive of the closing date for registration for the promotion competition. The period during which the person has been a judicial officer shall not be taken into account in calculating these years of service. In the case of effective promotion to the immediately superior courts, judges must have served for at least one year in the lower court (Art 128 Para 2-3).

Organizing the competition

The date and venue of the competition for the effective or on the spot promotion, the manner of holding the competition, the timetable for the competition, as well as the subjects and the competition bibliography shall be approved by decision of the Chamber for Judges of the Superior Council of Magistracy (Art 129 Para 1).

At least 60 days before the date of the competition, the posts/positions to be advertised are published on the website of the Superior Council of Magistracy and the National Institute of Magistracy, and the deadline for application is 15 days from the date of publication of the competition, applications to be submitted to the National Institute of Magistracy. According to Art 129 Para 5-6 "each candidate may make a single choice as to the type of promotion, the court or prosecutor's office to which he or she applies for effective promotion, including for the purposes of determining the subjects of the competition. In the case of actual promotion, for tribunals and courts of appeal, candidates are obliged to choose one of the specializations of the Chamber for which they have opted. By way of exception, in the case of those courts where there are several chambers for which posts have been awarded for the employment of which at least one common specialization is required, candidates who choose the common specialization may opt for one or more of these chambers, by pointing them in the order of preference".

The procedure for the effective promotion of judges to the next higher courts involves the appointment by the Section for Judges of the Superior Council of the Magistracy of an organizing committee and evaluation committees. Commission members are required to complete declarations that they "do not have a spouse, relatives or relatives up to and including the fourth degree among the candidates". According to Art 132 Para 6 "In the case of the effective promotion of judges, evaluation committees shall be set up at the level of each Court of Appeal and shall be composed of the President of the Court of Appeal, who shall also be the president of the committee, and four other judges with the specialization corresponding to the chambers in which the vacancies are advertised, proposed by the governing board of the Court of Appeal; for promotion to specialized courts or tribunals, committees may be set up in

the same way, the members of which may also be appointed from among the judges of the courts in the district of the Court of Appeal whose specialization corresponds to that of the chambers in which the vacancies are advertised".

Competition test

As for the competition, it consists, according to Art 139 Para 1 of the law, "of a test to assess the work and conduct of candidates over the last three years of actual service. The court judgments must be relevant to the candidate's work, have different subject matters and be drawn up at different stages of the proceedings. This includes judgments that have been overturned, annulled or handed down on appeal shall be attached; judgments which take note of the discontinuance, waiver or withdrawal of an appeal, the suspension of proceedings, the expiry or the annulment of an application, as well as judgments confirming a settlement between the parties, the declaration of enforceability, the confirmation of the discontinuance of proceedings or the admission of guilt shall not be taken into account".

In order to obtain the judgments to be analyzed, according to Art 139 Para 5 "the evaluation committee shall request from the courts/prosecution offices where the candidates are working the lists of the judgments delivered and drafted, respectively of the acts drafted by them in the last 3 years of actual activity, with the date and number of the judgment/act drafted, the file number, the subject matter of the case, the stage of the proceedings, the type of judgment/act, the decision delivered and with the mention that it has been dissolved/annulled/invalidated, if applicable. The lists are generated in electronic format only. In the case of candidates who, during the period under assessment, have worked in more than one court/ prosecutor's office, the lists are requested from each of these courts/ prosecutor's office".

The next step is for the "evaluation committee to establish uniform criteria for each specialization for the random selection of 10 judgments per candidate to be evaluated" (Art 139 Para 6).

According to Art 140 Para 1 "the evaluation of the work shall be performed based on the following criteria:

a) ability to analyze and summarize, coherence in expression;

b) argumentation in terms of clarity and logic, reasoned analysis of the claims and defenses put forward by the parties, compliance with the unified case-law of the High Court of Cassation and Justice and the courts of appeal;

c) respect of reasonable time limits for the disposal of cases/work and the drafting of decisions, taking into account the workload".

"On the basis of the established criteria, the evaluation committee shall carry out the selection of the judgments/acts, with the support of the organizing committee and the computer application specifically provided for this purpose by the Superior Council of Magistracy. After the selection carried out, the evaluation committee shall request the selected judgments/acts from the courts where the candidates are working. The courts shall forward the requested judgments/acts to the evaluation committee within 5 days of receipt of the addresses. Judgments/acts drawn up by the prosecutors shall also be submitted in electronic format, together with the records in the Electronic Case Management System (Art 139 Para 7-9).

The maximum score that the candidate can obtain is 60 points, i.e., a maximum of 20 points will be awarded for each of the above criteria.

The evaluation committee also requests for each candidate "the reasoned opinion of the section corresponding to the candidate's specialization from the court hierarchically superior to the one where the candidate works. The consultation is confidential and is purely advisory for the selection board" (Art 139 Para 14-15).

Candidates' conduct will be assessed in accordance with Art 140 Para 7 on the basis of the following criteria:

"(a) appropriate attitude in dealing with litigants, lawyers, experts, interpreters during the court hearing or, as the case may be, during the prosecution, supervision of criminal investigations or participation in court hearings, and in the performance of other professional duties, use of an appropriate, polite tone, avoidance of arrogant or contemptuous expressions and attitudes, ability to manage situations arising in the courtroom.

(b) the ability to cooperate with the other members of the panel and the conduct and communicate with other judges/prosecutors and staff of their own court or of superior or subordinate courts".

This assessment involves analyzing the elements set out in Art 140 Para 5:

- recordings of hearings where the panel was chaired by the candidate;
- existing data in the professional file and information requested from the Judicial Inspection on possible disciplinary offences and violations of the Code of Ethics for Judges and Prosecutors in the last 3 years of actual activity;
- and any other verifiable information about the candidate".

The maximum score that can be obtained for this assessment is 40 points, 20 points for each criterion.

For each form of assessment, "the evaluation committee awards a single total score for each candidate, with the chair of the committee mediating in case of disagreement between committee members".

The final total score is established based on Art 140 Para 9-10 namely "The evaluation committees shall draw up a reasoned report showing the scores obtained for each criterion and the total score obtained by the candidate, as well as the reasons for awarding that score. The evaluation report shall be sent to the organizing committee. The final total score obtained by each candidate is published on the website of the Council of Magistracy and the National Institute of Magistracy, with the candidates' codes".

Challenging the results

Every candidate has the possibility, on the basis of Art 140 Para 11-13, within 48 hours of publication, to contest the mark obtained, stating the reasons for the appeal.

The appeal will be decided by the Section for Judges of the Superior Council of the Magistracy. To this end, the organizing committee will ask the evaluation committee to send to the Section "the candidate's file containing all the documents on which the evaluation is based and the reasoned report of the committee". In the light of these

elements, if it considers the appeal to be well-founded, the Section will admit it and will consequently proceed to a new analysis of the candidate, in relation to the criteria provided by law. The re-evaluation procedure involves the following steps: "on a nominal evaluation sheet, each member of the section gives the corresponding scores. In this case, following the re-evaluation of the candidate, no mark awarded may be lower than that obtained in the initial evaluation. The total mark obtained following the admission of the appeal is final and is calculated as the arithmetical average of the marks awarded by each of the members of the relevant section of the Superior Council of the Magistracy present".

Final results

The final results will be communicated by the organizing committee once the appeals procedure has been completed and a list of the results will be drawn up.

The minimum pass mark is 70 points, and candidates are promoted according to the order of the averages obtained, within the number of posts that have been put out to competition and according to the candidate's choice.

Conclusions

Regarding the Romanian judicial system, the question is whether in the current legislative context it has the ability to select the best prepared candidates, taking into account meritocracy and equal opportunities for competitors, or on the contrary, the promotion model adopted by the legislator is inefficient, lacking an impartial and reliable prediction framework.

Analyzing both international standards in the field and domestic legislation, we can assess that the competition for the effective promotion of judges at the Tribunals, Specialized Courts and Courts of Appeal, by the way it is regulated, combines the two elements, namely meritocracy (professional competence) with seniority, their criteria of analysis being however insufficient to indicate the ability of the judge to perform his judicial duties with competence, namely that he has the necessary

training to accede to higher judicial positions. In my opinion, the elements that should be changed are determined, on the one hand, by the fact that the evaluation is carried out by several commissions, one at the level of each court, specialized court or court of appeal, and not by a single commission constituted at national level for each category of court and for each specialization, thus eliminating any subjective element of appreciation, and on the other hand, meritocracy cannot be strictly linked only to the way in which the court decisions are written, but it implies a real competition based on a rigorous verification of knowledge.

The solution identified by the Romanian legislator is a compromise solution, I would say, justified by the fact that in Romania, after the new regulations on the judicial system came into force, many judges who were working in these courts chose to leave the system, since they met the conditions for retirement.

In this context, the judicial organization in Romania is trying, through the new legislation, to fill the remaining vacancies, but also to promote judges who not only possess the necessary knowledge, but also, through their work, can ensure the increased efficiency of the judicial act, strengthening the independence of the judiciary and supporting the rule of law.

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NON-PAROLE PERIODS IN SOUTH AFRICA: ANOTHER REMINDER FROM THE CONSTITUTIONAL COURT IN *SITHOLE v S*, 2024

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Abstract*: The early release of offenders on parole allows them to leave prison before the expiry of the sentence and serve the remainder in the community. In South Africa, the decision to grant an offender parole was traditionally the sole function of the executive. Since 2004, courts are empowered by section 276B of the Criminal Procedure Act 51 of 1977 to postpone the release of offenders on parole until they have served a determined period, known as a non-parole period. This provision is an extension of the sentencing process and potentially limits the rights of offenders to not be deprived of liberty arbitrarily and to a fair trial. Thus, non-parole periods may only be exercised in prescribed situations when exceptional circumstances exist and the parties have been given an opportunity to be heard. However, it is evident from case law that, in practice, these requirements are not always complied with by courts. In December 2024, the Constitutional Court of South Africa in Sithole v S [2024] ZACC 31 again reminded trial courts of the requirements for the imposition of non-parole periods. Sithole demonstrates that despite 20 years of established judicial precedent, the practice of non-parole periods in South Africa remains non-compliant with the legal framework. This leaves offenders at risk of unjustifiable violations of their constitutional rights and warrants legislative intervention.*

Keywords: *parole; non-parole period; early release; prisoners' rights; sentencing; fair trial; Sithole; South Africa.*

Introduction

Parole is the conditional early release of prisoners before the expiration of their sentences. It allows offenders to serve the remainder of their sentences in the community. Ordinarily, parole is informed by factors before and after sentencing including the seriousness of the offence and the conduct of an offender during their imprisonment. Section 276B of the South African Criminal Procedure Act (Act 51 of 1977) allows sentencing courts to impose a restriction on the eligibility of an offender for parole by determining a period within which parole may not be considered. This period, known as the non-parole period, means that an offender will spend a longer period in prison before they may be considered for possible release on parole by the Correctional Supervision and Parole Board. This postponement of parole by courts has the potential to infringe the constitutional rights of offenders such as the right to liberty and a fair trial in sections 12 and 16 of the Constitution (Constitution of the Republic of South Africa, Act 108 of 1996). Commendably, courts have developed restrictive requirements on the circumstances and procedure relating to non-parole periods. However, the practice of non-parole periods in South Africa is fraught with problems characterised by non-compliance with these requirements, attracting frequent censure from appellate courts. The South African Constitutional Court in *Sithole v S* (*Sithole v S* [2024] ZACC 31) considered yet another challenge against the validity of a non-parole period imposed by the High Court. The court again reminded trial courts of the preconditions for and human rights implications of non-parole periods.

This contribution discusses *Sithole* and its significance in reiterating the non-negotiable principle that non-parole periods must be imposed sparingly and that the right to a fair trial obliges a court to hear an offender before imposing an adverse order that results in a stiffer punishment. *Sithole* emphasises the importance of constitutional rights in the criminal process, including sentencing and its execution. The paper proceeds with an overview of the legal framework for non-parole periods before examining S*ithole* and its relevance to the discourse on non-parole

periods in South Africa.

Legal framework for non-parole periods

Parole is a fundamental part of the South African correctional system (*Mazingane v Minister of Correctional Services* [2024] ZAGPJHC 1092 para 70; *Motsemme v Minister of Correctional Services* 2006 (2) SACR 277 (W) 285). It promotes the rehabilitation and social reintegration of the offender into society (*Van Vuren v Minister of Correctional Services* 2010 (12) BCLR 1233 (CC) para 51). Parole is informed by both retrospective and prospective factors such as the seriousness of the offence, the behaviour of an offender during their sentence, and the possibility of rehabilitation and reintegration into society. Although parole is not a right but a privilege (Mujuzi, 2011, pp. 204, 207-209),[1] an offender has a right to be considered for release once they meet the eligibility criteria.[2] Section 73(6)(a) of the Correctional Services Act (Act 111 of 1998) sets out two requirements for parole eligibility. The first is that a prisoner must serve at least half of the sentence imposed by the court. The second requirement is that a prisoner must serve the full non-parole period set by a court under section 276B of the Criminal Procedure Act.

The judicial power to determine non-parole periods in section 276B was introduced by section 22 of the Parole and Correctional Supervision Amendment Act (See Act 87 of 1997), effective since October 2004. Section 276B shifted established parameters for the separation of powers relating to sentencing. The imposition of a sentence is primarily a judicial function; a sentence only binds the maximum period a prisoner may serve in a prison. Meanwhile, the determination of the actual length of a

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[1] *Du Preez* v *Minister of Justice and Correctional Services* 2015 (1) SACR 478 (GP) para 12; *Combrink v Minister of Correctional Services* 2001 (3) SA 338 (D) 342..

[2] *Van Gund v Minister of Correctional Services* 2011 (1) SACR 16 (GNP) para 11; *Mohammed v Minister of Correctional Services* 2003 (6) SA 169 (SE).

sentence to be served in prison is traditionally an executive decision.[1] Thus, whether and when to release an offender on parole is an executive function[2] and, in South Africa, exercised by the Department of Correctional Services.

