ANALELE UNIVERSITĂŢII "TITU MAIORESCU"

"TITU MAIORESCU" UNIVERSITY LAW REVIEW

Drept

Serie nouă
2022
– anul XXI –

Editura Hamangiu
2022

Editura Universităţii „Titu Maiorescu"
http://analedrept.utm.ro

INDEXATĂ:

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CEEOL

Editura Hamangiu SRL
Str. Mitropolit Filaret nr. 39-39A, Sector 4, Bucureşti

Editura Universităţii „Titu Maiorescu"
Bucureşti, România, Calea Văcărești nr. 187, sector 4

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ISSN: 1584-4781

TITU MAIORESCU UNIVERSITY LAW ANNALS

Drept

Law

2022

COLEGIUL DE REDACŢIE

Manuscrisele, cărţile şi revistele pentru schimb, precum şi orice corespondenţă
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CONTENT

FUNDAMENTAL ELEMENTS OF A THEORY OF HUMAN RIGHTS

Nicolae VOICULESCU[*]
Maria-Beatrice BERNA[**]

ABSTRACT

The human rights are a legal product, but the legal character does not exclusively monopolize the theory and practice of human rights. On the same line of ideas, we can affirm without a doubt that human rights are a cultural, value, ideological, philosophical and ultimately social product. Combined, these observations are the support points of the following conceptualization: through their suis generis character, human rights determine a meta-theory that combines the legal with the social and its derivatives (philosophical, psychological, religious, cultural).

KEYWORDS: *human rights; conceptualization; object; methodological apparatus; principles*

Whether set in the paradigm of today or on future coordinates, humanity is subject to necessary confrontations that compel a panoramic view through the lens of the critic of all the component elements of a given society[1]. The reconfiguration of interstate relations, the recalibration of the means and methods of official action aimed at responding to emerging challenges - among which perhaps the most insidious is the deterioration of the intrinsic human fund and the reflection of this dehumanization in individual interactions - all these elements compose the logic of a human community at the limit of entropy. In the given context, the dynamics of the current society point to the field of human rights *as a referent* of a

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[1] The article resumes some formulations and considerations included in the work "Treatise of human rights", currently being published by Universul Juridic Publishing House, Bucharest, Romania.

democratic prototype built, in turn, on values and principles that support the citizen. The key point of any balancing discourse of the current situation is *human rights* - disputed reality between multiple fields of analysis (from the legal, to the sociological, historical, philosophical to innovative fields derived from technical and technological problems), subject to conceptual tensions and problems of implementation inherent in a scientific investigation.

Although essential, the scientific scrutiny of the field of human rights is an arduous undertaking. On the one hand, human rights are transversal to the common human experience of individuals: whether we are discussing vulnerable groups or relating to human rights defenders. On the other hand, human rights have a synthetic character, representing the binder of all human activities in the most diverse fields of activity: from the technical and technological matter to the matter of humanitarian assistance, to technical and scientific progress.

The difficulty of conceptualizing a theoretical framework related to human rights stems, finally, from the complexity of the human being: until the moment of obtaining a clear definition of his rights, the individual - as the holder of human rights - is in search of his own identity and a methodology of application in society of the various postures in which the individual identity is manifested.

Because *the relevance* and *ubiquity of human rights for existence in society are self-explanatory* aspects, the construction of a theoretical framework that accommodates the scientific particularities of the field of human rights *is a substantial requirement,* without which the effective protection of human rights would remain a pointless endeavour. Epistemological knowledge is the first step in the effective implementation of human rights: in conditions where human rights are criticized for their lack of universality, hegemonic tendencies of manifestation and conditioning relative to culture, ensuring the application of human rights is only possible if, beforehand, the field of human rights goes through an *effort of conceptual clarification.*

If the need to develop a theoretical construct of human rights cannot be denied, finding a working vision capable of integrating the particularities of the field of human rights in a logical variant, which gives concreteness to the theoretical vocation of human rights, is the first step to follow epistemological development. In the study of human rights, a form of *ontological dualism* becomes evident which is placed, alternatively, either

in a context of certainty or in a posture of the possibility of being according to the overall vision promoted within the theory.

Starting from an axiomatic element for the theory of human rights - the fact that it operates with rights incumbent on the individual and his existence in society, some other component parts of the theorizing on human rights are implicit: (1) the explanation of the notion of human rights and the identification of *specific* differences within the field of study: for example, the clear conceptual delimitation in the triad of *values-rights-freedoms*; (2) characterization of human rights following *the principle framework applicable to them;* (3) identification of the holder of the right and the correlative conduct of the right held; (4) imposing a *modus operandi* corresponding to human rights by establishing the following: the form of exercise, limitations, restrictions, derogations of the exercise of human rights; (5) identifying the bearers of obligations vis-à-vis the effective realization of human rights and clarifying the issue of sanctioning certain categories of rights.

As it follows from the reasoning above, the theorization of human rights starting from the idea of *guaranteed rights in favour of individuals involved in social relations* must be viewed, *at least ab initio,* through the spectrum of legal sciences. Although the assignment of an exclusively legal paradigm to the theorization of human rights can be questioned from the perspective of the opportunity or the difficulty of finding an effective theoretical formula (*field, branch of law, discipline of study),* we believe that human rights cannot be placed in a theoretical dimension segregated from that of legal sciences. Human existence in society is guided by legal norms and the importance of these norms on how the individual is inserted and protected in society has an exceptional impact on the effectiveness of human rights. Obviously, moral norms are also a valid argument for the promotion of human rights within social relations, but, in the absence of other autonomous legal elements (we are referring in particular to instruments, mechanisms or sanctions), human rights are liable to become a discursive component of the rhetoric of official's society.

So, morality recognizes and supports the relevance of human rights in society, but this *alone* cannot provide a conceptual, methodological and/or epistemological framework for the *integral accommodation of human rights.* In the course of the ideas in the lines above, human rights have a first moral foundation, evolving from the idea of the Common Good and of counteracting evil in society, but their diachrony proved more complex

than the initial moral foundation, overtaking morality through formalism, universal means of *expression and supranational enforcement mechanisms, having unanimous spheres of action and recognition.*

Human rights cannot exist exclusively in a theory of morality because their praxeological stake imposes a conduct of conceptualization likely to provide clear results for individuals. Philosophical foundations are preserved for the substantial argumentation of human rights, but it is clear that states are aware of the danger of linking human rights to areas whose analytical scope is limited to problematization and contemplation, leaving in derision the ways and directions of intervention and direct action in favour of the individual.

The plea for conceptualizing human rights according to legal epistemology is a pillar of our demonstration and not the end of the argument itself. The purpose of the conceptualization approach is to bring clarity to the understanding and operationalization of human rights by systematizing information and decrypting the meanings axiomatically attached to the field of human rights. So *critical understanding,* based on argumentation, is a key point of introducing human rights into the legal sphere. Once legal epistemology is admitted as a way of conceptualizing human rights, another scientific puzzle appears: *the way to organize and systematize scientific information.* In other words, returning to the problem, it is necessary to ask ourselves what is *the form of scientific knowledge of human rights within the legal sciences.*

In order to cut through this uncertainty, we should turn to the sociological foundations of knowledge (since the social and, consequently, sociological character of law is indisputable). At this point we discover that the specialized literature defines *the scientific model for determining social truth by combining a pertinent and correct method of knowledge with the rigorous observation of social phenomena.*[2] The last premise transposes in relation to human rights some doubts related to the legal epistemology that we opted for in leading our analysis: we can claim a neutral and objective look at human rights if by their nature they cannot be separated from the individual and from the particular manifestations of it which, in turn, cannot be separated from *subjectivism?* In the absence of a

[2] See in detail, Septimiu Chelcea, *Methodology of sociological research. Quantitative and qualitative methods,* Bucharest, Economic Publishing House, 2001, ISBN 973-590-451-9, pp. 31 et seq.

clear answer, there is a high probability that the legal norms that systematize the sphere of knowledge of human rights constitute a useful tool for the analysis of human rights on the basis of objective scientific rigor.