Before the enactment of section 276B, South African courts were generally wary of recommending a minimum period that an offender must serve before consideration for parole. Such recommendations were regarded as an interference with executive functions and were to be made sparingly when triggered by exceptional circumstances.[3] In *S v Mhlakaza*, the Supreme Court of Appeal (SCA) stated that while the role of a sentencing court is to determine the maximum sentence that an offender may serve, it has 'no control over the minimum or actual period served or to be served'.[4] These sentiments were later echoed in *S v Botha* where the SCA characterised a recommendation by a court that an offender serves two-thirds of their sentence before consideration for parole as 'an undesirable incursion into the domain of another arm of the state' with a potential 'to cause tension between the Judiciary and the executive'.[5]

Ironically, in response to these reservations with fixing non-parole periods, section 276B was enacted to grant legislative authority for courts to exercise some control over parole eligibility. The provision empowers a court to postpone the eligibility of an offender for parole through the imposition of a non-parole period. Section 276B reads:

> 1(a). If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

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1 *S v Botha* 2006 (2) SACR 110 (SCA) para 25.
2 *S v Botha* 2006 (2) SACR 110 (SCA) para 25.
3 *S v Mhlakaza* 1997 (1) SACR 515 at 521.
4 *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 521. See also *S v Matlala* 2003 (1) SACR 80 (SCA) para 7.
5 *S v Botha* 2006 (2) SACR 110 (SCA) para 25.

(b). Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

2. If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(b), fix the non parole-period in respect of the effective period of imprisonment.

This provision allows a court to fix a period during which the accused cannot be released on parole.[1] The SCA in *S v Pakane* observed that the intention of section 276B is to permit courts to 'control the minimum or actual period to be served by the convicted person'.[2] The provision is only applicable where an offender is sentenced to two years or more.[3] Where an offender is convicted of multiple offences and the sentences are ordered to run concurrently, the court may fix a non-parole period in respect of the effective sentence.[4] Non-parole periods must not exceed two-thirds of the sentence or 25 years, whichever is the shorter.[5] Therefore, as held in *S v Mhlongo*,[6] non-parole orders that effectively deny an offender a chance of ever being released on parole are a misdirection and unlawful.[7]

The imposition of a non-parole period is part of the sentencing phase of a criminal trial.[8] In practice, section 276B is understood to permit a court to extend the statutory non-parole periods (Terblanche, 2016, p. 259).[9] It, therefore, constitutes an increased sentence in that an

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1 Section 276B(1)(a) of the Criminal Procedure Act.
2 *S v Pakane* 2008 (1) SACR 518 (SCA) paras 46–47.
3 Section 276B(1)(a) of the Criminal Procedure Act.
4 Section 276B(1)(c) of the Criminal Procedure Act.
5 Section 276B(1)(b) of the Criminal Procedure Act.
6 *S v Mhlongo* 2016 (2) SACR 611 (SCA).
7 *S v Makhokha* 2019 (2) SACR 198 (CC); *S v Ntozini* 2017 (2) SACR 448 (ECG) paras 18 and 19; *S v Kodisang* [2015] ZAGPPHC 490 para 10.2.
8 *S v Mhlongo* 2016 (2) SACR 611 (SCA) para 5.
9 *S v Makgopa* 2023 (2) SACR 208 (GJ) para 31.

offender is denied a chance to be considered for early release until later in their sentence.[1] Consequently, the imposition of a non-parole period must accord with constitutional rights such as the right to a fair trial.[2]

The power to impose a non-parole period is discretionary (de Williers, 2015, pp. 513-521).[3] A court is not obliged to impose a non-parole period in each case that it orders a sentence of more than two years as stipulated in section 276B(1)(a).[4] Section 276B is an 'unusual'[5] and 'exceptional'[6] provision that should be not be invoked lightly.[7] When imposing non-parole periods, a court predicts the future status of an offender based only on the present facts at the time of sentencing.[8] Indeed, *S v Bull; S v Chavulla* describes a non-parole period is a determination in the present for the future behaviour of the offender that they do not deserve being released on parole in future.[9] This pre-mature determination penalises offenders from suitability for parole although such suitability must also consider their conduct after sentencing.[10]

Aware of the adverse implications of non-parole periods, South African courts have developed two requirements to restrict the use of section 276B. The requirements relate to the circumstances in which the power to impose a non-parole period may arise, the facts relevant to its

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1 *Senwedi v S* 2023 (4) BCLR 449 (CC) para 24; *S v Botha* 2006 (2) SACR 110 (SCA) para 26.

2 Cf *S v Makgopa* 2023 (2) SACR 208 (GJ) para 31 where Wilson AJ in *S v Makgopa* opined that section 276B can also be used to impose a lower non-parole period than would normally attach to a particular term of imprisonment

3 *Mthimkhulu v S* 2013 (2) SACR 89 (SCA) paras 14 and 16.

4 *Mhlongo v S* [2025] ZAKZPHC 17 para 8.

5 *S v Stander* 2012 (1) SACR 537 (SCA) para 16.

6 *S v Mhlongo* 2016 (2) SACR 611 (SCA) para 5.

7 *Strydom v S* [2015] ZASCA para 15; *Tutton v S* [2019] ZASCA 3 para 6.

8 *S v Ntozini* 2017 (2) SACR 448 (ECG) para 15.

9 *S v Bull; S v Chavulla* 2001 (12) SACR 681 (SCA) 692, 693, and 697; See also *Strydom v S* [2015] ZASCA 29 para 16.

10 *S v Ntozini* 2017 (2) SACR 448 (ECG) para 15.

exercise, and the procedure to be followed in its imposition. The first requirement is that non-parole periods must only be imposed in exceptional circumstances[1] based on facts 'that would, after the imposition of sentence, continue to result in a negative outcome for any decision to be made concerning parole'.[2] Courts must exercise care and caution when determining the existence of exceptional circumstances.[3] *Strydom v S* instructs that exceptional circumstances must be established through 'investigation and a consideration of salient facts, legal argument and … further evidence upon which such a decision rests'.[4] While there is no definitive list of what constitutes exceptional circumstances,[5] they are more than mere repetition of aggravating factors. Indeed, the SCA in *S v Stander* held that exceptional circumstances must be specifically relevant to parole in addition to any aggravating factors.[6] A court must give reasons that explicitly set out a proper evidential basis for a finding that such circumstances exist and warrant a non-parole period in each case.[7]

The second requirement for the imposition of a non-parole period is procedural: a court must notify and invite the parties to make submissions on the propriety and length of a non-parole period.[8] This requirement is an extension of an offender's right to make submissions in mitigation of sentence. In *S v Dzukuda; S v Tshilo*, the Constitutional

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1 *Mhlongo v S* [2025] ZAKZPHC 17 para 12; *Ndlovu v S* [2023] ZAGPPHC 1804 para 8; *S v Makhokha* 2019 (2) SACR 198 (CC); *S v Sidyno* 2001 (2) SACR 613(T); *S v Jimmale* 2016 (11) BCLR 1389 (CC) paras 20 and 24.

2 *S v Ntozini* 2017 (2) SACR 448 (ECG) para 16

3 *S v Paul* 2006 (2) SACR 101 (C) para 15.

4 *Strydom v S* [2015] ZASCA para 16.

5 *S v Paul* 2006 (2) SACR 101 (C) para 15*; S v Williams; S v Papier* 2006 (2) SACR 101 (C).

6 *S v Stander* 2012 (1) SACR 537 (SCA) para 20.

7 *Madolwana v S* [2013] ZAECGHC 67 para 11; *S v Stander* 2012 (1) SACR 537 (SCA) para 20; *S v Paul* 2006 (2) SACR 101 (C) paras 18 and 19.

8 *S v Stander* 2012 (1) SACR 537 (SCA) para 22.

Court held that at the sentencing stage, the right to a fair trial requires a procedure which allows an offender to present all potentially mitigating factors for consideration.[1] Therefore, requiring parties to be heard when a court contemplates a non-parole period promotes the right to a fair trial and enables proper judicial consideration of whether exceptional circumstances exist and the appropriate duration of the period.[2] A failure to comply with these requirements is a material misdirection.[3] Further, a failure to afford the parties an opportunity to address the court may infringe the right to a fair trial.[4]

With the legal framework for non-parole periods outlined, *Sithole* will now be examined.

Facts in *Sithole*

The applicant and his co-accused were convicted by the High Court of robbery with aggravating circumstances and four counts of attempted murder.[5] He was sentenced to 20 years for robbery and 10 years for each count of attempted murder. The sentences for attempted murder were ordered to run concurrently, resulting in an effective sentence of 30 years' imprisonment. Without inviting the parties for legal argument on the non-parole period, the court imposed a non-parole period of 20 years.

Aggrieved, the applicant approached the Full Court of the Pietermaritzburg High Court for leave to appeal the convictions and sentences. However, leave was only granted against the convictions

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1 *S v Dzukuda; S v Tshilo* 2000 2 SACR 443 (CC) paras 10-12.

2 *S v Mogaga* 2014 JDR 0582 (GSJ); *S v Mhlongo* 2016 (2) SACR 611 (SCA); *S v Pauls* 2011 (2) SACR 417 (ECG) para 15; *Madolwana v S* [2013] ZAECGHC 67 para 11.

3 *Strydom v S* [2015] ZASCA 29 para 11.

4 *S v Ntozini* 2017 (2) SACR 448 (ECG) para 18 and 19; *Strydom v S* [2015] ZASCA 29 para 17; *Mthimkhulu v S* 2013 (2) SACR 89 (SCA) para 21.

5 The facts and history of the case are summarised in paras 1-17 of S*ithole v S* [2024] ZACC 31.

which were then confirmed. Further leave to the High Court against the sentence was denied and a subsequent petition for special leave to the SCA was also unsuccessful. The applicant then turned to the Constitutional Court to challenge the convictions and the non-parole order.

Legal issues before the Constitutional Court

The court had to determine whether the non-parole order imposed by the High Court was appropriate and, if not, an appropriate remedy. The applicant argued that the convictions were not supported by the facts and that the non-parole order was unfairly imposed. The state did not oppose the challenge against the non-parole order. It contended that the High Court erroneously imposed the order since there were no exceptional circumstances to justify it. The state further argued that the non-parole order was improper because the High Court failed to give the parties an opportunity to be heard on the matter.

The Constitutional Court judgment

Writing for a unanimous court, Mhlantla J ruled that it lacked jurisdiction to entertain the appeal against conviction as the applicant complained about the factual findings of the High Court.[1] Therefore, the application for leave to appeal against the convictions was dismissed. On its jurisdiction to deal with the appeal against sentence, the court relied on its earlier decision in *Jimmale* to hold that the power of a court to impose a non-parole period is a constitutional issue.[2] This is because non-parole orders have the potential to limit the right to not be deprived of

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1 The Constitutional Court does not entertain disputes of fact.

2 *Sithole v S* [2024] ZACC 31 paras 25 and 26.

liberty arbitrarily or without just cause,[1] and the right to benefit from the least severe punishment.[2]

The court stressed that non-parole periods may only be imposed if a trial court fulfils two requirements: it must establish the existence of exceptional circumstances justifying the non-parole period and afford the parties a chance to address it on the matter.[3] A failure to meet these requirements amounts to a material misdirection.[4]

Turning to the facts, the Constitutional Court noted that the High Court had not afforded an opportunity to the parties to make representations before invoking its powers to impose the non-parole order[5] and that there were no exceptional circumstances warranting the order.[6] It further ruled that failure to grant parties an opportunity to address the propriety of a non-parole order rendered it irrelevant whether the High Court had established the existence of exceptional circumstances warranting the non-parole order.[7] This is because both requirements must be met for the lawful exercise of the powers under section 276B. Therefore, the court concluded, the High Court had not been entitled to impose the non-parole period. In the result, the Constitutional Court quashed the non-parole order.[8]

Mhlantla J also highlighted the impact of the non-parole period on the applicant. The judgment notes that the Department of Correctional Services was yet to consider the applicant for parole although he had served 18 years of his sentence.[9] In terms of section 73(6)(a) of the Correctional Services Act, the applicant would have been entitled to consideration for parole after serving half of the sentence, being 15 years

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1 Section 12(1)(a) of the Constitution.
2 Section 35(3)(n) of the Constitution.
3 *Sithole v S* [2024] ZACC 31 para 27.
4 *Sithole v S* [2024] ZACC 31 para 27.
5 *Sithole v S* [2024] ZACC 31 para 29.
6 *Sithole v S* [2024] ZACC 31 para 30.
7 *Sithole v S* [2024] ZACC 31 para 31.
8 Footnote 5 in *Sithole v S* [2024] ZACC 31.
9 *Sithole v S* [2024] ZACC 31 para 31.

in this case. 'But for the order, it is possible that he would have been considered for parole after serving half of his sentence.'[1]

Obiter, the Constitutional Court also made some observations on whether section 276B permitted the calculation of a non-parole period based on the effective sentence comprising of the sum of consecutive and concurrent sentences imposed on an offender.[2] It noted that the provision does not envisage a non-parole period based on the cumulative effective result of sentences which do not run concurrently. The court stated that section 276B creates the possibility of a non-parole period in two scenarios. The first obtains in section 276B(1) where a court may impose a non-parole period for a sentence in respect of a single offence. The second scenario is in section 276B(2) which states that where sentences for two or more years are ordered to run concurrently, a court may impose a non-parole period for the resulting effective sentence. There is no provision, the court continued, for imposing a non-parole period based on an effective sentence that does not result from concurrent sentences. Despite these observations, the court refrained from drawing any conclusions on the matter because the issue was not before it.

Discussion

Sithole underscores that that constitutional rights are pertinent to sentencing. Specifically, it reiterates that the right to a fair trial applies to the sentencing process, including any decisions that affect its implementation. *Sithole* also demonstrates continued problems with the practice of non-parole periods in South Africa. The decision does not establish new legal principles; rather, it is a reminder of settled jurisprudence on the judicial approach to non-parole periods. It is worrisome that over two decades since the introduction of section 276B,

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1 *Sithole v S* [2024] ZACC 31 para 31.
2 The remarks are in footnote 5 of *Sithole v S* [2024] ZACC 31.

non-compliance with the fixing of non-parole periods persists amidst generous judicial precedent.