Advancing on the coordinates of the legal scientific knowledge of human rights, we agree with the rules arising from the objective-perceivable characterization of social relations and social phenomena that depend on the field of human rights: (1) the surrounding world exists independently of our observation, it is not created by our senses (principle of realism); (2) relationships in the surrounding world are organized in terms of cause and effect (principle of determinism); (3) the surrounding world can be known through objective observations (principle of knowability).[3] The realism of the research object - although useful - does not decide on the epistemological formula of the legal knowledge of human rights. At the given time, in the critical analysis, the only "legal certainty" of knowledge of human rights is *the objectivity and rigor of the legal norms of human rights (concrete in instruments, policies, standards and guarantees) that make possible the neutral observation of individual phenomena that are of interest to the study human rights.* Comprehensive knowledge also calls for a suitable theoretical form. It is true that the primary form of theoretical scientific knowledge is *theory;* this is assimilated to a set of axiomatic ideas about the phenomena and relationships studied.[4] But, again, human rights raise some *suis generis points* that cannot be constrained to an axiomatic knowledge. The complex nature of human feelings, experiences and reasoning that appear in relation to human rights carries an immeasurable echo at the level of specialized mechanisms in the matter; by way of consequence, the general understanding in the matter of human rights is that all the profile standards (be they restrictive and not programmatic) are intended to provide *models of individual conduct and state intervention*, the actual transposition in practice remaining a problem of continuous relevance. Obviously, we cannot deny *the theory* in search of an appropriate formula for human rights, but maintaining the previous specifications.

[3] Zanden James W. Vander, *The social experience. An introduction to sociology,* New York, Random House Publishing, 1988, apud Septimiu Chelcea, *op. cit.,* p. 31.

[4] Septimiu Chelcea, *op. cit*., Bucharest, Economic Publishing House, 2001, ISBN 973-590-451-9, p. 32.

In support of the construction of an articulated theory of human rights, *Amartya Sen* directs the axiomatic ideas classically assumed by scientific theory to a number of questions that are the subject of a heuristic approach to the subject. Compared to those discussed earlier, Sen's amendment depends directly on freeing the study from the constraints of legal scholarship and placing on record the *scientific theory of human rights independent of a rigorous normative framework.* Sen's interrogations are, in fact, the working tools that probe the potentiality of human rights within the theory and the legal character - although unexpressed, remains present in a latent form given the fact that the answers to the interrogations cannot be dissociated from the elements of the legal scientific knowledge of human rights.

We note the queries advanced by Amartya Sen: *(1) what are the specific statements/assumptions of human rights? (2) why are human rights important? (3) what duties and obligations do human rights generate? (4) through what forms of action can human rights be promoted, and whether legislation should be the main or means of implementing human rights or even a necessary means of implementing them? (5) can economic and social rights (so-called second-generation rights) reasonably be included in the broader category of human rights? (6) how can human rights claims be defended or contested, and how should they claim a valued universal status, especially in a world of great cultural variation and widely diversified practice?*[5]

Pleading for *a theory of human rights,* Amartya Sen pleads, in fact, for *a suis generis construct of analysis* that accommodates both the fears of jurists regarding the demonstration of the universality of human rights and its support in practice by obtaining relevant and effective practical solutions, able to restore the social balance as well as the contemplative spirit of philosophers who observe human rights considering their impact on the Human Being and its Existence. Amartya Sen does not qualify the elements of human rights and does not establish a traditional foundation of human rights theory but rather questions to discover the particularities of human rights that can crystallize new theoretical approaches.

On the other hand, *John Tasioulas* is of the opinion that the legal scientific research of human rights is limiting and restrictive in the study of human rights because human rights themselves cannot be realized if

[5] Amartya Sen, *Elements of a Theory of Human Rights*, Blackwell Publishing, Inv. Philosophy & Public Affairs 32, no. 4, pp. 318-319.

they are not subject to a conceptual purification (that makes clear distinctions between moral, values and rights) and if they are not promoted coherently enough within the judgments/solutions issued by the specialized mechanisms.[6]

Between the two theories, the only point of connection seems to be *legal epistemology.* Contested or accepted as a stand-alone prefiguring perspective in human rights analysis, legal epistemology is inherent in the construction of a theory of human rights.

The next problem arising from this reasoning is *the determination of the sufficiency of a purely legal theory of human rights.* Returning to the general characterization of scientific knowledge, we find that, similarly to the social sciences to which human rights are subsumed, in the study of human rights we distinguish *theories with different levels of generality:* big theories, theories of medium level of generality and theories of minimal level of generality [7]. Again, the synthetic nature of human rights justifies such a complex approach. The search for a legal theory of human rights involves *the choice of primordial forms/formulas* that allow adequate informational incorporation and/or quantification while preserving exemplifications relating to concrete applications of the acquired information. *Paradigm* is the concept introduced in scientific research by Thomas S. Kuhn to capture a pattern of learning based on the experiences and characteristics common to the field under study which essentially aims at formulating and solving research questions and problems.[8]

Within the legal sciences, 3 models of scientific knowledge are distinguished: *fundamental (global) legal sciences* (intended to structure the bases of the logical learning of the legal phenomenon); *historical legal sciences* (concerned with developments in law and society); *branch legal sciences* (delimited by object, methods, principles and independent sanctions).[9] **Associating the field of human rights with any of the 3**

[6] See extensively, John Tasioulas, *Saving Human Rights from Human Rights Law*, Vanderbilt Journal Of Transnational Law, 2019, pp. 1167-1204.

[7] Septimiu Chelcea, *op. cit.,* p. 33.

[8] Kuhn Thomas, *Essential tension,* Scientific and Encyclopedic Publishing House, Bucharest, 1977, *apud* Septimiu Chelcea, *op. cit.,* p. 37.

[9] For additional details, see Andrei Sida, Berlingher Daniel, *General Theory of Law,* University of the West Vasile Goldiș Arad, Vasile Goldiș University Press, Arad, 2007,

paradigms is possible and leads to implications for *the in-depth understanding of human rights:*

(1) *human rights can be qualified as a fundamental legal science* because their operationalization through instruments, mechanisms, standards contributes to the understanding of the individual's role in society and the relevance of his involvement in public acts; the vocation of the right to meet human needs is the precursor of the vocation of human rights to support the quality of life of the individual in society through the awareness and exercise of individual rights and by respecting the rights of others;

(2) *human rights can be associated with historical legal sciences* since their diachrony cannot be denied and the historical evolutions of mankind have been constantly conjugated with human rights (from the moral, philosophical, religious forms of manifestation and reaching the refined forms of law constitutional or international human rights law);

(3) *human rights can be systematized in accordance with the elements that delimit the branch sciences, being susceptible to scientific object, research methods, guiding principles of normative activity and coercive sanctions in the event of rights violations.*

At this point in the analysis, some additional comments are in order. First, ***the scientific object of*** *human rights* is broken down into multiple valences:

(1) *the main problem* of human rights is *the identification of human peculiarities, their capture in models of legal regulation with the aim of improving the existence of the individual in society, strengthening inter-human solidarity and making state agencies (including the international community as a whole) responsible in the meaning of serving the individual;*

(2) *in the subsidiary,* the scientific object of human rights resides in placing humanity in a new stage of evolution and development that allows the individual to approach humanistic values, the understanding of human existence as a common experience of all members of the human family *and* the redefining of man's attitude towards of oneself, otherness and the environment;

(3) *in perspective,* human rights study the integration of the individual in a reconfigured matrix of the world in which forms of artificial intelligence (especially robotics) invoke claims of full assimilation with humans,

pp. 20 et seq.; Mihai Bădescu, *General Theory of Law,* Sitech Publishing House, Craiova 2018, pp. 11-14.

respectively animal rights invoke the scientific basis of dignity according to the model of human dignity and technical and scientific progress allows man to go to unknown spaces (cosmic or aquatic) shaping new applications in the field of human rights such as the cosmic law of human rights or the law of the sea of human rights.

The recognition of the polyvalent character of the scientific object in the matter of human rights has beneficial repercussions on *the delimitation of the branches:* human rights deny the domain of constitutional law as a sphere of ontological belonging - the main determinant being the fact that human rights are oriented towards the individual regardless of nationality/citizenship, while constitutional law conditions its protection on the political-legal relationship of citizenship. Similarly, human rights are not confused with public/private international law for the reason that in the analysis carried out, the individual has pre-eminence in relations with the state, the latter being the bearer of obligations towards the individual. Public/private international law studies interstate relations, respectively private relations with elements of extraneousness, but the individual is not evaluated taking into account the totality of his particularities and the impact of the environment (of state actions) on his situation.