Sithole illustrates that the requirements for the fixing of non-parole periods are conjunctive; courts must ensure that both requirements are met in that exceptional circumstances exist and the parties are heard. These requirements originate from before 2004 when non-parole periods were merely recommendations made to the Department of Correctional Services. They signify the continued need for restraint in the use of non-parole periods by courts. *Sithole* emphasises that only in exceptional circumstances should a court impose a non-parole period, and even then this power is only triggered by factors relevant to parole beyond the existing aggravating factors of the crime committed. Further, both the state and the defence must be granted an opportunity to present legal arguments on whether and for how long a non-parole period is warranted. Courts have a duty to provide clear and substantial reasons for a non-parole period. Otherwise, the non-parole period will be invalid. Given the impact of non-parole periods on prisoners' rights, courts must not be too keen to exercise their discretion in an adverse manner.

The continued disregard of settled legal principles by courts when invoking their powers to impose non-parole periods severely undermines the constitutional rights of offenders. Non-parole periods affect the rights of offenders including their right not to be deprived of liberty arbitrarily or without just cause,[1] and the right to benefit from the least severe prescribed sentence.[2] They are inherently prejudicial to offenders and prematurely decided since, ordinarily, parole also depends on factors present well after the sentencing phase. For instance, the behaviour of offenders while serving their sentences is a relevant factor yet completely impossible to consider at the time of sentencing.[3]

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1 Section 12(1)(a) of the Constitution.

2 Section 35(2)(n) of the Constitution.

3 The general framework for parole is governed by the Correctional Services Act and other policies. For instance, see *Walus v Minister of Justice and Correctional*

Generally, courts must defer parole decisions to the Department of Correctional Services as they are best placed to make proper determinations.[1] This deference also aligns with the doctrine of separation of powers.[2] If anything, as the Constitutional Court remarked in *S v Makhokha*, courts must be slow to impose non-parole periods.[3] The executive, through the Department of Correctional Services, is better placed to decide on parole matters as dictated by the principle of the separation of powers (Terblanche, 2022, pp. 412, 414-5). The judiciary must retain an oversight role over parole decisions by the executive as it has done in multiple instances like *Maifadi v Minister of Correctional Services*,[4] *Anderson v Minister of Justice and Correctional Services*,[5] and *Walus v Minister of Justice and Correctional Services*.[6] This oversight ensures proper checks and balances for the protection of prisoners' rights in South Africa.

Lastly, the Constitutional Court in *Sithole* is right in its obiter observations that the legal framework in section 276B does not cater for a non-parole period calculated on a combined effective sentence emanating from sentences that have not been ordered to run concurrently. This position is quite clear from the wording of section 276B which creates a non-parole period as part of a single sentence for a single

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Services 2023 (2) SA 473 (CC); *Barnard v Minister of Justice, Constitutional Development and Correctional Services* 2016 (1) SACR 179 (GP) paras 19 to 28.

1 *Makena v S* 2011 (2) SACR 294 (GNP) 299.

2 *S v Botha* 2006 (2) SACR 110 (SCA) para 25.

3 *S v Makhokha* 2019 (2) SACR 198 (CC) para 11.

4 *Maifadi v Minister of Correctional Services* [2025] ZAGPPHC 169.

5 *Anderson v Minister of Justice and Correctional Services* [2024] ZAGPPHC 1355.

6 *Walus v Minister of Justice and Correctional Services* 2023 (2) SA 473 (CC). See also *Ndhlovu v Correctional Supervision and Parole Board, Kgosi Mampuru II Central* [2024] ZAGPJHC 1265; *Nyamakazi v Head of Modderbee Correctional Centre* [2024] ZAGPPHC 1280; *Mahlangu v Minister of Justice and Correctional Services* [2024] ZAGPPHC 1253; *Malatji v Head of Prison Female Centre: Department of Correctional Services* [2024] ZAGPJHC 1181; *Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412 (GP).

offence[1] and as part of an effective sentence resulting from concurrent sentences for multiple offences.[2] This means that in a scenario like *Sithole*, the High Court should have considered two separate non-parole periods: one for the 20-year sentence for armed robbery and another for the effective 10-year sentence for the attempted murder convictions since these were ordered to run consecutively. This aligns with the requirement in section 39(2)(b) of the Correctional Services Act that non-parole periods must be served consecutively. The inevitable result then was that the High Court's 20-year non-parole period based on the cumulative 30-year sentence was erroneous. Should the Constitutional Court have formally queried this aspect of the High Court order to set it aside? The Court aptly stated that this aspect of section 276B was not before it. In any case, there was already ground to set the non-parole period aside.

Conclusions

Non-parole periods imposed by courts under section 276B of the Criminal Procedure Act intrude on the executive function to determine the early release of offenders from prison. Sentencing courts lack adequate information to foretell an offenders' future eligibility for parole. Therefore, courts must exercise restraint in invoking section 276B in clearly established exceptional circumstances and only after the benefit of input from the state and defence. These safeguards mitigate against the overuse of non-parole periods by courts and ensure that the rights of offenders to liberty and a fair trial are protected in the criminal process. Evidently, *Sithole* demonstrates that South Africa faces sustained practical challenges of non-compliance by courts which flout established principles guiding the use of non-parole periods. The time is ripe for the Legislature to amend section 276B to incorporate compliance requirements developed through case law. Better still, South Africa must

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1 Section 276B(1)(a).
2 Section 276B(2).

consider repealing the provision altogether to firmly place parole decisions primarily in the executive and let the judiciary take its rightful role of oversight.

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EXTRADITION - ONE OF THE OLDEST FORMS OF INTERNATIONAL COOPERATION

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Abstract: *Extradition is a form of international cooperation in criminal justice and is based on the fact that each country accepts the decisions of courts in other countries. Each country has different views on different crimes and how they should be investigated and punished. The purpose of extradition proceedings is not to establish whether or not a person is guilty of the act on which the extradition warrant is based. This is a problem that will only be resolved after the wanted person has been brought back to the country that issued the request. The European Arrest Warrant operates on the principle of mutual recognition: judges are obliged to treat the warrant at face value without regard to the facts set out in the warrant or to require the issuing State to show that it has sufficient evidence to handle the case. EU countries also have no right to refuse to extradite their nationals under the European Arrest Warrant procedure.*

Keywords: *extradition; arrest warrant; mutual recognition.*

Introduction

Extradition was, in the beginning, more of a gesture of courtesy from one Sovereign to another Sovereign, allowing monarchs to punish their personal enemies who had taken refuge in another state's territory. The few conventions governing extradition were negotiated and

concluded almost exclusively in the interests of sovereigns. The monarch of the requested state decides in a discretionary manner whether or not to grant extradition. The decision largely depended on the nature of the relations with the requesting state, on the desire of the sovereign to determine a possible positive decision on an extradition request made by him, the person to be extradited being taken into account only to a small extent.

Even in these conditions, extradition was used very rarely in the Middle Ages, considering the significant isolation of the states and the existing tradition in relation to the right of asylum.

And in the following period, extradition remained at the discretion of the Sovereign, to whom each individual was subject.

After the fall of the Stuart dynasty in England and the establishment of the constitutional and parliamentary monarchy, the concepts of "State" and "individual" began to appear. The State begins to detach itself from the Sovereign, and the individual becomes a subject of the State, and not an object.

The Philadelphia Declaration of 1776, as well as the Declaration of the Rights of Man and Citizen of August 26, 1789, adopted in France, established new principles, starting from the idea that people are born free and equal, up to the principle that no one can be accused, arrested or detained, except in the cases determined by law and according to the forms prescribed by it.

At the end of the Age of Enlightenment, the practice of concluding extradition conventions based on certain framework principles spread more and more.

In the 19th century, more and more such agreements were concluded. One of these is the extradition convention between Romania and Great Britain, concluded in 1893.

The two world wars showed that it is absolutely necessary for sovereign States to cooperate with each other, so international organizations were created: the United Nations, the Council of Europe, the European Economic Community, etc.

In this context, in the field of extradition, bilateral treaties have increasingly been replaced by multilateral ones".

In the Romanian system, considering the imperative provisions of art. 19 para. 4 of the Constitution, according to which extradition is decided by the judiciary, the role of the Ministry of Justice is circumscribed by the constitutional framework and essentially consists of:

- the examination of international regularity (verification of the compliance of the request with the applicable treaty) carried out before the referral to the judicial authorities, in the case of passive extradition, and, respectively, after the conclusion of the court establishing that the legal conditions are met to request extradition, in the case of active extradition;
- drawing up and submitting the extradition request;
- the execution, together with the Ministry of Administration and Interior, of the final decision on extradition, approval of the transit. In all cases, however, the mechanism provided by Law no. 302/2004, in order to comply with the provisions of the Constitution, is constructed in such a way that the court has the final decision, not only in the case of passive extradition (from Romania), but also in the case of extradition requests made by Romania.

Analysis of the extradition institution

Starting from the definition of extradition as an act of sovereignty of the requested state, the central authorities, usually the ministries of justice, have a very important role in this matter. In the vast majority of states, extradition is decided by an executive authority (for example: the US State Department, the Council of Ministers in France and Spain, the Government in Sweden, the Minister of Justice in Canada, Italy) based on a judicial decision with the role of notice

In Romania, extradition is regulated in the Constitution in art. 19, in the Criminal Code in art. 9 and in Law no. 302/2004 regarding international judicial cooperation in Title II - "Extradition", law amended and supplemented by Law no. 224/2006.

In the Romanian system, considering the imperative provisions of art. 19 para. 4 of the Constitution, according to which extradition is decided in court, the role of the Ministry of Justice is circumstantial to the constitutional framework and consists, in essence, in: the examination of international regularity (verification of the compliance of the request with the applicable treaty) carried out prior to notification to the judicial authorities, in the case of passive extradition, and, respectively, subsequent to the conclusion of the court establishing that the legal conditions are met to request extradition, in case active extradition; drawing up and submitting the extradition request; the execution, together with the Ministry of Administration and Interior, of the final decision on extradition, the approval of the transit.

In all cases, however, the mechanism provided by Law no. 302/2004, in order to comply with the provisions of the Constitution, is constructed in such a way that the final decision is taken by the court, not only in the case of passive extradition (from Romania), but also in the case of extradition requests made by Romania.

The extradition procedure provided for by Law no. 302/2004 on international judicial cooperation in criminal matters, as amended by Law no. 224/2006, is as follows:

A. Active extradition procedure

1. Conditions for requesting extradition

According to the provisions of Law no. 302/2004, with subsequent amendments and additions[1], in order for Romania to be able to request the extradition of a person located on the territory of another

[1] Art. 64 para. (2) of the law provides that: "apart from the condition regarding the severity of the punishment provided for in art. 28, an additional condition for Romania to be able to request the extradition of a person, in order to carry out the criminal prosecution, is that the criminal action be initiated against that person, under the conditions provided by the Code of Criminal Procedure".

state, it is necessary that, in addition to the conditions provided for in art. 28[1], in the criminal investigation phase, criminal action should be initiated against that person, in accordance with the existing criminal procedural rules.

2. Extradition request procedure

The competence to draw up and submit the extradition request on behalf of the Romanian state rests with the Ministry of Justice.

When the competent Romanian judicial authorities have issued, against a person, a warrant for preventive arrest or a warrant for the execution of a prison sentence or for the execution of a safety measure, they will request the extradition of the foreign state, in whose territory it was located, in all cases where the conditions of the extradition law are met (Boroi, Rusu, 2008, p. 259). If a warrant for preventive arrest or execution of the sentence cannot be carried out, as the defendant or the convicted person is no longer on the territory of Romania, the court that issued the warrant for preventive arrest or the executing court, as the case may be, at the proposal of the prosecutor notified for this purpose by the police bodies, issues an international investigation warrant with a view to extradition, which is sent to the Center for International Police Cooperation within the Ministry of the Interior and Administrative Reform, in order to be broadcast on the specific channels.

The international extradition warrant contains all the elements for the identification of the wanted person, a summary of the factual situation and data on the legal framework of the facts. Also, the international arrest warrant can also contain the request for provisional arrest with a view to extradition. The alert entered in the Schengen Information System is equivalent to an international warrant for extradition to the Schengen area. After receiving the international

[1] Art. 28 of the law provides that: "extradition is granted by Romania, with a view to criminal prosecution or trial, for acts the commission of which attracts, according to the legislation of the requesting state and Romanian law, a custodial sentence of at least one year, and in in view of the execution of a sentence, only if it is at least 4 months".

extradition warrant issued by the competent court, the Center for International Police Cooperation will undertake all measures through its international structures, in order to identify and locate the person pursued by the Romanian state. After the identification and location of the wanted person, the Center for International Police Cooperation will inform the Ministry of Justice or directly the enforcement court or the court that issued the warrant, which establishes through a reasoned conclusion whether the conditions provided for requesting extradition are met. Regarding the term and procedure, according to the provisions of the law, the International Police Cooperation Center has the obligation to inform the executing court or the court issuing the preventive arrest warrant, as soon as the similar competent authority notifies it that the person who is the subject of the warrant has been located. The information will be sent directly with a copy to the Ministry of Justice.

After receiving the information mentioned above, the court pronounces by conclusion, in the council chamber, given by a single judge, with the participation of the prosecutor and without summoning the parties. For preventive purposes, with the idea of preserving confidentiality, the law provides that the conclusion is not pronounced in a public meeting and is recorded in a special register. This conclusion can be appealed by the prosecutor within 24 hours of the pronouncement, the file being submitted to the court of appeal also within 24 hours. The appeal is judged within 3 days, and the court will return the file to the first instance within 24 hours of the resolution of the appeal. The final conclusion by which it was established that the necessary conditions for the extradition request are met shall be immediately communicated to the Ministry of Justice.

With the conclusion, the following documents will also be sent:

- the originals or authentic copies of the final sentencing decision, with the mention of finality, the decisions pronounced as a result of the exercise of legal appeals, the mandate to execute the prison sentence, respectively the originals or authentic copies of the preventive arrest mandate, the indictment or other documents having equal power;

- an exposition of the facts for which extradition is requested, respectively: the date and place of their commission, their legal qualification and references to the applicable legal provisions;

- a copy of the applicable legal provisions or a statement on the applicable law, as well as the most precise details of the extraditable person and any other information likely to determine his identity and nationality;

- data on the duration of the unexecuted sentence, in the case of a request for the extradition of a convicted person who has only served part of the sentence.