Second, scientific human rights research uses a ***methodological apparatus own*** which validates any research method recognized in the social sciences and implicitly, in the legal paradigm (the logical method – in the deductive and inductive version; the historical method, the method of abstracting and generalizing the legal phenomenon, the comparative, sociological method, etc.). From all the methodological instruments used in explaining human rights, *the hermeneutic method* has the highest level of adaptability to the specifics of human rights. Of philosophical origin, the hermeneutic method aims at the *correct understanding and interpretation of what is understood*[10], and in the case of human rights, its application is imperative. The need for the hermeneutic method in human rights research is legitimized in two ways: (1) by reaching the fundamental aspects of human mundane relationships and (2) by framing them in models of scientific relevance.[11] It is No. less true that in the field of human

[10] For additional details, see Hans-Georg Gadamer, *Truth and Method*, Teora Publishing House, Bucharest, 2001, p. 11.

[11] Hans-Georg Gadamer, *op. quote*, Teora Publishing House, Bucharest, 2001, p. 11.

rights the method of hermeneutics benefits from intrinsic originality provided by *the authority of interpretation.* The correct understanding directly depends on the correct interpretation and the latter encounters resistance of recognition within the juridical science of human rights depending on the *issuing authority of the interpretation.* The main limitation in the hermeneutics of human rights is that all individuals have a sense of *common knowledge* and invoke the claim of scientific rigor in the hermeneutics of facts, situations, circumstances that evoke human rights issues. It is fair that human rights configure a narrative that overlaps with states or situations that affect people in all aspects of daily life, but the hermeneutic of human rights is not limited to these. Legitimacy of human rights hermeneutics must be cultivated by considering legal instruments, jurisprudence, relevant doctrine and correlatively by limiting speculative assessments of the informational framework from rights holders.

Thirdly, the framework ***of principles*** that delimit the scientific scope of human rights is intimately linked to the axiological framework. The link between the two frameworks is transparent and natural: the value framework allows a verification within the legal epistemology of the principles applicable to human rights and validates the latter from a praxiological point of view. Humanistic values are the scientific response to the needs, capacities and aspirations of the individual; they are not pre-existing human experiences but shape human personality and interactions between individuals taking into account *the desirable human model.* Cumulated - the humanist values of peace, solidarity, tolerance, dignity, equality and non-discrimination, inclusion - become vectors that, in turn, shape the principles according to which human rights will be oriented and applied. Being valid trans generationally, applying ubiquitously (although with some necessary adaptations), values become moral benchmarks of human rights that propagate over human experiences regardless of time and space, leading to the correlative practice of autonomous principles: universality, inalienability, indivisibility, interdependence.[12]

Fourth, ***the sanctions*** of human rights reflect the complexity of the human rights norms to protect which they were created. The violation of

[12] United Nations Population Fund, *Human Rights Principles*, text available at: *https://www.unfpa.org/resources/human-rights-principles,* accessed on August 2, 2022, 6:15 pm.

human rights brings with it the blame of the international community, the opprobrium of the society in which the said violation occurred, and the condemnation of the competent quasi-jurisdictional or jurisdictional mechanisms in the field of human rights. The dual - moral and legal - substrate of human rights, as well as the synthetic character that we discussed in the lines above, determine moral, social and legal implications in the case of human rights violations. A major difficulty is discovered in connection with *the subject of sanction.* The expert committees that evaluate the progress of the states parties to the international instruments in the field of human rights, drawing up monitoring reports as well as the judgments handed down by the regional courts for the protection of human rights (of which the most visible one continues to be the European Court of Human Rights) have as an object *to direct state conduct in order to more visibly align with the international standards proposed by the international community in the matter.* Human rights are both a regulatory issue and a state policy issue so that the interest in sanctioning state conduct in the event of violation of legal instruments in the field of human rights to which the state in question is a party is obvious. So, in the logic of the application of sanctions, the state is the bearer of obligations that must guarantee the individual the exact application of the international instruments to which it is a party. However, the issue of applicable sanctions remains a priority in the case of human rights violations regarding *the individual. Exempli gratia,* situations of armed conflict bring to the fore situations of systematic and serious violation of human rights such as genocide[13], crimes against humanity[14] and war crimes[15].

[13] According to article 6 of the Statute of the International Criminal Court of July 17, 1998, published in the Official Gazette no. 211 of March 28, 2002, *the crime of genocide* is defined as: *any act of those stated in the text of the article committed with the intention of destroying, in whole or in part, a national, ethnic, racial or religious group*.

[14] According to article 7 of the Statute of the International Criminal Court of July 17, 1998, published in the Official Gazette no. 211 of March 28, 2002, *the crime against humanity* consists of *one of the acts expressly mentioned in the content of the article, when it is committed within a generalized or systematic attack launched against a civilian population and in the knowledge of this atav.*

[15] According to article 8 of the Statute of the International Criminal Court of July 17, 1998, published in the Official Gazette no. 211 of March 28, 2002 *The Court has jurisdiction over war crimes, especially when these crimes are part of a plan or policy or when they are part of a series of similar crimes committed on a large scale*.

In such cases, the prevention of impunity represented a collective effort of the international community through which specialized jurisdictions were established to deal with crimes of genocide, war crimes and crimes against humanity: the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda[16], the[17] Tribunal International for the Far East[18] or the Nuremberg Tribunal[19]. The jurisprudence of these mechanisms *substantially touches the issue of human rights protection,* bringing to criminal responsibility the individuals guilty of committing the crimes of genocide, war crimes or crimes against humanity, however, from a procedural point of view, the *modus operandi of these tribunals is positioned at the intersection between the rules of international humanitarian law and the rules of public international law.* It is evident from the facts analysed that human rights sanctions are characterized by *holding states accountable for not implementing the standards of international human rights law; in relation to individuals who commit acts against human rights, the intervention of international jurisdiction is conditioned by the context of the production of human rights violations (as a rule, situations of armed conflict), respectively by the seriousness of the violations (acts of genocide, war crimes, crimes against humanity).*

In the light of what has been exposed up to this point of the analysis, some coordinates of human rights theorization become evident: (1) the framing of human rights in one of the dimensions of scientific research cannot avoid the legal paradigm; (2) in turn, the legal paradigm for accommodating human rights can be split into three different sub-fields: fundamental (global) legal sciences, historical legal sciences, branch legal sciences – all of which are likely to respond to the characteristics of human rights; (3) although it has the highest degree of compatibility with human rights, the legal paradigm cannot reconcile all the features (complex and synthetic) derived from the application of human rights, necessitating a complement drawn from the broader paradigm of the social sciences.

[16] Established by UN Security Council Resolution no. 827 of May 25, 1993.

[17] Established by UN Security Council Resolution no. 955 of November 8, 1994.

[18] Established by the Charter of the International Military Tribunal for the Far East, 19 January 1946.

[19] Established by the Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), 8 August 1945.

Human rights are *a legal product*, but the legal character does not exclusively monopolize the theory and practice of human rights. On the same line of ideas, we can affirm without a doubt that human rights are *a cultural*, *value, ideological, philosophical and ultimately social product.* Combined, these observations are the support points of the following conceptualization: through their *suis generis character, human rights determine a meta-theory that combines the legal with the social and its derivatives (philosophical, psychological, religious, cultural).* The metatheory of human rights starts from its own autonomy: if the particularities of human rights (generically called *suis generis character)* are responsible for ensuring the unique ontological basis of human rights, they can, in turn, establish correlations with other scientific theories regardless of the rank of knowledge that they allow and the degree of generality of the information. The synthetic character positions human rights as *the centrum mundi* of the ordering of knowledge. From this follows the interconnection with other fields of study and theories against which human rights prove heuristic appeal. So, human rights must be placed in a legal logic because this is *sine qua non* for their understanding, but at the same time, human rights must be practiced in a comprehensive paradigm that includes the legal without being limited to it. To provide minimal systematization to the metatheory of human rights, we will organize the dimensions of knowledge according to the *legal-non-legal binomial.* The non-legal side of the binomial describes itself as the dimension that incorporates the totality of the study elements that involve a high degree of hermeneutic flexibility, exceeding purely legal rigors and that, through the set of features, decisively contribute to shaping the meta-theory of human rights, establishing original perspectives for study.

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THE MODIFICATION AND COMPLETION OF SOME NORMATIVE ACTS IN THE FIELD OF CONSUMER PROTECTION ON UNFAIR CLAUSES IN CONTRACTS CONCLUDED BETWEEN PROFESSIONALS AND CONSUMERS

Mihaela Georgiana ILIESCU[*]

ABSTRACT

This study concerns the new amendments to Law no. 193/200 regarding the unfair clauses in the contracts concluded between professionals and consumers by Romanian Government's Emergency Ordinance (GEO) no. 58/2022 for the modification and completion of some normative acts in the field of consumer protection. The analysis of these changes highlights the fact that the solutions provided by the Romanian legislator through the new normative act represent a legislative consecration of the principles derived from the vast jurisprudence of the Court of Justice of the European Union in the field of unfair clauses.