In the situation where the request for extradition is not approved, the final decision stating that the conditions for requesting extradition are not met is communicated to the Ministry of Justice within 3 days at most from the pronouncement.

In no more than 48 hours from the receipt of the conclusion by which it was found that the conditions for the request for extradition and the accompanying documents are met, the Ministry of Justice, through the specialized department, carries out the examination of international regularity, to ascertain whether:

- there are conventional rules or reciprocity for extradition between Romania and the requested state;

- the documents stipulated by the applicable international treaty are attached to the extradition request;

- the conclusion and the attached documents are accompanied by translations according to the provisions of the law;

- there is one of the limits of granting judicial cooperation provided by law.

Depending on the conclusions of the international regularity examination, the specialized department of the Ministry of Justice can take one of the following measures:

- in the situation where it establishes that the substantive and formal conditions necessary for the extradition request are met, it prepares the extradition request, accompanied by the annexed documents, and submits it to the competent authority of the requested state;

- if he finds that the necessary conditions for the extradition

request are not met, he prepares a document (information, report, etc.) by which he proposes to the Minister of Justice, motivated, to notify the general prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice, in order to initiate the review procedure of the final decision by which the extradition request was ordered.

In both situations, the specialized department of the Ministry of Justice will inform the International Police Cooperation Center of the Ministry of Internal Affairs. If the specialized department of the Ministry of Justice finds that the documents are incomplete, before drawing up and submitting the extradition request, it can request the competent court to send it, within 72 hours at most, the additional documents necessary according to the applicable international treaty. The Minister of Justice cannot request the initiation of the review procedure for reasons other than those related to the conclusions of the international regularity examination.

The review request is made within 5 days of the communication of the final decision to the Ministry of Justice and is resolved within 24 hours.

The court, if it finds that the request for review is well-founded, cancels the contested decision. If it finds that the request for review is well-founded, it rejects it, maintaining the challenged conclusion. The decision of the review court is final and is communicated within 24 hours from the pronouncement to the Minister of Justice and the general prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.

The extradition request and the documents attached to it accompanied by the aforementioned documents and the certified translations in the language of the requested state, in English or French, are sent to the competent authority of the requested state, in one of the following ways: through the Ministry of Justice; diplomatically; other way established by direct understanding.

In the situation where the pursued person is not provisionally arrested with a view to extradition by the authorities of the requested

state, the entire procedure mentioned above is confidential, until the requested state is vested with the extradition request.

If, for various reasons, the extraditable person is no longer under the power of the preventive arrest warrant or the execution warrant, the competent court, ex officio or at the request of the prosecutor, establishes by a reasoned conclusion that the conditions provided for by law no longer exist to request extradition and immediately orders the withdrawal of the extradition request. The decision is sent to the Ministry of Justice within 24 hours of the pronouncement. The Ministry of Justice immediately withdraws the extradition request, informing about it the Center for International Police Cooperation within the Ministry of Internal Affairs, an institution that will continue to act according to the previously examined provisions. If, in order to resolve the extradition request, the authorities of the requested state request the transmission of additional information, these shall be communicated, within the deadline set by the authorities of the requested state, through the Ministry of Justice or directly by the competent court. In case of emergency, such as the imminence of the person who is the subject of an international arrest warrant for extradition leaving the territory of the requested state, the competent court may request, before a formal request for extradition is made, the provisional arrest with a view to extradition of that person . If the request for provisional arrest with a view to extradition is made after the transmission of the international investigation warrant, it is sent to the Center for International Police Cooperation within the Ministry of the Interior and Administrative Reform and the Ministry of Justice.

The previously mentioned procedure is confidential until the provisional arrest with a view to the extradition of the wanted person. The request for provisional arrest with a view to extradition is recorded in a special register.

According to the provisions of the law, the Romanian authorities have the obligation to withdraw the request for provisional arrest with a view to extradition, in case the extraditable person is no longer under the power of the preventive arrest warrant or the execution of the sentence. If the Romanian state requests the extradition of a person who was tried and convicted in absentia, the requested state may request the retrial of that

person. In this situation, the Romanian state will give assurances through the Ministry of Justice that that person will have the right to a new court procedure through which his defense rights will be ensured and guaranteed. The extradition decision entitles the Romanian state to proceed to a new trial in the case, in the presence of the convicted person, if he objects, or to pursue the extradited person, otherwise.

3. Effects of extradition in Romania

The provisions regarding the surrender-takeover of the extradited person are also applied accordingly in the situation where Romania is the requesting state. The extradited person brought to Romania according to the previously examined procedure will be urgently handed over to the prison administration or the competent judicial authority, as the case may be. If the extradited person was convicted in absentia, he will be retried, upon request, respecting the aforementioned rights. The Ministry of Justice informs the competent Romanian judicial authority about the method of solving the extradition request by the requested state and, as the case may be, about the duration of the provisional arrest with a view to extradition, to be calculated according to the provisions of the law.

The person who will be surrendered as a result of extradition will neither be prosecuted, nor tried, nor detained for the execution of a sentence, nor subject to any other restriction of his individual freedom, for any fact prior to surrender, other than that which motivated the extradition, except when:

a) the requested state that handed it over consents; for this purpose, the Romanian state will present a request accompanied by a judicial record in which the statements of the extradited person are recorded; this consent may be given when the crime for which it is requested attracts the obligation of extradition according to the law;

b) having the opportunity to do so, the extradited person did not leave the territory of Romania within 45 days of his final release, or if he returned to the country after leaving its territory.

The Romanian state will still be able to take the necessary measures in view, on the one hand, of a possible sending of the person

from its territory, and, on the other hand, of the interruption of the prescription according to Romanian law, including recourse to a missing procedure. When the legal classification given to the deed will be changed during the criminal investigation or trial procedure, the extradited person will not be prosecuted or judged only to the extent that the constitutive elements of the reclassified crime would allow extradition. In the aforementioned case, the request addressed to the foreign state is formulated by the Ministry of Justice, based on the decision of the court competent to resolve the case in the first instance, on the reasoned proposal of the Public Ministry or based on the decision of the court before which the case is pending, if the extradition was granted after sending the extradited person to court, as the case may be.

In the situation where the requested state has granted extradition under condition, the court that requested the extradition will take the necessary measures to comply with the condition imposed by the requested state and will give guarantees in this regard. When the imposed condition is the resending of the extradited person to the territory of the requesting state, the court orders that he be accompanied to the border, in order to be taken over by the competent authorities of the requesting state.

In both extradition procedures (passive and active), the Romanian state is represented by the central authority and the Public Ministry in the country. At the express request of the Romanian authorities, their representatives may participate, with the approval of the competent court, in the settlement of the extradition request. Fraud in extradition, consisting in handing over a person by expulsion, readmission, return to the border or another measure of the same kind, is prohibited, whenever it hides the will to evade the rules of extradition. The expenses related to the extradition procedure carried out on the territory of Romania are borne by the Romanian state, through the budgets of the authorities and institutions involved, depending on the powers conferred on each of them by law. Transit costs are borne by the requesting state.

B. Passive extradition procedure

1. Conditions of passive extradition

In order for a person, located on the territory of Romania, to be handed over to the state that requests extradition for the purpose of criminal prosecution, trial or execution of a sentence, it is necessary to fulfill certain conditions, which we find in Law no. 302/2004 and which will be presented in the following:

a. Conditions regarding the requested person

According to art. 18 of Law no. 302/2004, persons located on the territory of Romania who are prosecuted or are sent to court for committing crimes or are wanted for the execution of a safety measure, a punishment or another decision of the criminal court in the state may be subject to extradition applicant.

Romanian citizens can only be extradited in the situation where the conditions provided for in art. 20 of Law no. 302/2004 on international judicial cooperation.

The legal regime is different depending on the convention – multilateral or bilateral – under which extradition is requested.

In the case of requesting extradition based on a multilateral convention, extradition can be made, only subject to reciprocity and only in the situation where at least one of the following conditions is met:

- the extraditable person resides on the territory of the requesting state on the date of the extradition request;
- the extraditable person also has the citizenship of the requesting state;
- the extraditable person committed the offense on the territory of or against a citizen of a member state of the European Union, if the requesting state is a member of the European Union.

Regarding the latter requirement, we point out that, as a rule, the procedure of the European arrest warrant is used.

Romania is a signatory to several multilateral conventions on legal assistance in criminal matters, but the most important in the matter

of extradition and the one that refers exclusively to this institution is the European Convention on Extradition, concluded in Paris on December 13, 1957, with its additional protocols, of 15 October 1975 and 17 March 1978.

In the situation where the request is made on the basis of a bilateral convention, Romanian citizens can be extradited under conditions of reciprocity.

As can be seen, in the case of multilateral conventions, the legislator considered it necessary to impose additional conditions, in addition to reciprocity, for granting extradition, with the aim of granting increased protection to Romanian citizens. This is explainable because, even if in the case of these conventions the states share certain common principles, the existence of significant differences in terms of the standards applicable between them is not excluded.

Conversely, bilateral conventions offer the advantage of being able to determine on a case-by-case basis whether and under what conditions a state will extradite its own citizens. Thus, the law only provides for the condition of reciprocity, and any additional conditions will be established.

In addition to Romanian citizens, who can be extradited only under the previously presented conditions, the law also exempts a number of persons from extradition. Thus, asylum seekers, beneficiaries of refugee status or subsidiary protection in Romania are exempted, in cases where, if the extradition were to take place in the country of origin or in any other state, their life or freedom would be endangered or in which they would be subjected to torture, inhuman and degrading treatment. Therefore, the law provides protection to any person who would be subjected to persecution, actions that contravene the respect due to the human being and his inherent rights. At the same time, the law offers protection, in case of an extradition request, to foreign persons who enjoy immunity from jurisdiction in Romania. However, immunity from jurisdiction cannot be opposed by the state that conferred it.

Another category of persons exempted from extradition is foreign persons summoned from abroad for hearing as suspects, injured persons, parties, witnesses or experts or interpreters before a requesting Romanian

judicial authority, within the limits of the immunities conferred by the international convention. The role of this regulation is to ensure the smooth running of the judicial procedure before the Romanian authorities.

The law also provides a reason for optional refusal or postponement of extradition, in the situation where the surrender of the extradited person would be likely to have particularly serious consequences for him, especially because of his age or health condition.

b. Conditions regarding the deed

From this perspective, a first condition is double criminality. Thus, according to para. (1) of art. 24 of Law no. 302/2004, extradition is possible only in the situation where the committed act is criminalized in the laws of both states participating in the extradition.

The rule of double criminality represents the expression of the principle of legality in matters of extradition. It is based on the concept according to which, if the act is not criminalized in the requested state, extradition cannot be granted, since if the person in question had committed the same act on the territory of the requested state, he would not have been punished, thus, if the extradition was granted, this situation would contravene the principle of legality.

However, paragraph (2) of the same article provides for a derogation from the condition of double criminality. Thus, it is possible to grant extradition even if the act committed is not provided for by Romanian law, in the situation where the requirement of double criminality was excluded for this act through an international convention to which Romania is a party.

It is important to state that, through international conventions or declarations of reciprocity, states can provide additional clarifications regarding extradition.

According to paragraph (3) of art. 24 of Law no. 302/2004, the existence of differences in terms of the legal qualification or the name of a crime in the laws of the two states is not relevant if the international

convention or, in its absence, the declaration of reciprocity does not provide otherwise.

In the case of fiscal crimes, according to art. 25 of Law no. 302/2004, extradition will be granted according to the provisions of the applicable international agreement, for acts which correspond, according to the law of the Romanian state, to crimes of the same nature.

Secondly, it is necessary that the act committed does not constitute a political offense or an offense related to a political offence. According to art. 21 para. (1) lit. (e), extradition cannot be granted in this situation by the requested state. The political character of an offense will be assessed by the requested state.

The qualification of a crime as having a political nature can be a real challenge in practice, as there is no legal definition of "crime of a political nature" or "crime related to a political crime". Instead, in the content of art. 21 para. (2) from Law no. 302/2004, lists the categories of crimes that do not fall into this category.

In the specialized literature, based on the analysis of jurisprudential evolution, a distinction is made between "pure" political crimes (for example, treason, espionage, etc.) and "relative" political crimes (which combine political and criminal elements).

Also, another condition is that the crime committed is not a military crime that does not constitute a common law crime.

The last condition regarding the act imposed by Law no. 302/2004 constitutes its gravity. Considering the fact that extradition usually involves a complicated procedure and likely to affect some fundamental rights and freedoms of the person, it is normal that it should be triggered only in the case of crimes or punishments of a certain gravity.

Thus according to art. 26 of Law no. 302/2004, extradition can be granted by Romania, with a view to criminal prosecution or trial, only for acts the commission of which attracts, according to the legislation of the requesting state and Romanian law, a custodial sentence of at least one year, and with a view to the execution of a sentence, only if this is at least 4 months.

c. Procedural conditions

According to paragraph (1) of art. 22 of Law no. 302/2004, extradition may be refused when the act committed and which motivated the request is the subject of an ongoing criminal trial or when this act may be the subject of a criminal trial in Romania. This is an optional reason for refusal, which means that the Romanian authorities can grant extradition even if the crime would fall under Romanian law or even if the deed is already the subject of an ongoing criminal process in our country.

A ban on granting extradition can also be found in art. 30 of Law no. 302/2004 on international judicial cooperation. Thus, extradition will not be granted if, according to both the Romanian legislation and the legislation of the requesting state, the criminal action can only be initiated upon the prior complaint of the injured person, and this person opposes the extradition.

Also, in the application of the non bis in idem rule, provided in art. 8 of Law no. 302/2004, extradition cannot be granted if the requested person has been definitively tried for the same deed in Romania or in another state and the acquittal or termination of the criminal process has been pronounced by final decision. Extradition will also be refused in the situation where the requested person has been convicted by a final judgment, and the imposed punishment has been executed or has been the subject of a pardon or amnesty, in its entirety or on the unexecuted part or if it has been ordered to waive the application of the punishment or the postponement of the application of the penalty and the term provided for in art. 82 para. (3) Criminal Code, respectively the term of supervision provided for in art. 84 of the Criminal Code, without revoking or canceling them.