KEYWORDS: *unfair clauses; consumer; professional; CJEU; ex officio control; the principle of effectiveness;*

The Romanian Government's Emergency Ordinance (GEO) no. 58/2022 for the amendment and completion of some normative acts in the field of consumer protection, recently adopted, is the normative act that transposes into national legislation the provisions of Directive (EU) 2019/2.161 of the European Parliament and of the Council of November 27, 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council in terms of better ensuring compliance with Union consumer protection rules and the modernization of these rules. As a preliminary remark, it is easily observed from comparing the texts of Directive 2161/2019 with those of GEO 58/2022, the fact that a substantial part of the amendments made to Law no. 193/2000 regarding unfair clauses, are not found in the provisions of the Directive, the latter focusing mainly on the introduction of rules

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relating to effective, proportionate and dissuasive sanctions, applicable in case of non-compliance with the provisions of domestic law, as well as the necessary measures to ensure their application.

As we will highlight in the following, in essence, the most important amendments brought to the Law on unfair terms by GEO 58/2022 constitute a *true transposition* into national legislation of the main jurisprudential benchmarks of the CJEU in the matter of unfair terms in contracts concluded between professionals and consumers.

One of the most important changes brought by the provisions of GEO 58/2022 is the *expressis verbis* establishment of the non-prescriptive nature of the action in the determination of unfair clauses.

Thus, according to Article 13 (7) of Law no. 193/2000, amended, by way of derogation from the provisions of the Civil Code that regulate the statute of limitations, the formulation of an action to establish the existence of unfair clauses is not time-barred.

The provisions of Article 6 and Article 7 of Directive 93/13/CEE, faithfully taken over by the Romanian legislator, oblige the member states to adopt appropriate and effective measures to remove unfair clauses from contracts concluded with consumers, without clarifying the concrete legal regime of these measures. The Directive only establishes that such unfair clauses used in contracts concluded with a consumer by a professional, in accordance with domestic law, *do not create obligations for the consumer.*

In the Romanian doctrine, mainly two solutions were offered: that of the absolute nullity of the unfair clause, respectively the consideration of the unfair clause as being unwritten. The majority of authors supported the thesis of the absolute nullity sanction, considering it the most appropriate solution in relation to the need to protect consumers' interests, considering, mainly, the non-prescriptive nature of the action in absolute nullity.

In this sense, the HCCJ also held that: "although Law no. 193/2000 regarding unfair clauses in contracts concluded between professionals and consumers does not provide as a sanction the annulment of unfair clauses, but their ineffectiveness in relation to the consumer, **the legal regime of this sanction is identical to that of absolute nullity.** Regarding the nature of the protected interest, the respective norm protects a general interest, and not an individual one, it being obvious that the law protects a generic category, that of consumers, and not a particular person. In this sense, Law no. 193/2000 is nothing more than the transposition into Romanian legislation of Directive 93/13/EEC, whose provisions, according to CJEU juris-

prudence, are of public order. Consequently, since it cannot be a matter of relative nullity, but of absolute nullity, which can be invoked at any time, the plaintiffs' right to action cannot be considered as time-barred."[1].

Regarding the non-prescriptive character of the action in the determination of unfair clauses, the CJEU has made countless interventions, in response to the preliminary questions that have been addressed to it over time, its constant jurisprudence being in this sense.

Thus, starting from the premise that "the consumer protection system is based on the idea that a consumer finds himself in a situation of inferiority to the professional in terms of both the bargaining power and the level of information", Article 6 paragraph (1) of the directive, according to which unfair terms do not create obligations for the consumer, "constitutes an imperative provision that seeks to replace the formal balance established by the contract between the rights and obligations of the co-contractors with a real balance, likely to restore equality between these parties.[2] Considering the nature and importance of the public interest on which the protection that the directive provides to consumers is based, "Article 6 of this must be considered as a norm equivalent to the national norms that occupy, within the domestic legal order, **the rank of norms of public order** [...]."[3].

In the judgment delivered in the related cases C-154/15, C-307/15 and C-308/15, Gutierrez Naranjo, the Court of Luxembourg showed that Article 6(1) of Directive 93/13 must be interpreted as meaning that it is necessary to consider, in principle, that a contractual term declared unfair **never existed**, so that it **cannot have an effect as far as the consumer is concerned**; the judicial finding of the unfair character of such a clause must, in principle, have as a consequence the restoration in law and in fact of the situation in which the consumer would find himself in the absence of the respective clause."

[1] Decision no. 686 of the Second Civil Section of the HCCJ, of February 21, 2013.

[2] Judgment of the Court in Case C-488/11, *Asbeek Brusse,* paragraph 38, with references to Judgments of the Court in Cases C-618/10, *Banco Español de Crédito*, paragraph 40, and C-472/11, *Banif Plus Bank*, paragraph 20.

[3] Judgment of the Court in the related cases C-154/15, C-307/15 and C-308/15, Naranjo Gutierrez, paragraph 54; Judgment of the Court in case C-488/11, *Asbeek Brusse,* paragraph 44; here the Court refers to two previous decisions: the Judgment handed down in case C-40/08, *Asturcom Telecomunicaciones*, point 52, and the Ordinance handed down in case C-76/10, *Pohotovost'*, point 50.

In the judgment in case C-473/00, *Cofidis*, the Court ruled that the protection conferred on consumers by the said directive is opposed to a national provision under which – in an action brought by the seller or supplier against the consumer on the basis of a contract concluded between them –, upon expiry of a set term, the national court cannot invoke, ex officio or at the request of the consumer, the unfair nature of a contractual clause. This constant orientation of the Court was reiterated and reinforced by a recent judgment pronounced in related cases *C-776/19-C-782/19, BNP Paribas Personal Finance,*[4] by which the Court ruled to the effect that, "Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation which makes the submission of a claim by a consumer for a declaration that a term in a contract concluded between a seller or supplier and that consumer is unfair subject to a limitation period.[5]

Therefore, from the jurisprudence of the Court, it is clear that both the sanction of *nullity* of unfair contractual clauses, as well as the *non-prescriptive character of the action in establishing the nullity of unfair clauses*, represent the ways by which the protection proposed by the directive can be ensured in the most effective way.

Closely related to this amendment, as a natural consequence of the establishment of absolute nullity as a sanction for unfair clauses, the obligation of the court to ex officio examine the unfair nature of the clauses of contracts concluded between professionals and consumers is introduced in the new Article 131.

Thus, "the court has the obligation to ex officio examine the unfair nature of a contractual clause as soon as it has the necessary legal and factual elements in this regard. When it considers that such a clause is unfair, the court does not apply it, except if the consumer objects.

[4] Judgment of 10 June 2021, *BNP Paribas Personal Finance,* C-776/19-C-782/19, ECLI:EU:C:2021:470.

[5] "(...) in particular in order to ensure an effective protection of the rights conferred on a consumer by Directive 93/13, he must be able to invoke, at any time, the unfair nature of a contractual clause not only as means of defence, but also in order to declare by the court the unfair nature of a contractual clause, so that a request made by a consumer in order to establish the unfair nature of a clause appearing in a contract concluded between a professional and a consumer may not be subject to any limitation period".

Regarding this matter, the jurisprudence of the Court of Luxembourg has been consistent in the sense that national courts must have the competence to examine unfair contractual clauses on their own initiative (*ex officio*), this orientation being manifested first by the judgments *OcéaNo. Grupo Editorial* and *Pannon GSM* and being reconfirmed in numerous subsequent decisions.[6] "The national court has the obligation to ex officio examine the unfair nature of a contractual clause as soon as it has the necessary legal and factual elements in this regard. When it considers such a clause to be unfair, the court shall not apply it, unless the consumer objects. This obligation rests with the national court including when it verifies its own territorial jurisdiction." The *ex officio* control of the unfair nature of contractual clauses comes as a consequence of the fact that the rules that provide for the non-binding nature of unfair clauses are imperative public order rules applicable *ex jure,* so they constitute legal issues that do not depend on their invocation by the parties.

Another necessary amendment brought to Law 193/200 refers to the possibility of the enforcement court to examine, without being constrained by any deadline, during the enforcement appeal, at the consumer's request or ex officio, the unfair nature of the clauses in a contract that constitutes an enforceable title. In addition, consumers are exempted from paying a deposit, when they prove that their monthly income does not exceed the cumulative value of two average salaries in the economy.

Thus, according to Article 13 (8) of Law no. 193/2000, "(8) By way of derogation from Article 713 (2) of the Code of Civil Procedure, the enforcement court has the possibility to examine in the enforcement appeal, at the request of the consumer or ex officio, if the clauses of a contract concluded between a professional and a consumer that constitutes an enforceable title are unfair, such an enforcement challenge being imprescriptible". Also, according to paragraph (9)"by way of derogation from the provisions of Article 719 (2) and (3) of the Code of Civil Procedure, when the suspension of enforcement is requested, consumers are exempted from paying a deposit when they prove that their monthly income does not exceed the cumulative value of two minimum wages per economy."

[6] Judgment rendered in Case C-421/14, *Banco Primus*, Judgment of the Court in Case C-415/11, Aziz, and jurisprudence cited, Judgment of the Court in related cases C-154/15, C-307/15 and C-308/ 15, *Gutiérrez Naranjo and others*.

Since the consumer most often does not realize from the beginning of the contract the unfair nature of some of the clauses, in order to be able to achieve a real protection that directive 93/13 proposes, the consumer must have the possibility to invoke in court their unfair character both during the execution of the contract and in the phase of triggering the enforced execution. In this sense is, as we will see in the following, the jurisprudence of the CJEU.

Why a necessary change? Because, in the national legislation, by amending Article 713 (2) Civil Procedure Code, by Law no. 310/20181, the possibility of formulating substantive defences regarding the right contained in the enforceable title, by way of challenging the enforcement, was eliminated.[7] As a result of this change, the enforcement appeals in which the examination of the unfair nature of the clauses of the contract concluded between a professional and a consumer constituting an enforceable title was rejected as inadmissible, on the grounds that the finding of the unfair character of the contractual clauses could be requested through a common law action.[8]

The jurisprudence of the CJEU in this matter can be easily and clearly separated from the numerous judgments pronounced in response to the preliminary questions of the national courts.

Thus, we note first of all, as a consequence of the imposition of *ex officio* control of the possible unfair nature of contractual clauses, the fact that, in its judgments, the Court reiterates a general principle of European Union law, namely that the national courts must ensure the achievement of this control by interpreting and applying domestic law in accordance with EU law.[9] If national procedural rules do not comply with the principle of *effectiveness* or do not guarantee an effective remedy, national courts

[7] Article 713 (2) of the Code of Civil Procedure "(2) If the forced execution is done on the basis of another enforceable title than a court decision, factual or legal reasons regarding the substance of the right contained in the enforceable title may be invoked in the challenge to the enforcement, only if the law does not provide for that enforceable title a procedural way to abolish it, including a common law action".

[8] Prior to this change, the doctrine held that the debtor could invoke the unfair character of some contractual clauses by way of contesting the execution. In this sense see M. Dinu, R. Stanciu, *Executarea silită în Codul de procedură civilă. Comentariu pe articole*, Hamangiu Publishing House, Bucharest, 2017, p. 410.

[9] Judgment in Case C-397/11, *Erika Jőrös*, paragraph 32.

must remove these national rules, in order to carry out the *ex officio* review provided for by EU law.[10]

Considering the principle of *effectiveness*, the CJEU has recalled on several occasions in the judgments issued in the procedure of preliminary references that national legislation must provide remedies that allow consumers to invoke the unfair nature of contractual clauses, and these remedies must be effective.[11] In order to determine whether there are effective appeals, the Court shows that, among other things, it must be checked whether, due to procedural limitations, the introduction of the available appeals becomes excessively difficult or even practically impossible[12]. Thus, in the considerations of the *Profi Credit Polska* Decision[13], The CJEU emphasized that, "effective protection of the rights conferred on the consumer by Directive 93/13 can be guaranteed only provided that the national procedural system allows the court, during the order for payment proceedings or the enforcement proceedings concerning an order for payment, to check of its own motion whether the terms of the contract concerned are unfair"

One of the relatively recent judgments of the CJEU with relevance in the matter under discussion is the interpretation contained in the *BNP Paribas Personal Finance SA Paris* Ordinance[14], "Council Directive 93/13/EEC on unfair terms in contracts concluded with consumers must

[10] Court judgment in case C-118/17, *Dunai*, point 61.

[11] Court Order in Case C-632/17, *PKO*, paragraph 43, and Court Judgment in Case C-567/13, Nóra Baczó, paragraphs 52 and 59.

[12] Judgment of the Court in case C-618/10, *Banco Español de Crédito*, paragraphs 52-54; Judgment of the Court in Case C-176/17, *Profi Credit Polska*, paragraphs 61-72, Judgment of the Court in Case C-176/17, *Profi Credit Polska*, paragraph 69, Judgment of the Court in Case C-49/14, *Finanmadrid,* paragraph 52, Order of the Court in Case C-122/14, *Aktiv Kapital Portfolio*, paragraph 37, and Judgment of the Court in Case C-618/10, *Banco Español de Crédito*, paragraph 54.

[13] Court judgment in case C-176/17, *Profi Credit Polska*, paragraph 44.

[14] Judgment of November 6, 2019, BNP Paribas Personal Finance SA Paris Bucharest and Secapital Branch, C-75/19, ECLI:EU:C:2019:950. In point 29, it was shown that ″In the present case, although the referring court indicated in its request for a preliminary ruling that there is a procedure in national law distinct from the challenge to enforcement, which is not subject to a limitation period, which allows the invocation of the unfair character of a contractual clause, this court stated that such a circumstance does not produce effects on the enforcement procedure, insofar as the latter can be imposed on the consumer before the settlement of the action in establishing the existence of such unfair clauses."

be interpreted in the sense that it **opposes** a rule of national law under which a **consumer** who has concluded a credit agreement with a credit institution; and against whom this professional has started an enforcement procedure is **deprived** of the right to invoke the existence of unfair clauses in order to challenge the mentioned procedure after the **expiration of a period of 15 days from the communication of the first documents of this procedure,** *even if this consumer has at his disposal, under national law, a legal action in order to establish the existence of unfair clauses whose introduction is not subject to any time limit,* but whose solution does not produce effects on the one resulting from the forced execution procedure and which can be imposed on the consumer before the resolution of the action in establishing the existence of unfair clauses". It should be noted that, by the Ordinance of November 6, 2019, the Court ruled on a situation that arose before the amendment of Article 713 paragraph (2) of the Code of Civil Procedure by Law no. 310/2018. The Court pointed out that where the enforcement proceedings were completed before the decision of the trial court in the separate proceedings, this decision only provided consumers with *a posteriori* protection, which was incomplete and insufficient in relation to Directive 93/13 and therefore contrary to the objective set out in Article 7(1) thereof.[15]

A series of decisions pronounced during this year reconfirms the previous jurisprudence of the Luxembourg Court regarding the relationship between national procedural principles and European Union law[16]. Thus, the Court considers that the national procedural rules must comply with the **principle of effectiveness, appreciating** that in the absence of effective control of the potentially unfair nature of the contract clauses in question, compliance with the rights conferred by Directive 93/13 cannot be guaranteed.[17]

[15] Ordinance of November 6, 2019, BNP Paribas Personal Finance SA Paris Bucharest and Secapital Branch, C-75/19, EU:C:2019:950, point 32, as well as the jurisprudence cited.

[16] The Court's judgments in the following cases: Case C-869/19, *Unicaja Banco*, Case C-600/19, *Ibercaja banco*, Related Cases C-693/19, *SPV Project 1503*, and C-831/19, *Banco di Desio e della Brianza and others*, Case C-725/19, *Impuls Leasing Romania.*

[17] Judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19-C-782/19, as well as Judgment of 4 June 2020, *Kancelaria Medius*, C-495/19, EU:C:2020:431, point 35 and the jurisprudence cited.