In para. (3) of art. 8 of Law no. 302/2004 stipulates that the principle provisions "do not apply if an international treaty to which Romania is a party contains more favorable provisions in terms of the non bis in idem principle". From this perspective, we appreciate that the understanding of the non bis in idem principle according to the European

standards for the protection of human rights goes beyond the traditional meaning of the res judicata authority enshrined in Romanian legislation. Thus, it must be interpreted through the prism of art. 4 of Protocol no. 7 of the European Convention on Human Rights and art. 50 of the Charter of Fundamental Rights of the European Union, as well as the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union, respectively. That being the case, as provided by art. 52 para. (2) of the Charter, the rights contained in this instrument that correspond to rights guaranteed by the European Convention on Human Rights have the same meaning and the same extent as those provided for in the mentioned Convention, the Union law being able to confer, in return, a wider protection.

In this context, we specify that the Strasbourg court refers to the autonomous notion of accusation in criminal matters, from art. 6 and 7 of the same Convention.

Other requirements of the law are that the prescription of criminal liability has not run out, either in Romania or in the requested state (art. 33 of Law no. 302/2004), that the amnesty has not run out in Romania, if the Romanian state had the competence to pursue this crime, according to its own law (art. 34 of Law no. 302/2004), or the pardon has not intervened in the requesting state, even if the other conditions of extradition are fulfilled (art. 35 Law no. 302/2004).

In the situation where a state withdraws the extradition request, the authorities of the requesting state will not grant the extradition[1].

d. Guaranteeing fundamental human rights and freedoms

Art. 21 of Law no. 302/2004 imposes a series of reasons on the basis of which extradition will not be granted, among which some have the role of providing protection to the requested person in the situation where there is the possibility of violating some fundamental rights or freedoms of the person. These are: failure to respect the right to a fair

[1] Bucharest Court of Appeal, First Criminal Section, sentence no. 34/02/03/2015.

trial, the existence of serious reasons that lead to the conclusion that extradition is requested for the purpose of prosecuting or punishing a person on grounds of race, religion, sex, nationality, language, political or ideological opinions or membership to a certain social group; if the person's situation risks worsening for one of the previously stated reasons; the request is made in a case pending before extraordinary tribunals, other than those established by relevant international instruments, or in order to enforce a sentence imposed by such a tribunal.

2. The request for extradition, the contest of requests and the competence to resolve

According to art. 36 of Law no. 302/2004 on international judicial cooperation, the extradition request will be made in writing by the competent authority of the requesting state and will be addressed to the Ministry of Justice. If the request is addressed through diplomatic channels, it is sent to the Ministry of Justice. By direct agreement between the requesting state and the requested Romanian state, another method of request can be agreed upon. Also, the Ministry of Justice, through the specialized department, mainly performs the following activities:

a) receiving the extradition request;

b) examining the extradition request and the documents attached to it from the point of view of international regularity;

c) sending the extradition request and the documents attached to it to the competent general prosecutor;

d) the reasoned return of the extradition request and the documents attached to it, in cases where it does not meet the conditions required by law;

e) the execution, in collaboration with the Ministry of Administration and Interior, of the final decision by which the extradition was ordered;

f) communication to the central authority of the requesting state of the solution given to the extradition request or the request for

provisional arrest with a view to extradition, pronounced by the competent judicial authority.

The powers conferred on the Ministry of Justice by law do not affect the jurisdictional character of the extradition procedure in Romania. These powers are established in accordance with the obligations assumed by the treaties to which Romania is a party and derives from the fact that extradition is placed in the plan of public international law and from the fact that the conclusion and negotiation of treaties rests with the executive power, which also manages the international relations of the state.

It should be noted that, obviously, the Ministry of Justice has no decision-making role in matters of extradition, because such a role would be contrary to the fundamental law.

Article 36 of Law 302/2004 stipulates that, depending on the phase of the criminal process, together with the extradition request, the following must be submitted: the decision of final conviction, with the mention of the final stay; the decisions pronounced as a result of the exercise of appeals; preventive arrest warrant; the indictment; other acts having equal force. All these documents can be submitted either in original or in authentic copy. In addition, they are also required: an exposition of the facts for which extradition is requested, the date and place of their commission, their legal qualification and references to the legal provisions applicable to them, which will be indicated in the most accurate way possible; a copy of the applicable legal provisions or, if this is not possible, a statement on the applicable law, as well as the most precise details of the extraditable person and any other information likely to determine his identity and nationality; data on the duration of the unexecuted sentence, in the case of a request for the extradition of a convicted person who has only served part of the sentence.

The compliance of the extradition request and the related documentation is indispensable for the resolution of the case, since, for example, a possible defective presentation of the facts is not able to accurately reveal the correspondence with the Romanian legislation, and the gaps regarding elements such as: date and place the commission of the alleged acts prevents the analysis of the other conditions regarding

the granting of extradition, such as the statute of limitations, the offense committed in a third state.

To the extent that the facts indicated by the requesting state also involve the jurisdiction of a third state, the provisions of art. 29 of Law no. 302/2004, according to which, in this situation, "extradition can be granted when the Romanian law confers the competence to prosecute and judge the Romanian judicial authorities for crimes of the same type, committed outside the territory of the Romanian state or when the requesting state proves that the state the third party on whose territory the crime was committed will not request extradition for that act".

In this sense, still in the early period of the application of the Romanian normative framework in the matter, the supreme court indicated that "(...) the decision by which the court of appeal rejected the extradition request, when the authorities of the requesting state did not send the original or the copy of the indictment, is legal or of other documents having legal force, and the documents submitted in support of the extradition request do not show the date and place of the acts, their legal qualification, as well as the legal provisions applicable, there being no declaration on the applicable law".

Regarding the moment of notification of an extradition request to the Romanian authorities, we consider it important that the person whose extradition is requested be on the territory of Romania. This is, in our opinion, an essential condition that determines the competence of the Romanian authorities and that emerges from the provisions of art. 18 of Law no. 302/2004, where it is stipulated that "persons on its territory" can be extradited from Romania, at the request of a foreign state. Also, art. 44 para. (6) of Law 302/2004, which refers to the request for provisional arrest in an emergency regime, talks about the existence of data "that the internationally wanted person is in Romania."

From the corroboration of the provisions mentioned above, it follows that the Romanian authorities are competent over a request for extradition, respectively for provisional arrest with a view to extradition, only if on the date of their referral the extraditable person is on the territory of Romania. This assertion is also supported by art. 40 of the

same law, which assigns competence to the general prosecutor of the prosecutor's office attached to the court of appeal in whose jurisdiction the extraditable person was located. If the place in Romania where the extraditable person is located is not known, the general prosecutor of the Prosecutor's Office attached to the Bucharest Court of Appeal is competent.

We consider it irrelevant that, after notification, the extraditable person arrives on the territory of the requested state; and in this situation the request will be ineffective, because the Romanian authorities are not competent.

The judicial procedure and the competence to resolve an extradition request is provided by art. 42 of Law no. 302/2004. Thus, the competence to resolve extradition requests rests with the court of appeal in whose jurisdiction the extraditable person was located and the prosecutor's office next to it. In the situation where the requesting state requests the extradition of two or more persons at the same time, located in the constituencies of different appeal courts, the competence to resolve the requests rests with the Bucharest Court of Appeal.

According to paragraph (2) of art. 42 of Law no. 302/2004, the request for provisional arrest with a view to extradition and the request for extradition shall be resolved by a panel composed of a judge of the criminal section of the competent court of appeal.

We are of the opinion that the latter judge must be one of substance, and not of rights and liberties, as has been seen in Romanian judicial practice. Otherwise, the penalty of absolute nullity of the judgments rendered would become applicable.

The fact that this competence to resolve requests regarding extradition cannot rest with the judge of rights and liberties results both from the provisions of the Code of Criminal Procedure and from those of Law no. 302/2004.

Thus, the competence of the judge of rights and freedoms is established by art. 53 Code of Criminal Procedure, text of the law which includes the following:

"The judge of rights and liberties is the judge who, within the court, according to its competence, resolves, during the criminal

prosecution, requests, proposals, complaints, appeals or any other referrals regarding: a) preventive measures; b) security measures; c) temporary safety measures; d) the prosecutor's documents, in the cases expressly provided by law; e) approval of searches, the use of special surveillance or research methods and techniques or other evidentiary procedures according to the law; f) the procedure of the anticipated hearing; g) other situations expressly provided by law" (s.n.).

Regulating the separation of judicial functions, art. 3 of the Criminal Procedure Code gives the rights and freedoms judge "the function of ruling on the fundamental rights and freedoms of the person during the criminal investigation phase" [par. 1 lit. b)]. Also, para. 5 of the same article provides that: "On the acts and measures within the framework of the criminal investigation, which restrict the fundamental rights and freedoms of the person, the judge appointed with attributions in this regard decides, except in the cases provided by law."

From the foregoing, it is clear that the duties of the judge of rights and freedoms are limited to the criminal investigation phase, which is a component of the criminal process. More precisely, of the criminal process taking place on the territory of Romania, by virtue of the principle of territoriality of the criminal procedural law, enshrined in art. 13 para. (2) Criminal Procedure Code.

On the other hand, art. 42 para. (2) from Law no. 302/2004 establishes the following: "The request for provisional arrest with a view to extradition and the request for extradition shall be resolved by a panel consisting of a judge of the criminal section of the competent court of appeal". We emphasize that the text of the law reproduced above speaks of "a judge" and not "a judge of rights and freedoms".

Art. 43 para. (3) of the same law provides that: "Provisional arrest with a view to extradition is ordered (...) by the same panel vested with the resolution of the extradition request".

So, first, the panel charged with extradition (the main request) must be established, this panel being competent to resolve the accessory request (provisional arrest).

Obviously, the resolution of the extradition request requires the exercise of the judicial function, which, with the entry into force of the new Code of Criminal Procedure, is separated from the function of ruling on the fundamental rights and freedoms of the person, which is exercised by the judge of rights and freedoms. Moreover, these functions are incompatible, according to art. 3 paragraph (3) of the same code.

As I have shown above, the disposition function exercised by the judge of rights and liberties is strictly related to the criminal investigation phase. However, in the case of extradition, we are in the presence of a special procedure, carried out by the Romanian authorities separately from the criminal process in the requesting state, a process that may have a different structure.

In terms of legal qualification, we believe that it is a functional competence, which is a form of substantive competence.

As a type of material jurisdiction, functional jurisdiction designates the categories of activities that each judicial body carries out within its general jurisdiction.

Considering all this and the fact that the procedural provisions regulating the functional competence are mandatory norms, their violation entails the sanction of nullity. Considering the fact that art. 281 para. (1) lit. b) The Criminal Procedure Code limits the incidence of the sanction of absolute nullity only to the hypothesis in which "the judgment was carried out by a lower court than the legally competent one", the conclusion that emerges is that of the intervention, by law, of relative nullity, which requires proof of fulfillment the requirements established by art. 282 of the same code. As a result, the person provisionally arrested or extradited on the basis of a judgment issued by a judge of rights and liberties must prove, among other things, the existence of the injury, i.e. a veritable probatio diabolica, which defeats the constitutional principle of legality. It is the reason why we appreciate that the provisions of art. 281 para. (1) lit. b) Criminal Procedure Code are unconstitutional insofar as they do not sanction with absolute nullity the decisions pronounced by the judge of rights and liberties in the matter of extradition.

In this context, the decision of the Constitutional Court no. 302,

pronounced on May 4, 2017, by which it was established that "the regulation of the powers of judicial bodies is an essential element arising from the principle of legality, a principle that constitutes a component of the rule of law. This is because an essential rule of the rule of law is that the attributions/competencies of the authorities are defined by law. The principle of legality presupposes, mainly, that the judicial bodies act on the basis of the competence that the legislator conferred on them, and, subsequently, presupposes that they must comply with both the provisions of substantive law and those of incidental procedural law, including the rules of competence".

We also consider that, in the situation where the request is resolved by a judge of rights and liberties, it will also be possible to appreciate that there will be a problem of composition of the panel of judges, because, in our opinion, the notion of composition of the panel of judgment is not limited to quantitative aspects, but also covers qualitative ones. Or, under this aspect, the considerations previously presented in the discussion related to functional competence are also valid here. The consequence is the absolute nullity of the decision issued, pursuant to art. 281 para. (1) lit. a) Criminal Procedure Code.

Moreover, if, illegally, an extradition request is resolved by the judge of rights and liberties, it can be assumed that the rules provided by art. 203 paragraph (5) Criminal Procedure Code, which establishes that "during the criminal investigation and the preliminary chamber procedure, requests, proposals, complaints and appeals regarding preventive measures are resolved in the council chamber, by reasoned conclusion, which is pronounced in boardroom".

Taking into account the fact that, according to art. 46 paragraph (1) of Law no. 302/2004, "the procedure is public if the extraditable person does not object (…)", we believe that if the court session is held in the council chamber, as the Code of Criminal Procedure requires, a basic rule of the criminal process will be violated , the publicity of the court session, the provisions of art. 281 para. (1) lit. c) Criminal Procedure Code, which attract the sanction of absolute nullity.

The judicial procedure will present certain particularities, depending on the option of the extraditable person (art. 47 et seq. of Law no. 302/2004). Thus, if the extradition is voluntary, it will be carried out in a simplified manner, and if the extraditable person objects to the extradition, evidence may be administered in order to prove that the arrested person is not the wanted person or that the conditions for extradition are not met.

At the same time, according to art. 51 of Law no. 302/2004, there is also the possibility of requesting additional information from the requesting state, to the extent that the information provided is considered insufficient to allow the Romanian state to issue a decision based on the law.

Regarding the application competition, art. 39 of Law no. 302/2004 provides that in the situation where extradition is requested by several states, either for the same act or for different acts, the Romanian state decides, taking into account all the circumstances and, in particular, the gravity and the place where the crimes were committed, from the date of the submission of the respective requests, the citizenship of the extraditable person, the existence of extradition reciprocity in relation to the Romanian state and the possibility of subsequent extradition to another requesting state.