In the considerations of the Decision of May 17, 2022, *Impuls Leasing Romania*[18], at point 46, the Court specified that the obligation of the member states to ensure the effectiveness of the rights conferred on litigants by Union law implies, in particular for the rights arising from Directive 93/13, a requirement of effective jurisdictional protection, reaffirmed in Article 7 paragraph (1) of this directive and also enshrined in article 47 of the Charter of Fundamental Rights of the European Union, which applies, inter alia, to the definition of procedural modalities relating to legal actions based on such rights.[19] The Court also recalled and reaffirmed its constant jurisprudence from which it appears that the costs that a legal action would entail in relation to the amount of the disputed claim must not be likely to discourage the consumer to notify the court in order to examine the potentially unfair nature of the contractual clauses.[20] Given that a defaulting debtor is likely to lack the financial resources to provide the required collateral,[21] the general lawyer of the case considers in his conclusions that a consumer may be discouraged from formulating a request for the suspension of enforced execution considering that this is conditioned by the payment of a deposit which is calculated according to the value of the object of the request; such a requirement makes it practically impossible to obtain such a suspension, since it is likely that the consumer, as a debtor who has not fulfilled his payment obligation, does not have the necessary financial resources to constitute the requested bond.[22]

Concluding, the Court ruled that, "Article 6(1) and Article 7(1) of Directive 93/13/EEC (…) must be interpreted as precluding national legislation which does not allow the court enforcing a claim, notified with a challenge to this enforcement, to assess, *ex officio* or at the request of the consumer, the unfair character of the clauses of a contract concluded between a consumer and a professional which constitutes an enforceable title, since the

[18] C-725/19, EU:C:2022:396.

[19] See in this regard the Judgment of 10 June 2021, *BNP Paribas Personal Finance*, C-776/19-C-782/19, EU:C:2021:470, point 29 and the cited jurisprudence.

[20] See in this regard Judgment of 14 June 2012, *Banco Español de Crédito*, C-618/10, EU:C:2012:349, paragraph 54, Judgment of 18 February 2016, *Finanmadrid* EFC, C-49/14, EU:C:2016:98, paragraphs 52 and 54, and Judgment of 20 September 2018, EOS KSI *Slovensko,* C-448/17, EU:C:2018:745, paragraph 46.

[21] Judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 60.

[22] The conclusions of the advocate general, Mr. Evgheni Tancev in case C-725/19, EU:C:2021:616.

court of first instance, which can be referred to with a separate common law action in order to examine the possibly unfair nature of the clauses of such a contract, may not stay the foreclosure proceeding pending judgment on the merits except upon payment of a bond at a level that may deter the consumer from bringing and maintaining such an action."

We cannot conclude the analysis of the legislative changes that are the subject of this study without also mentioning the provision that gives the ANPC, together with the authorized consumer associations, the possibility to request the court to order the termination of the future use of adhesion contracts concluded between professionals and consumers, which contain unfair clauses. The legislator's intervention is salutary, thus putting an end to the doctrinal controversies rightly sparked by the old legal text.[23]

Thus, according to Article 12 (1) If they find the use of adhesion contracts that contain unfair clauses, the control bodies provided for in Article 8 will notify the court at the domicile or, as the case may be, the office of the professional, to order the cessation of the use of the unfair clauses for the future and the modification of contracts currently being executed, by eliminating unfair clauses.

Conclusion

We consider the new legal provisions in the field of unfair clauses welcome and necessary in the context where, on the one hand, there were divergent solutions in judicial practice in relation to the various legal problems generated by the provisions of Law no. 193/2000; and on the other hand, from the jurisprudence of the CJEU it emerges that compliance with the principle of equivalence may in some situations require legislative adaptations to guarantee compliance with this principle.

[23] See Gh. Piperea *Class action a la roumaine*, in RRDA no. 7/2013, L. Bercea, Efectele *erga omnes* ale hotărârilor judecătoreşti pronunţate în acţiunile în eliminarea clauzelor abuzive din contractele standard de consum, in R.R.D.A. no. 7/2013, I.I. Neamţ, Consideraţii generale cu privire la acţiunea reglementată de Art. 12 şi Art. 13 din Legea nr. 193/2000. Analiză de drept comparat, in R.R.D.P. no. 6/2013.

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14. Judgment of 17 May 2022 Impuls Leasing Romania IFN SA, C-725/19, EU:C:2022:396.

FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVATE LIFE. DEFENSE OF PERSONAL NON-PATRIMONIAL RIGHTS

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ABSTRACT

The provisions of the Romanian Civil Code establish the legal means of protection of non-patrimonial personal rights or the rights of personality of civil law subjects. In this paper we will briefly analyze the jurisprudence of the European Court of Human Rights and at the same time we will briefly present the legal provisions of national law. Likewise, we will do an examination of the jurisprudence handed down by the courts in order to provide a more accurate picture of rights of the personality.

KEYWORDS: *civil liability; public servant; public institution;*

I. Introductory aspects

The Romanian Civil Code establishes in Book I, Title I, Chapter II the respect due to the human being and its inherent rights. In Article 58 the rights of personality are listed, being regulated that: "*(1) Every person has the right to life, health, physical and mental integrity, dignity, self-image, respect for private life, as well as other such rights recognized by law. (2) These rights are not transferable*".

In a logical sequence, the legislator regulated in Article 70 et seq. Civil Code respect for private life and the dignity of the human person. In this section, the right to free expression, the right to private life, the right to dignity, the right to one's image are presented. As we will show throughout this paper, these rights have been the subject of many lawsuits, in which the courts have analyzed the infringements of these non-patrimonial personal rights.

Consequently, although non-patrimonial personal rights are not valuable in money, this cannot be interpreted to mean that the violation of such

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rights cannot engage tortious civil liability or other forms of reparation for the person responsible for the violation of such rights of personality.

In this sense are also the provisions of Article 252 (4) Civil Code, according to which "*also, the injured person can ask for compensation or, as the case may be, a patrimonial reparation for the damage, even non-pecuniary, that was caused to him, if the injury is attributable to the author of the prejudicial act. In these cases, the right to action is subject to the statute of limitations*".

Therefore, in case of violation of non-patrimonial personal rights, the person who considers himself injured can request compensation for the damage suffered as a result of the violation of non-patrimonial personal rights.

The protection of rights of personality is guaranteed not only to public persons, with notoriety, the protection of these values being guaranteed to any natural persons who are protected from violations that are not limited to the exceptions provided by Article 75 of the Civil Code[1].

By Decision no. 1576/07.12.2011[2], The Constitutional Court of Romania ruled that human dignity is an inalienable attribute of the human person, a value that imposes on each member of society a behaviour of respect and protection of other individuals and the prohibition of any humiliating or degrading attitude towards man.

The right to dignity, the right to honour and the right to reputation are some examples of rights of personality or aspects of the right to private life[3]. The right to honour represents the right of every natural person not to be affected by his consideration, honour representing both the feeling that the person has that he is beyond reproach from a moral and legal point of view, as well as the fact that the person is valued in society, according to the same criteria.

[1] According to Article 75 of the Civil Code: "Limits (1) It does not constitute a violation of the rights provided for in this section the touches that are allowed by law or by international conventions and pacts regarding human rights to which Romania is a party. (2) The exercise of constitutional rights and freedoms in good faith and in compliance with international pacts and conventions to which Romania is a party does not constitute a violation of the rights provided for in this section."

[2] Published in the Official Monitor of Romania no. 32 of January 16, 2012.

[3] Dr. Horațiu Dan Dumitru, *Libertatea de exprimare și viața privată. Conexiuni constituționale și civile,* in Pandectele Române no. 5/2012.

These personal non-patrimonial rights enjoy an *erga omnes* opposability, all other legal subjects having an obligation not to do, that is, not to prejudice the rights of personality. When the obligation is not respected and these rights are still violated, the injured party has the opportunity to repair the damage caused.

II. The jurisprudence of the European Court of Human Rights

In the consistent jurisprudence of the European Court of Human Rights (hereafter ECHR) it has been ruled that a distinction must be made between value judgments and de facto accusations[4]. With regard to value judgments, the ECHR held that they cannot and should not be proven, their essence being subjective, the only requirement being that of a minimal reality from which the opinions are extracted. In the absence of it, the opinions can be considered excessive, likely to attract the responsibility of the one who launches them in the public space[5].

Unlike opinions, statements of fact must be proven by the person making them. The condition of proof is assessed rigorously, going down to the last details of the de facto accusation. Any deviation from the presented reality is circumscribed to the illegal act that has as a direct consequence the damage brought to the honour and reputation of the natural person targeted by the respective press article[6].

Also in the ECHR jurisprudence, a distinction was established between the affirmation of facts and that of value judgments, bearing in mind that "*The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof*". Thus," if the concreteness of the first can be proven, the following cannot prove their accuracy. As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10"[7].