3. Provisional arrest pending extradition

Law no. 302/2004 separately regulates for the institution of passive extradition both a judicial procedure of provisional arrest with a view to extradition, when the request for provisional arrest is formulated together with the extradition request (art. 43), and a judicial procedure of provisional arrest in case emergency, when the extradition request is submitted after the provisional arrest request (art. 44). However, we consider, in disagreement with a solution from judicial practice, that, in the second hypothesis, the transmission of the extradition request does not split the passive extradition procedure to require the questioning of taking a new measure of provisional arrest under Art. 43 of the law and, respectively, issuing a new provisional arrest warrant.

Regarding emergency provisional arrest, in art. 44 para. (4) from Law no. 302/2004, the elements that such a request must contain are indicated, including the existence of an arrest warrant or any other document having the same legal effects or an enforceable court decision, as well as confirmation of the validity of this act [lit. c) and d)]. From the legal text stated, it follows that the request for provisional arrest is mandatorily attached to an enforceable internal judicial act, which, although it is not attached to the request at this stage, must be confirmed in terms of its validity, just as, subsequently, it is its transmission with the extradition request is mandatory. Failure to meet these conditions should lead, in the first case, to the rejection of the request for provisional arrest and, in the second case, to the rejection of the extradition request.

Also, according to the jurisprudence of the supreme court, "the Romanian courts, when resolving the extradition request, cannot examine the validity of the preventive arrest ordered by the competent authorities of the requesting state, the competence of the Romanian courts being limited to verifying the fulfillment of the conditions provided for in Law no. 302/2004 for the admission of the extradition request, which do not concern the validity of the measures ordered by the competent authorities of the requesting state".

According to art. 43 para. (3) of Law 302/2004, provisional arrest with a view to extradition can be ordered and extended by the same panel charged with resolving the case, the duration not exceeding 180 days.

It is necessary to underline the fact that provisional arrest in view of extradition is not a preventive measure, in the sense of art. 202 et seq. Criminal procedure code, but a special measure, which is integrated into the extradition procedure. This latter argument is further evidence that the adjudication of the application by a rights and freedoms judge could not be justified in the case of extradition proceedings.

Arrest for extradition is also allowed by art. 5 lit. f of the European Convention on Human Rights, according to which deprivation of liberty can be ordered if it is the arrest or legal detention of a person against whom expulsion or extradition proceedings are underway. In this situation, the deprivation of liberty is justified due to the need to

guarantee the execution of an extradition decision, a purpose that justifies both the detention before and after the extradition decision, until the time of its execution.

According to art. 43 para. (5) from Law no. 302/2004, during the settlement of the extradition request, the court must periodically check, but not later than 30 days, the necessity of maintaining the provisional arrest, being able to order, as the case may be, the maintenance of the provisional arrest or its replacement with the measure of house arrest, control judicially or on bail. Replacement is done only in well-justified cases and only if the court assesses that the extradited person will not try to evade the extradition request.

From the provisions above, one could draw the conclusion that, on the merits, only the issue of replacing the measure of arrest with the other measures can be discussed, but not its revocation. But the possibility of revoking the measure of provisional arrest, even if it is not indicated expressis verbis in the provisions regulating this measure from Law 302/2004, can be requested based on art. 5 of the European Convention on Human Rights and C.E.D.O. jurisprudence. relevant in the matter. These provisions become applicable whenever a form of arbitrariness is identified regarding the deprivation of liberty, and the possibility of direct application of the conventional text emerges from the entire European mechanism for the protection of the right to liberty, which enjoys direct and priority applicability in Romanian law .

In concrete terms, the conventional texts that become incidents in the situation of requesting or ordering the revocation of the provisional arrest, at the substantive court, are art. 5 para. 4 of the Convention, related to art. 5 para. 1 lit. f, respectively the arrest or legal detention of a person with a view to extradition. Para. 4 of art. 5 of the Convention (the so-called habeas corpus guarantee) provides that any person deprived of liberty by arrest or detention has the right to request a review of the legality of his detention and the right to be released, if the detention is illegal.

Regarding the replacement of the measure, starting from the wording contained in art. 43 para. (5) of the law ("Substitution is made only in well-justified cases and only if the court assesses that the

extradited person will not try to avoid judging the extradition request"), in jurisprudence, it was considered that, as an exception to the rule applicable in the Romanian criminal procedural law, according to which the measure of preventive arrest has an exceptional character, in this special procedure the replacement would have a subsidiary character to the arrest and is justified by the purpose of the procedure extradition, respectively ensuring the surrender of the extradited person in case the extradition request is accepted.

We cannot agree with this reasoning, since this interpretation tends to reverse the principle unanimously recognized at the level of the European system of protection of fundamental rights according to which freedom constitutes the rule, noting that, in this matter, freedom would, in fact, constitute the exception. However, based on art. 11 and art. 20 of the Romanian Constitution, C.E.D.O. standards. they are imposed with "constitutional and supra-legislative force", having "direct applicability" and priority in Romanian law, and they do not provide for any derogation from the rule of freedom in the case of extradition. On the contrary, for the requirement of the legality of the deprivation of liberty to be fulfilled in accordance with art. 5 of the Convention, it is not enough only to comply with the applicable domestic law, but it is necessary that the latter "be in accordance with the Convention, including the general principles that it enunciates or implies, especially that of the preeminence of the law, expressly mentioned in the preamble of the Convention ".

The conclusion ordering the taking, maintenance, replacement or termination of the measure of provisional arrest with a view to extradition can be appealed separately, within 48 hours of the pronouncement. The file will be submitted to the hierarchically superior court within 48 hours, and the appeal will be judged within 5 days from the registration of the case.

The imperative wording of the above provisions does not allow for derogations. However, in the practice of the supreme court, it is considered, unjustifiably, that only the deadline for exercising the right of appeal is one of forfeiture, the other two deadlines being of recommendation.

The appeal filed against the conclusion ordering the taking or maintaining of the measure of provisional arrest is not suspensive of execution.

4. Settlement of cases and effects of passive extradition

After examining the extradition request, the evidentiary material and the conclusions presented by the extraditable party and the prosecutor, the appeal court may, according to art. 52 of Law 302/2004:
a) order the connection of the files, in the case of the application competition;
b) order the postponement of the resolution of the extradition request for a period of 2 months, with the possibility of repeating the request and granting a final period of another 2 months, in case of the need to receive additional information from the requesting state;
c) ascertain, by sentence, whether or not the conditions for extradition are met.

Regarding the connection of the files in the situation of a contest of claims, it is noted that this is only a faculty and not an obligation of the court. In the absence of legal criteria for assessing the opportunity of the meeting, the court will assess in concreto if this measure is required, depending on the stage of the procedure in each of the files or other such elements.

With regard to the limits of the examination of the extradition conditions, we point out a relevant decision issued by the Constitutional Court of Romania, which, being notified with an exception of unconstitutionality, showed that the Romanian court cannot rule on the merits of the prosecution or conviction ordered by the foreign authority, nor on the possibility of extradition, since, otherwise, the principle of mutual recognition of criminal judgments would be affected.

In the situation where the extradition conditions are not met, the court will reject the extradition request and order the release of the extraditable person. This solution does not have the effect of removing criminal liability. If the conditions stipulated by the law are met, the Romanian state will be obliged to proceed with the prosecution and trial

of the person whose extradition was refused.

In case of refusal to extradite a Romanian citizen or a political refugee, according to art. 23 para. (1) from Law no. 302/2004, at the request of the requesting state, the Romanian state will be obliged to submit the case to its competent judicial authorities, so that criminal prosecution and trial can be carried out, if necessary. For this purpose, the requesting state will send the files, information and objects related to the crime to the Romanian Ministry of Justice free of charge. The requesting state will be informed of the outcome of its request.

If the extradition of a foreign citizen convicted in another state for one of the crimes provided for in art. 96 para. (1) from Law no. 302/2004 or for another crime for which the law of the requesting state provides for a prison sentence with a special minimum of at least 5 years, the examination of own competence and the exercise, if necessary, of the criminal action are done ex officio, without exception and without delay. The requested Romanian authorities decide under the same conditions as for any serious crime provided for and punished by Romanian law.

The acceptance of an extradition request has the effect of handing over the requested person to the authorities of the requesting state for criminal prosecution, trial or subjecting him to the execution of a sentence.

The extradition of the person who is the subject of the extradition request can only be done in compliance with art. 74 of Law no. 302/2004, which enshrines the specialty rule in the case of extradition. Thus, the extradited person will not be able to be prosecuted, judged, detained in order to execute a sentence, nor subject to any other restriction of his individual freedom, for any facts prior to the surrender, other than the one that motivated the extradition. This rule was originally conceived as a guarantee against the prosecution of individuals for political offences, but the rule of specialty has nowadays become a fundamental principle in the matter of extradition and for this reason it is enshrined in most bilateral treaties on the matter, as well as in the European Convention on extradition (art. 14) and the Inter-American Convention on Extradition of 1981 (art. 13).

The purpose of the rule of specialty is to guarantee respect for the rights of the extradited person, by observing the conditions under which the extradition was granted and to prevent the circumvention of the rules on extradition, by trying the extradited person also for other crimes or by subjecting him to the execution of other punishments for which he would not have been met the conditions of extradition.

Law no. 302/2004 also provides for some exceptions to the specialty rule. Thus, prosecution, trial or execution of a sentence for a different act than the one that motivated the extradition is possible if:

a) the state that handed it over consents; In this situation, the requesting state must submit to the Romanian state a request regarding the extension of the criminal investigation. The requested state will be able to give its consent if an extradition request would have been admissible in relation to the new crime.

b) the extradited person did not leave, within 45 days of his final release, the territory of the requesting state, although he had the opportunity to do so (in this sense, it must be noted that the person in question had not only the freedom to leave the territory the requesting state, but had the effective opportunity to do so), or if he returned to this state after leaving it.

It should also be stated that there is, according to art. 47 of Law no. 302/2004, the possibility of the extradited person to waive the application of the specialty rule, only under the conditions in which he gives his consent to be extradited and handed over to the authorities of the requesting state.

Regarding the legal framework given to the act, it should be noted that it is possible to change it if two conditions are met:

a) if the act remains as described in the extradition request;

b) if the new qualification of the crime would allow extradition.

Regarding the right of appeal that can be exercised against the decision by which the extradition request was resolved, Law no. 302/2004 contains contradictory provisions.

Therefore, art. will apply. 52 para. (8) from Law no. 302/2004, according to which: the decision given on extradition can be appealed by the competent general prosecutor and the extraditable person, within 5

days from the pronouncement, to the Criminal Section of the High Court of Cassation and Justice. The competent general prosecutor can file an appeal ex officio or at the request of the Minister of Justice. The appeal filed against the decision by which an extradition request was rejected is suspensive of execution, and the one filed against the decision by which extradition was ordered is suspensive of execution, with the exception of the provisions relating to the state of provisional arrest with a view to extradition.

The reference to the criminal section of the supreme court raises the legitimate question: we are in the presence of a special provision derogating from common law, namely art. 4251 para. (3) of the Code of Criminal Procedure, which imposes the requirement to submit the appeal to "the court that issued the contested decision"?

We are of the opinion that the answer is obviously negative, if only for reasons related to the risk of executing a non-definitive decision. In reality, we believe that it is a defective wording that does not deviate from the rule established by the Code of Criminal Procedure.

Without establishing any sanction, art. 4251 para. (3) The Criminal Procedure Code stipulates that such an appeal "must be motivated until the term established for resolution". From the fact that the requirement of the written form of the motivation is not imposed and the appropriate application of only art. 415 Criminal Procedure Code (which regulates the withdrawal of the appeal), not art. 412 para. (4) - which requires the reasons for the appeal to be indicated in writing - it follows that oral reasoning is also admissible (obviously, during the debates).

Art. 53 of Law no. 302/2004 provides that, immediately after the reasoning of the sentence, the appeal court forwards the file to the criminal section of the High Court of Cassation and Justice. The president of this section sets a deadline with priority, respecting the provision regarding the deadline of no more than 10 days established for judging the appeal.

We note that this attribution given to the president of the criminal section of the supreme court violates the principle of random distribution of cases, being criticizable from a constitutional point of view from the

perspective of impartiality, as long as the choice of the court term, in the conditions of the planning of the meetings, practically signifies the choice of the panel.

The appeal is judged in a panel consisting of 3 judges, with the possibility for the president of the panel to appoint "one of the judges or an assistant magistrate" to draw up a written report.

And this time the text of the law suffers from imprecision in the sense that not every judge or every assistant magistrate will be able to be appointed to draw up the report, but only one of those who constitute the panel charged with resolving the appeal.

Conclusions

We can conclude that the usefulness of extradition, as an act of mutual international legal assistance, is indisputable, especially in the current conditions of increasing the possibilities of free movement of people and, at the same time, of the exacerbation of the crime phenomenon (especially cross-border criminal forms).

All the states on the European continent and most of the world's states understood the importance of this institution in the fight against crime worldwide, acting to implement it in practice by adopting appropriate legislation.

As an example, in Romania, the institution of extradition is provided for in the Constitution, the Criminal Code, Law no. 302/2004 and O.U.G. no. 103/2006 regarding some measures to facilitate international police cooperation, with subsequent amendments and additions. It should also be stated that the internal legal norms regarding extradition are supplemented by the conventions and treaties concluded with different states and ratified by Romania.

With the help of this mechanism, those who break the law cannot hide indefinitely from the consequences of the deeds they have committed, moving to the territory of other states. So, it can be said that thanks to international judicial cooperation, society as a whole has become a safer place.

We appreciate that the institution of passive extradition in

Romania - despite some inconsistencies and drafting inaccuracies - has, in general, an effective and flexible regulation, and with regard to the application of these provisions by the Romanian judicial bodies, a dialectical approach to them is required, to ensure the balance between the need to achieve the finality of this form of judicial cooperation with the imperative to respect the fundamental rights of the extraditable person.

Although we admit that the procedure of passive extradition involves a certain degree of formality, this should not be seen as an end in itself. As a result, there is no justification for some of the national courts to appear in the settlement of extradition requests made by other states as courts approached with a simple exequatur procedure, ordering provisional arrest and extradition in a quasi-automatic manner, without thorough analysis and without to properly argue these measures.