It is No. less true that the fact of accusing certain persons implies the obligation to provide a sufficient real basis and that even a value judgment

[4] To that effect, see *Pfeiffer v. Austria, Lingens and Oberschlick v. Austria*, available at *www.hudoc.echr.coe.*

[5] In this sense, see *Ivanciuc v. Romania, Cumpănă and Mazăre v. Romania*, available on *www.hudoc.echr.coe.*

[6] *Chauvy v. France*, available on *www.hudoc.echr.coe.*

[7] *Lingens v. Austria*, available on *www.hudoc.echr.coe*.

can prove excessive if it is totally devoid of a real basis[8]. Therefore, the Court analyzes whether there is a sufficiently supported *de facto* basis at the origin of the statements made[9]. Therefore, the quality of the person involved, correlated with the subjects subject to attention, justifies the interest of the journalistic investigation, not being able to claim that the satisfaction of some particular interests of the journalist or the television station would have been pursued.

Even if these articles contain a dose of exaggeration and provocation, admissible in a democratic society for journalists, on the one hand, and on the other hand, even if the suspicions regarding the influences exerted on some politicians and the abuses committed by them in the interest of the plaintiff, aroused his indignation, the court appreciates that the manner in which the journalist presented the incriminated statements does not exceed the acceptable limits of the right to free expression, since the intention that animated the defendant-journalist was not to affect the image of the plaintiff, but to inform the public about subjects of public interest and to arouse interest in removing the criticized phenomena[10].

In the practice of the courts, the relationship between the freedom of expression and the personal patrimonial rights belonging to another has been extensively analyzed, the courts being invested with the resolution of actions regarding the reparation of the damage caused by the infringement of rights of personality. In this context, it was analyzed whether by exercising the right to freedom of expression, as a non-patrimonial personal right, harm can be caused to another[11].

It should be noted that according to Article 10 (1) of the ECHR, every person has the right to freedom of expression, freedom of opinion, freedom to receive or communicate information. The article in point 2 specifies that the exercise of these freedoms may be subject to formalities, conditions, restrictions or sanctions as necessary measures for the protection of the reputation or rights of others, to prevent the disclosure of confidential information, to guarantee the authority and impartiality of the judiciary.

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[8] *Cumpănă si Mazăre v. Romania*, § 98-101, *Petrina v. Romania,* § 42, *Ivanciuc v. Romania, inadmissibility decision,* available on *www.hudoc.echr.coe.*

[9] *Cârlan v. Romania*, available on *www.hudoc.echr.coe.*

[10] High Court of Cassation and Justice, civil decision no. 382/2017 of February 23, 2017.

[11] Details: *https://legeaz.net/spete-civil-cluj-2015/raspundere-civila-denigrare-in-presa-scrisa-714-2015.*

The reflection in the press of pending judicial cases, especially criminal ones, is a constant nowadays and raises the issue of the relationship between freedom of expression through the press and the need to guarantee the presumption of innocence and the proper functioning of justice.

The European Court has established that when a person communicates details about a specific activity of another stating in good faith accusations against him, the imposition of a sanction is not allowed[12]. Conversely, if the publication is not made in good faith, the sanction may be accepted to protect the rights and freedoms of another, provided that the sanction is proportionate to this purpose.

Although the Court's jurisprudence gives the press a privileged role relative to freedom of expression, the guarantee offered by Article 10 is subject to the condition that it acts in good faith, precisely considering its role as an opinion maker and the special impact of information and published opinions. In this sense, we note that in the Court's jurisprudence it was held that "*the interest to protect the reputation and ensure the authority of the magistrates is superior to that of allowing a free discussion on their impartiality*."

As can be seen, the ECHR jurisprudence made an extensive analysis of the relationship between the two important non-patrimonial rights, namely freedom of expression on the one hand and the right to honour, reputation and private life on the other.

It is true that, being rights of personality, the Court must ensure a fair balance when limiting a fundamental right such as the right to free expression. As it follows from the considerations of the judgments analyzed previously, the freedom of expression of the press was mainly analyzed on the role of the Court. Like any subjective civil right, the right to free expression must be exercised in good faith and without harming or damaging another person through its exercise. The provisions of Article 15 of the Civil Code, which regulate the abuse of law, are also in this sense. At the same time, the provisions of Article 1353 of the Civil Code must also be taken into account, which regulate that the exercise of rights exempts from civil liability, with the exception of the situation where the exercise is abusive.

We believe that the previously mentioned legal provisions must be implicitly analyzed by national courts when they are called upon to analyze

[12] The case of *Dălban v. Romania*, available on *www.hudoc.echr.coe.*

whether the exercise of the right to free expression has prejudiced the rights or legitimate interests of another person. In all cases, we believe that the limit that exceeds the freedom of expression and enters the sphere of civil wrongfulness must be taken into account. We appreciate that as long as the right to free expression is exercised in good faith and without considering the denigration of the person about whom it is exercised, this right enjoys increased protection. However, when information is presented to the public without factual support, in violation of the right to honour, dignity and private life, the one who chooses to exercise his right to free expression in this way will be held criminally liable for the damage caused.

Regarding the exercise of freedom of expression, it includes obligations and responsibilities, the extent of which depends on the situation and the technical procedure used. The guarantee offered by Article 10 of the Journalists' Convention is subject to the condition that those concerned act in good faith, so as to provide accurate and reliable information in compliance with journalistic ethics[13]. While it is necessary to protect sources, journalists have an obligation to provide a solid de facto basis for contentious allegations and that does not involve an obligation to reveal the names of the people who provided the information they relied on to write their articles[14].

Freedom of expression, as enshrined in Article 10 of the Convention, constitutes one of the essential foundations of a democratic society, but the exercise of this freedom must not be done abusively and discretionarily, but must be subordinated to good faith in its exercise, respectively it must be subject to formalities of good intentions, also in such a way as not to exceed the condition of "necessity in a democratic society".

Another obligation that must be respected by journalists refers to the ethical principles that govern this profession. According to Resolution no. 1003/1993[15], the journalist is obliged to act in good faith and prove the accusations issued and, equally, the dissemination of the news must be done respecting the truth, after they have been rigorously verified previ-

[13] Carmen-Maria Cont, *Dreptul la libera exprimare versus dreptul la demnitate și la propria imagine,* in Revista Română de Jurisprudență no. 2 of 2019.

[14] The case of *Cumpănă and Mazăre v. Romania*, cited in Carmen Maria Cont, *op. cit.*

[15] Resolution no. 1003 of July 1, 1993 of the Council of Europe regarding journalistic ethics, published in the Official Gazette no. 265 of September 20, 1994.

ously, the facts must be exposed, described and presented impartially. Information should not be confused with rumours.

Consequently, when the exercise of the right to free expression is done in compliance with the principle of good faith, in a way that cannot be considered abusive and considering the limits established in Article 75 of the Civil Code, the person who exercises his right to free expression does not commit an illegal act. Equally, it should be noted that the freedom of expression of the press must also take into account the principles of ethics, as they were established in the aforementioned Resolution 1003/1993.

III. The analysis of rights of personality made in the specialized literature

Regarding the notion of honour, specialized literature[16] extensively analyzed the existence and content of this right of personality. In the cited work, the author notes that "the notion of honor has three meanings: a) for a person who is distinguished by his position or his merits, it evokes an exceptional sign of consideration, esteem, tribute to his value; b) for any person evokes an element of his moral heritage that entitles him to be respected by others and to respect them; in this sense it is said "man of honor", "word of honor", "duty of honor" (well, derived from a natural obligation); c) in an objective sense - the rule of conduct, moral norm of behavior, ideal value to which a collective or group is related (the honour of a people, the honour of a profession) as well as the synthesis of its essential virtues (loyalty, courage, attachment to freedoms) to make them a motto, a code (for example, a deontological code)".

With regard to the right to free expression[17], regarding it, it was appreciated that expression can be achieved through speaking, in writing, through images or sounds, or through mimicry and gestures. The author appreciates[18] that the provisions of Article 70 of the Civil Code must be analyzed with some aspects that form the legal regime of civil liability

[16] A se vedea Ovidiu Ungureanu, *Dreptul la onoare și dreptul la demnitate,* în Pandectele Române nr. 2 din 2006.

[17] Carmen Todică, *The right to free expression from the European Convention on Human Rights to the Romanian Constitution and the internal legislation. Jurisprudential solutions*, in Law and forensics science, A global challenge – acts of the 2nd international Conference, Rome, 2022, Ed. Diretto Piu, 2022.