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EXERCISE OF A RIGHT OR FULFILLMENT OF AN OBLIGATION. JUSTIFYING CAUSE

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Abstract: *The Criminal Code, in the General Part, Title II, Chapter II, Art 21, states that "(1) the act provided for by criminal law consisting in the exercise of a right recognized by law or in the performance of an obligation imposed by law, in compliance with the conditions and limits provided by law" and that "(2) the act provided for by criminal law consisting in the performance of an obligation imposed by the competent authority, in the form provided by law, is also justified, if it is not manifestly unlawful".*

Keywords: *exercise of a right, fulfillment of an obligation, justification, criminal law, criminal code*

Introduction

Compared to the old Penal Code published in 1969, the current Penal Code regulates new justifying grounds, namely:

- exercise of a right recognized by law;
- the fulfillment of an obligation imposed by law;
- the fulfillment of an obligation imposed by the competent authority.

By justifying cause, in the present Penal Code, is understood the fact that "the act provided for by the criminal law does not constitute an

offense, if any of the justifying causes provided for by the law exists" (Criminal Code, Code of Criminal Procedure, updated on 06.09.2019, Art 18 Para 1). Therefore, when we refer to the justifying causes provided by the criminal law, we refer to the following:

- Self-defense (stated by Art 19 of the Penal Code);
- State of necessity (stated by Art 20 of the Penal Code);
- Exercising a right or fulfilling an obligation (stated by Art 21 of the Penal Code);
- The consent of the victim (stated by Art 22 of the Penal Code);

1. The concept of exercising a right or fulfilling an obligation

The Criminal Code, in the General Part, Title II, Chapter II, Art 21, states that "(1) the act provided for by criminal law consisting in the exercise of a right recognized by law or in the performance of an obligation imposed by law, in compliance with the conditions and limits provided by law" and that "(2) the act provided for by criminal law consisting in the performance of an obligation imposed by the competent authority, in the form provided by law, is also justified, if it is not manifestly unlawful".

For example, law enforcement and public order forces, in the performance of their duties, may commit acts that can be categorized as a crime against bodily integrity, but they do not attract criminal liability of persons as they are a justifying cause.

In the following, we will detail the new regulations introduced by the criminal code regarding the exercise of a right or the fulfillment of an obligation, which we listed in the previous chapter.

a) The exercise of a right recognized by the law

This justifying cause can be invoked by both a natural and a legal person.

The legislator regulates two conditions that must be met for the existence of the justifying cause, namely:

- The performance of an act mentioned by the criminal law;
- The exercise of a right stated by the law.

As regards the first condition, when the act committed is not provided for by the criminal law, there is no question of removing the unjustified nature of the act.

As an example, for this first condition, we will present the act of a person who destroys a door/window or objects in his apartment in order to put out a fire caused by an electrical short circuit.

With regard to the second condition, by law can be understood both the normative act issued by the Parliament (law) and other normative acts (government ordinance, emergency ordinance, government decisions, Constitution, etc.).

In order to be considered a justifiable cause, the exercise of the right provided for by law must be carried out within the limits imposed by the law and in accordance with its conditions. Exceeding the limits and conditions imposed by law no longer constitutes justifiable cause and will therefore entail criminal liability of the perpetrator.

b) The fulfillment of an obligation imposed by the law

As in the case of the first justificative cause, this one too must also fulfill the following two conditions:

- The performance of an act mentioned by the criminal law;
- The fulfilment of the obligation must be in compliance with the conditions and limits mentioned by the law (Mitrache and Mitrache, 2019, pp. 191-192).

The fulfillment of an obligation imposed by law takes the form of imperative character, therefore, the act of the person who fulfills it under the conditions and within the limits prescribed by law is justified.

In the performance of an obligation imposed by law, the act is imposed on the person concerned, as opposed to the exercise of a right recognized by law, where the act is left to the discretion of the person concerned (optional).

This condition is also referred to in the specialized literature as an “order of law” (Udroiu, p. 161).

Activities carried out in order to fulfill an obligation imposed by law must have a legitimate aim, be necessary and proportionate to the aim pursued.

c) The fulfilment of an obligation imposed by the competent authority

The conditions for fulfilling an obligation imposed by the competent authority are the following:

- The performance of an act stated by the criminal law;

This first condition means "committing any of the acts that the law punishes as a consummated crime or as attempts, as well as participating in their commission as a co-author, instigator or accomplice" (Criminal Code, Code of Criminal Procedure, updated on 06.09.2019, Art 174).

- The fulfillment of the obligation to be imposed by the competent authority (civil or military).

Therefore, the fulfilment of the obligation imposed by an authority other than the competent one according to the law makes this imposition illegal, thus the act provided for by the criminal law is unjustified.

- The fulfillment of the obligation to be imposed in the form prescribed by law.

C-tin Mitrache and C. Mitrache in their work entitled "Romanian Criminal Law – General Part" state that this condition of the form stipulated by law "represents for the person who executes the obligation, an indication of legality of the act he commits to fulfill the obligation" (Mitrache and Mitrache, p. 193).

The concept of law could be identified by reference to the concept of criminal law stated by Art 173 new Criminal Code, namely organic law, emergency ordinance or other normative acts that at the date of their adoption had the force of law. Art 173 of the New Criminal Code refers only to the organic law to ensure compliance with Art 73 Para3 lit. h of the Constitution (offenses, punishments and their enforcement shall be regulated only by organic law); in the present case – of the right recognized by law, of the obligation imposed by law, of the form prescribed by law – there is no justification for limiting to the organic law, and the ordinary law should also be taken into account. The Constitution may also be taken into account insofar as it recognizes and

guarantees certain rights (freedom of movement, freedom of expression, the right to education, etc.) and with the proviso that the detailed regulation of constitutionally recognized rights is carried out by infra-constitutional laws. Moreover, the doctrine proposes interpreting the concept of law in a broad sense (normative acts in the form of a law in the strict sense of the law, whether constitutional, organic or ordinary, as well as normative acts given on the basis of the law).

Lower normative acts were also considered by inter-war doctrine as a source of law justifying an act. The inter-war doctrine cited the regulation, while the contemporary doctrine cites the government decision in so far as it was issued to specify the conditions for the application of a law. The recognition of the justifying character of normative acts inferior to the law (regulations, decrees, decisions of the administration) is subject to certain requirements: they must not exceed their scope and must not contradict a rule that is superior to them, they must represent a rule of law and not a mere administrative practice, they must emanate from a public authority and not from any other body.

- The compliance with the obligation is not manifestly unlawful.

2. Effects

The commission of an act provided for by criminal law in the exercise of a right or the fulfillment of an obligation imposed by law or by the competent authority is justified and has the following effects:

- It removes the unjustified feature of the act stated by the criminal law. The Civil Code states that "the person who causes damage by the very exercise of his rights is not obliged to make reparation, unless the right is exercised abusively" (Art 1353).

- The commission of an act in fulfilment of an obligation imposed by the competent authority may give rise to civil liability if the perpetrator could have realized that the obligation imposed was unlawful. Art 1364 of the Civil Code clearly states the following aspect: "the performance of an activity required or permitted by law or by order of his

superior does not exempt him from liability if he could have realized the wrongful nature of his action in such circumstances".

3. Examples

- The fulfilment of an obligation

In the work "*Teoria generală a infracțiunii și a răspunderii penale*" we find as an example of this justifying cause the demolition of a building belonging to another person (Bucur, 2023, p. 98).

Thus, it is stipulated that the act of demolishing a building that belongs to another person is an act of destruction regulated by the legislator in the provisions of Art 253 of the Penal Code. Therefore, the justifying cause of these facts is to be found in the fact that the demolition of the building is carried out in order to enforce a judgment issued in the present case.

Another example is found in surgical intervention that involves harming a person. They will not lead to offense as long as the surgery was carried out in accordance with medical prescriptions or procedures (Mitrache and Mitrache, p. 192).

- The exercise of a right

For this justifying cause we will present the act of a person breaking into his own home. This cannot amount to trespass as long as the person is not restricted in his right to enter his home.

Conclusions

According to the new Penal Code, "exercising a right or fulfilling an obligation" is a "justifying cause".

The legislator wanted to emphasize the fact that not all the causes that remove the criminal feature of an act are based on the lack of guilt.

In the situation of justifying grounds, the criminal law permits the commission of acts that it itself prohibits. In practice, in the context of certain specific states or circumstances, the unjustified nature of a criminal act is removed, giving it the appearance of legality. Put simply,

the perpetrator will be able to say, "I have done what I did, but I did it rightly".

Together with the "victim's consent", the exercise of a right or the fulfillment of an obligation is a novel element and provides that the act provided for by criminal law is justified, which consists in the exercise of a right recognized by law or in the fulfillment of an obligation imposed by law, in compliance with the conditions and limits provided for by the law.

Non-justifiable causes do not cast doubt on the fact that the offense was committed by the person using the justifying cause. It arises from the will of the perpetrator, fully aware of and responsible for what he is doing. However, although the fact exists in its materiality, it is committed under certain conditions that give rise to the presumption that the perpetrator had a good, legal reason, provided by law as permissible. Therefore, the act appears to be "justified" and the incompatibility between the act and the rule enacted by the legislator not to be violated disappears.

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HISTORICAL STAGES IN THE EVOLUTION OF CONSTITUTIONALISM IN ROMANIA

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Abstract: *The constitutional evolution of Romania reflects the cultural traditions, social realities, the degree of economic development and the degree of democratization. The evolution was not simple, it has a complex dimension that involves the multitude of constitutive factors of society. It is marked by normative acts with constitutional value through which, over time, social relations regarding power and fundamental human rights have been regulated. This legal materialization of the will of the rulers is directly determined by the social realities existing at a given time.*

In Romania, as in other European states, constitutional evolution signifies the democratization of the exercise of power, the limitation of the discretionary powers of the state, the affirmation of the principle of democracy regarding the social, political, and legal organization in the state, and the consecration of fundamental civil rights and freedoms.

Constitutional development reflects political, legal, economic reality, traditions, but also international influences along with the adoption of democratic ideas affirmed at the end of the 18th century and the beginning of the 19th century.

Keywords: *historical evolution; constitutional development; acts with constitutional value; constitution.*

Introduction

In the specialized literature (Andreescu & Puran, 2020, p. 182) the constitutional development of a state is treated in two senses:

- in a broad sense, this process refers to the development or

evolution of state life, respectively the political development of the state;

- in a narrow sense, it refers exclusively to the evolution of power institutions, to the relations between the state and the individual, as well as to fundamental rights as enshrined in constitutions or in normative acts with constitutional value.

One of the theoretical problems is to know the historical moment that marks the beginning of constitutional development in Romania. There is no clear demarcation nor unanimous opinions in the doctrine. It is important to emphasize that at any moment of development there were customary or written legal regulations that regulate the exercise of power and the attributions that fall to the state authorities.

From a scientific point of view, the beginning is marked by the adoption of the first constitutions, namely the normative acts which, from a formal point of view, but also from a content point of view, meet the general criteria for defining the constitution. It is important to identify the constitutional normative acts, the general principles of the constitution, the separation of powers in the state, the regulations regarding the enshrinement of fundamental human rights and freedoms (Andreescu & Puran, 2020, p. 183).

In world history, starting with the 8th century, the constitution, as the fundamental law of any state, has imposed itself alongside other major institutions created to express structural, political, economic or legal transformations.

The word constitution derives from the Latin "constitutio", which means establishment with foundations, state of something. In Roman law during the Empire, the word "constitution" was used to designate the laws emanating from the emperor, even if they did not refer to the organization and functioning of the state. In the Middle Ages, this word designated monastic rigors. (Drăganu, 2001, p. 175)

The meaning of the notion evolved in the historical process that followed in America and on the European continent, acquiring new characteristics. The American and French revolutions of the second half of the 18th century, in addition to proclaiming the need to limit the powers of the rulers and recognize some fundamental rights for man, also

sought to find the most effective legal procedures to achieve this goal. (Banciu, 2001, p. 98)

In Romania, the emergence and development of constitutionalism is marked by some specific characteristics of the economic, cultural, political and historical system of society, but also by the dominance of other powers over the state. Thus, the modern institutional structures of the state were established later and evolved more slowly than in other countries. (Andreescu & Puran, 2020, p. 183)

Romania's constitutional development has known two stages: the pre-constitutional stage and the constitutional stage.

1. Some aspects regarding the main acts with constitutional value adopted in the pre-constitutional stage

In the pre-constitutional period, multiple acts with constitutional value were adopted, whose normative content, although influenced or even determined by European constitutionalism, nevertheless had numerous elements of originality that reflected the social, cultural, economic and political realities at the time they were adopted.

Thus, Constantin Mavrocordat on February 7, 1741 adopted a normative act, considered by some authors to be a true constitutional act, known as the Constitution of Mavrocordat. This document regulated the "public assembly", this institution being intended to be a representative consultative body to which the boyars had access. This document affirmed some democratic principles regarding the collection of taxes, but also the balance that should characterize fiscal imposition. (Drăganu, 2001, p. 178)

The Transylvanian School, at the end of the 18th century, campaigned for the consecration, recognition and respect of fundamental human rights for the Romanians of Transylvania. Supplex Liberrus Valachorum is the name under which the memorandum of the Romanian nation in Transylvania of 1791, the most important political act of the Transylvanian Romanians of the 18th century, has remained in history. A product of the most enlightened minds of the Romanian intelligentsia, born in the context of the Enlightenment that shook old Europe, the act

crowns long efforts for the political and national emancipation of the Romanians, as well as a long series of memoirs and petitions. Supplex Liberrus synthetically formulates the demands of the Romanian people and is a programming document for the struggle for national emancipation that would take place in the 19th century, until the appearance of the Memorandum of 1892 a hundred years later (Muraru & Tănăsescu, 2023, p. 107). Through Supplex Liberrus Valachorum, among other things, it enshrines: the right to property, to the identity and preservation of the human being; the balance that must exist between the interests of each citizen - community - state. The right to life, freedom, unity for the entire Romanian people is proclaimed. Therefore, it can be considered a true constitutional document.

The first document that is at the origin of the modern organization of the Romanian State is a constitutional project by Dimitrie Sturdza from 1802.

The liberal doctrine and the theory of fundamental human rights penetrate the Romanian Principalities after 1820. After the revolution of Tudor Vladimirescu, a political document was drafted that incorporated many of the democratic and constitutional ideas and conceptions of the democratic era of the time. We refer to the Constitution of the Cărvunari of 1822, which was never adopted and remained in draft form. The Constitution of the Cărvunari was a draft constitution that attempted to introduce a modern system of government in the Romanian Principalities. It formulated for the first time the constitutional principle of the rule of law and the separation of powers in the state. It was drafted in Iași and subject to debate. The name "Cărvunari" alludes to the Italian Carbonari (Carboneria). (Andreescu, 2011) The Constitution provided for principles and rights inspired by the ideology of the French Revolution: individual freedom of the person, of assembly, of trade, equality before the law, respect for property, the principle of an equitable financial order, the organization of education, the organization of the state, the restriction of princely power and the establishment of the public council, formed on representative criteria, consisting only of boyars and which had legislative powers. Ioan Sturza, the ruler of Moldavia accepted the

Constitution, but it could not be adopted due to the opposition of Turkey and Russia. (Ionescu, 2002, p. 105)

An important historical moment in the constitutional development of Romania is the Revolution of 1848. Several political documents were proclaimed, which enshrined the fundamental rights and freedoms of man and the principle of the modern state. Thus, one of the points of the 1848 program was the adoption of a state constitution. Thus, the Proclamation of Izlaz was adopted, which is a true declaration of rights of the Romanians.

Compared to previous legal documents, the Organic Regulations of 1831 (Moldova) and 1832 (Wallachia) are mainly the work of the great boyars of the Romanian Principalities. Nicolae Iorga stated that the Organic Regulations are true constitutions, being for the most part a creation of the Romanians. The adoption of these political and legal documents was carried out at the initiative of Russia, but also with the collaboration of the great boyars of the Romanian Principalities. (Banciu, 2001, p. 96)

2. Brief considerations regarding the constitutional period

The Paris Convention of 1858 is the international act that established the fundamental norms regarding the legal and political situation of the Romanian Principalities, and which laid the foundations for the union of Wallachia with Moldova achieved in 1859.

The first act considered as a constitution in Romania is the Statute Developing the Convention of Paris (1864). The historical premises of the adoption of this document are marked by the weakening of the Ottoman Empire's dominance, the increase in the political and legislative autonomy of the Romanian Principalities, the achievement of the unification of the Romanian Principalities, the recognition of democratic claims after 1848 and the existence of the Convention of Paris establishing the new status of the Romanian Principalities. This document, with political and legal value, enshrined the first constitutional rules regarding the organization of the state. Thus, it enshrined the fact that state power belonged to the nation and was entrusted to the

sovereign and the national representation for exercise. (Muraru & Tănăsescu, 2023, p. 108) The legislative power was exercised collectively by the monarch and the National Representation, which had a bicameral structure, namely the Deliberative Assembly and the Elective Assembly. The two chambers were made up of elected members and members by right. The executive power was exercised by the monarch, although this constitutional act did not expressly refer to this.

Subsequently, the adoption of the Constitution of 1866, the first in the modern sense, was determined by the evolution of the legislative system (the adoption of the agrarian law - 1864, as well as the laws on public education and justice from the same year), as well as some major political events, such as the abdication on February 11, 1866 of Cuza and the bringing to the throne of Romania of a foreign royal house.

The Constitution of 1866 is considered to be one of the most democratic fundamental laws of a European state of that period. It was inspired by the Constitution of Belgium of 1831, it included 133 articles, grouped into 8 titles, which referred to the powers of the state, the organization and functioning of state institutions, the characters of the state, citizen rights, the principles of organizing economic and social activities. For the first time in Romania, fundamental human rights and freedoms are regulated and guaranteed. (Andreescu &Puran, 2020, p. 195)

The Constitution enshrined the fact that power and sovereignty belong to the people, as well as the indivisible character of the state. At the same time, special attention was paid to the fundamental rights and freedoms of citizens. Civil rights, individual freedom, freedom of conscience, including religious freedom, freedom of expression, as well as fundamental political rights, including the right to vote and to be elected, were enshrined and guaranteed. Special attention was paid to property, which was declared sacred and inviolable, and it was established that no law could establish the penalty of confiscation of property. The Constitution referred extensively to the organization and exercise of power. It established in this sense that all powers in the state emanated from the nation, and legislative power was exercised

collectively by the king and the National Representation, which had a bicameral structure (Senate and Assembly of Deputies). (Ionescu, 2002, p. 108)

The 1923 Constitution was controversial in terms of its adoption. Thus, many theorists in constitutional law (C. Dissescu, P. Negulescu) did not recognize the constitutional value of this normative act, because it was not adopted according to the rules and procedures provided for by the 1866 Constitution. However, modern constitutionalists, considering the content of this constitutional act, consider it to be one of the most democratic of the respective period. The Constitution included 138 articles grouped into 8 titles. Many regulations were taken from the 1866 Constitution, but there are also numerous new elements.

As for power, it was established, as in previous constitutions, that it belonged to the nation. The constitution also enshrined the character of the Romanian state as a national, unitary and indivisible state. The form of government was enshrined as the constitutional and hereditary monarchy in the male line. The powers of the state were exercised by the representatives of the nation.

The legislative power was exercised by the king together with the national representation formed by two chambers: the Assembly of Deputies and the Senate. The executive power belonged to the king and was exercised through the Government. The legislative council had the role of systematizing the existing legislation. The system of courts being organized by jurisdictional levels, the apex was the High Court of Cassation. The constitution expressly refers to the control of constitutionality, entrusting this function to the Court of Cassation. For the first time, the constitution refers to the organization of administrative litigation, that is, to the control of administrative acts by the courts.

For the first time, equal, direct, secret and compulsory voting was established, and any census system was abandoned. Both chambers were elected based on equal, direct and secret voting, but the Senate also included ex officio members, appointed for life by the king, either from among former state dignitaries or from among religious figures. An important chapter is the one on fundamental rights and freedoms. The normative content on fundamental rights and freedoms was largely

identical to that of the Constitution of 1866. The Constitution established equality between citizens without distinction of nationality, wealth and other such criteria.

The historical premises of the adoption of the 1938 Constitution are expressed by the new political orientations that intervened in Romania after 1935. The most important political aspect is the establishment on February 10, 1938 of the personal dictatorship of King Carol II. This event also meant a radical transformation of the traditional democracy established on the basis of the 1923 constitution, in the sense that the political regime existing at that time imposed the renunciation of some fundamental rights and freedoms, consecrated political power at the level of the head of state institution, limited the prerogatives of Parliament and, practically, eliminated political pluralism from state life, limiting the activity of political parties. (Andreescu, 2011) The constitutional legal expression of the established political regime was a Constitution adopted on February 28, 1938 on the initiative of King Carol II. This constitutional document had 100 articles grouped into 8 titles. The nation could exercise its powers only through representation. Legislative power was exercised by the king and the Parliament. It also enshrined the main characters and attributes of the Romanian state, namely: the unitary and indivisible national state and the inalienability of the territory. The powers of the state were coordinated by the king, who had increased, almost discretionary powers. Thus, the king had legislative power, being authorized to issue decrees with the force of law, which were not subject to parliamentary control. Executive power was entrusted to the king, who exercised it through the Government. At the same time, the king also had important state powers, namely: he was the commander of the army, he appointed and dismissed ministers, he could dissolve the parliament, he had the right to pardon punishments. (Muraru & Tănăsescu, 2023, p. 115)

The Parliament had a bicameral structure. The appointment of deputies was carried out by secret ballot, mandatory and expressed by uninominal ballot, but with certain limitations, in the sense that they had to represent the voters according to their profession. The term of office for deputies was 6 years. The Senate was composed of elected members

and appointed members, namely senators by right. The term of office was 9 years.

Judicial power was exercised by the Court of Cassation and Justice and the other courts. The Constitution enshrined the principle of legality regarding the organization of courts.

Fundamental rights were regulated restrictively in relation to the provisions of the 1923 Constitution. They could be limited if their exercise violated the ideological principles imposed by the personal dictatorship of King Carol II.

The 1938 Constitution was suspended in September 1940, at which point royal prerogatives were reduced and the President of the Council of Ministers was vested with full powers in the state. (Andreescu & Puran, 2020, p. 186)

The period 1944-1947 is characterized by strong social, economic and political instability, by the non-existence of a constitutional system in the traditional sense of the concept. Legal normative acts with constitutional value were adopted, which regulated the exercise of power in the state, as well as the fundamental rights of citizens. Among them, we mention two: Decree no. 1626 of 1944 - on the rights of Romanians in accordance with the provisions of the Constitution of 1866 and the amendments to the Constitution of March 28, 1923, a normative act by which the Constitution of 1923 was partially reinstated, and Law no. 363 of December 30, 1947, a normative act by which the form of government was changed, the monarchy was abolished and the people's republic was established. (Muraru & Tănăsescu, 2023, p. 116)

It is the constitutional act that abolished the separation of powers in the state as a form of organization of state power, replacing it with the principle of democratic centralism, i.e. the subordination of all institutions, including the state judiciary, to a single authority, which would soon be the Romanian Communist Party. The bicameral structure of the Parliament was replaced by the unicameral Parliament. It is also the constitutional act that marks the beginning of the establishment of the totalitarian communist state in Romania.

History has shown that the abolition of the monarchy was an act of force that had nothing to do with a constitutional legal reasoning. The

1947 abolition act was the result of ultimate pressure from the Communist Party supported from outside the country. From a legal point of view, the abdication of King Michael I was an unconstitutional act, since the institution of abdication was not provided for in the Constitution, and the King could not abdicate for his descendants anyway, in other words, he could not extend the legal consequences of his act of abdication to his presumed and future legitimate descendants. It is true that King Carol II abdicated in September 1940, but he abdicated in favor of his son, the legal heir to the throne. (Andreescu & Puran, 2020, p. 187)

The accession to the throne of Carol I was the result of a plebiscite. The abolition of the monarchy in December 1947 should have followed the same procedure in order to have constitutional legitimacy. In reality, Law no. 363/1947 does not use the term "abolition", but only the expression "the abdication of King Michael I for himself and his successors".

According to the 1923 Constitution, the act of abdication, even a forced one, should have been followed by the initiation of the procedure provided for in art. 79 of the Constitution regarding the vacancy of the throne. However, in order to avoid this possibility and to prepare the ground for the de facto abolition of the monarchy, Law no. 363/1947 expressly repealed the 1923 Constitution. As such, the issue of the plebiscite fell by itself, and the abolition of the monarchy was a political act and not a legal one, because it did not have the necessary legal legitimacy. (Andreescu & Puran, 2020, p. 187)

In the historical period 1948-1989, three constitutions were adopted, namely: the Romanian Constitution of April 13, 1948, the Romanian Constitution of September 24, 1952 and the Romanian Constitution of August 21, 1965. The general features of the constitutional reality of the Romanian state during this period are oriented towards the increasingly stronger affirmation of the leading role of a single party, the renunciation of the traditional principles of constitutional democracy, such as: political and institutional pluralism, the principle of separation of powers in the state, the independence of the

judiciary, economic freedom as well as the guarantee of the fundamental rights of citizens. The legislative power was exercised by the national representation organized unicameral, namely the Grand National Assembly. The executive power subordinated to the legislative and the institution of the head of state was exercised by the Council of Ministers, as well as by the central and local administrative authorities, also organized based on the political subordination of the state.

The 1965 Constitution establishes a unique ideological regime and imposes the principle of centralism in the organization and functioning of state authorities. The state's socio-economic activity is organized based on the principle of planning, practically abolishing, after 1952, private property in the economic field. The rule of value and the principles of competition are abandoned. Property is legally ranked, state property is in the first place, followed by cooperative property, and personal property, which is limited in terms of its content, is in the last place in legal importance. (Muraru & Tănăsescu, 2023, p. 123)

The constitutions referred to fundamental rights and freedoms, but these could be restricted at any time at the discretion of the state, and their exercise was oriented towards accepted ideological values. The autonomy of local administration bodies was greatly limited due to their organization based on centralism and strict subordination.

As a result of the radical political, economic and social transformations that occurred after December 1989, fundamental changes are taking place in the Romanian constitutional system. Several normative acts with constitutional value have been adopted, which laid the foundations for the re-establishment of democratic constitutionalism in Romania: Decree Law No. 2 of December 27, 1989 on the establishment, organization and functioning of the Council of the National Salvation Front, Decree Law No. 8 of December 31, 1989 establishing the basic principles of the organization and functioning of political parties, Decree Law No. 81 of February 9, 1990 adopted as a result of the transformation of the National Salvation Front into a political formation and Decree Law No. 92 of March 14, 1990 laying the foundations of the current constitutional system of Romania.

Constitutional principles are politically and legally enshrined, such

as: separation of powers, political pluralism, economic freedom, the rule of law, the principle of democracy, the enshrinement and recognition of fundamental human rights, democratic forms of exercising power, including by referendum, the responsibility and revocability of those holding government positions. (Muraru & Tănăsescu, 2023, p. 124)

At the same time, the Constituent Assembly was established and organized, consisting of the two chambers of Parliament that were to draft the future Constitution of Romania, the final act of adoption being the referendum procedure.

The current Constitution was adopted in the session of the Constituent Assembly on 21 November 1991 and entered into force following its approval by the National Referendum on 8 December 1991.

In 2003, the Constitution was revised by Law no. 429/2003, a law that was approved by the National Referendum on 18-19 October 2003 and entered into force on 29 October 2003, when it was published in the Official Gazette. Following the revision, the Constitution was republished, with the names updated and the texts given a new numbering, in the Official Gazette no. 767 of 31 October 2003.

Conclusions

The Constitution is a legal and political act with a special significance and importance that reflects and consolidates the democratic developments of society and establishes the conquest of state power by the people, the new socio-economic and political structures, as well as the fundamental rights and duties of citizens.

In addition to being the fundamental law in a state, the Constitution is a historical category, because it appeared at a certain stage of the historical evolution of society, namely in a period when the feudal organization was no longer adequate and had to be replaced. In this sense, the constitutional phenomenon knows its own dynamics, of a legislative nature, but also the strong influences of the economic and social interests of those who, under different names, establish

constitutional rules, as happened in the constitutional evolution of Romania.

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