[18] Horațiu Dan Dumitru, *op. cit.*

because exceeding the limits of freedom of expression will attract the sanction of the law. As it has been correctly appreciated in the specialized literature[19], freedom of expression is inevitably accompanied by limitations, so that the exercise of the right to free expression may appear as a limitation thereof.

The right to private life was described in the comments of the Civil Code[20] as representing the vast territory in which human existence is carried on; respecting the right to life gives its holder the power to keep secret aspects of his life and establishes a negative obligation on third parties not to interfere with intimate, personal or family life. The same author claimed, in accordance with the ECHR jurisprudence previously mentioned, that the right to respect for private life is also recognized for the person exercising a public office. If a person exercises a public function or is a public person, it does not mean that he does not have a private life. Therefore, these people benefit from the protection of the right to privacy[21]. But it is possible that professional deontology affects a person's private life when, through his behaviour, he affects the image or reputation of the position he exercises.

Equally, it is necessary to mention that the Criminal Code criminalizes crimes that affect the home and private life, respectively the violation of the domicile and the violation of the professional premises[22].

IV. National regulation and jurisprudence

Beyond the previously mentioned aspects with reference to ECtHR jurisprudence, it should be mentioned that the protection mechanism established by the European Convention on Human Rights has a subsidiary

[19] Cornelia Munteanu, *Dreptul la libera exprimare- drept subiectiv și limită a dreptului la viața privată*, in Revista Română de Drept Privat no. 4 of 2017.

[20] Lavinia Tec, *Codul civil comentat și adnotat. Despre legea civilă. Despre persoane. Art. 1-257,* Rosetti Internațional Publishing House, 2018.

[21] For further information, see Carmen Todică, *The person's right to the integrity in the light of the Treaty Establishing a Constitution for Europe* in Titu Maiorescu University Law Review 2004 (Analele Universităţii Titu Maiorescu, seria Drept 2004), volum III, pp. 187-198.

[22] For an extensive analysis, see Teodor Manea în *Drept penal. Partea specială. Infracțiuni contra persoanei. Infracțiuni contra patrimoniului,* Hamangiu Publishing House, Bucharest, 2022, pp. 339-352.

character in relation to the national systems for guaranteeing and protecting human rights[23]. As a result of this aspect, it is appropriate to analyze the national provisions adopted by the contemporary legislator in the matter of the protection of rights of personality. We will also present some decisions that we consider relevant, especially regarding the relationship between the right to free expression and private life, the right to dignity and the right to honour.

When the question of defending rights of personality is raised, the concern of the contemporary legislator to regulate specific measures in the analyzed matter is obvious. In order to guarantee adequate protection, Article 253 of the Civil Code establishes the following means of defense that the natural person whose non-patrimonial rights have been violated or threatened has at his disposal in order to obtain the protection of his rights.

It should be noted that according to the provisions of Article 253 of the Civil Code, the natural person has active legitimacy to apply to the court, but the provisions of Article 257 of the Civil Code must also be taken into account, which provide that the same provisions apply by analogy to the non-patrimonial rights of legal entities. In this context, even if we refer generically to the "person" whose personal non-patrimonial rights have been damaged, those indicated during the work will be equally applicable to both natural and legal persons.

Therefore, according to the provisions of the Romanian Civil Code, the person whose non-patrimonial rights have been violated or threatened, may at any time ask the court for the following measures expressly provided for in Article 253 of the Civil Code: **a)** prohibiting the commission of the illegal act, if it is imminent; **b)** termination of the infringement and prohibition for the future, if it still continues; **c)** ascertaining the illegal nature of the act committed, if the disorder it produced persists.

At the same time, Article 253 (2) provides that in the situation where non-patrimonial rights are violated by exercising the right to free expression, the court will be able to order exclusively the measures regulated in letter b) and c) above.

It is particularly important to analyze the fundamental right to free expression, and at the same time it is necessary to analyze the moment when freedom of expression can be considered as an illegal act causing

[23] The case of *Handyside v United Kingdom*, available at *www.hudoc.echr.coe.*

damages. As we will see in the following, the practice of the courts is very rich in the analysis of these two non-patrimonial rights.

As it follows from the provisions of Article 253 (1) c) Civil Code, one of the most energetic measures regulated for the protection of rights of personality is the finding of the illegal nature of the committed deed, if the disorder that the deed produced still exists. Equally, the provisions of Article 253 (3) and (4) must be remembered, which regulate that "*(3) At the same time, the person who has suffered a violation of such rights can ask the court to compel the perpetrator to carry out any measures deemed necessary by the court in order to reach the restoration of the achieved right, such as: a) obliging the author, at his expense, to publish the conviction; b) any other measures necessary to stop the illegal act or to repair the damage caused. (4) Also, the injured person can request compensation or, as the case may be, a patrimonial reparation for the damage, even non-pecuniary, that was caused to him, if the injury is attributable to the author of the prejudicial act. In these cases, the right to action is subject to the statute of limitations".*

As it follows from the previously cited legal provisions, the summons application having as its object the defense of rights of personality will be based on the provisions of Article 253 of the Civil Code in conjunction with the provisions of Article 1349 et seq. of the Civil Code relating to tortious civil liability. Courts are called upon to analyze under what conditions freedom of expression was exercised in good faith or, on the contrary, was exercised in an abusive manner.

In a decision held on appeal[24], the High Court of Cassation and Justice established that "the support regarding good faith cannot be accepted, as claimed by the appellant-defendant, since she was obliged to ensure a proportional relationship between the right to free expression and the defense of the person's reputation, in the sense that he had to use words that do not affect the honour or dignity of a person, to show more prudence, equidistance and decency, the verification of these aspects being essential in the assessment of good faith and, as a result, the defendant's good faith in ensuring the right to free expression cannot be withheld. The court also notes that the respective words do not represent qualifications or value judgments, as claimed by the appellant, admissible in a public dispute, but insulting expressions, which were not necessary to express an opinion,

[24] Decision 829/2021 of April 13, 2021.

even a negative one. The use of such words to characterize a certain person or their activity exceeds, by their very nature, the limits of a public polemic, justified by the purpose, possibly legitimate, of a debate related to a certain subject, even interesting for the general public. These offensive expressions are likely to affect the reputation, honour, public image and dignity of the person concerned, without bringing the public to whom they were communicated, by themselves, any necessary and useful information or communication regarding the subject discussed, being made with the sole purpose of discrediting the plaintiffs. With these terms, relevant opinions or assessments are not given in the context of the topic addressed, but only insults, insults are brought, without any contribution to the topic under discussion and without representing an argument. Of course, in the debate of a subject of interest, assessments of a negative nature can also be made, but these must still have the consistency of value judgments, even subjective, while the use of insulting, insulting, inconsistent language, by itself, does not represent such a value judgment and has No. justification in the economy of discourse, constituting exclusively abusive, derogatory behaviour. Therefore, these statements exceed the limits of the natural exercise of the right to free expression, enshrined as a fundamental right, representing an abusive, illegal exercise".

As can be seen from the considerations of the supreme court, the judges focused on all aspects that are also retained in the ECHR jurisprudence. Thus, first of all, the condition of good faith is analyzed, the proportionality between the right to free expression and the right to reputation, honour and dignity of the one who claims to be injured by exceeding the limits of free expression is analyzed. As long as the expressions used are not necessary to express an opinion, even a negative opinion, good faith cannot be withheld. At the same time, a distinction is made between qualifications and value judgments on the one hand and insulting expressions, the latter being outlined from the perspective of Article 253 related to Article 1349 et seq. of the Civil Code, the illegal act that can attract the tortious civil liability of the person who exercises his right to free expression in an abusive way.

In another decision[25], pronounced by the Cluj Court of Appeal, the court held that "The plaintiff suffered an obvious moral injury, injury consisting of damage to his honour, irreparable damage to his good reputation,

[25] Cluj Court of Appeal, Civil Decision no. 714/A/2015 of April 9, 2015.

both in society and in the profession, as well as in the family environment and in the circle of friends or acquaintances. It is not to be ignored, from the point of view of the moral damage caused to the respondent plaintiff, nor the psychological discomfort suffered by him, materialized in the disturbance of his soul and mental peace, inner peace; in the plaintiff's fear that the way his image will be perceived by all those close to him, as well as by public opinion, will be altered and damaged. Then, it should be taken into account that, regardless of the subsequent fate of the possible criminal files concerning the applicant, his image in society, in the family, in the professional environment, is seriously compromised, perhaps even irreversibly.

As it follows from the jurisprudence of the courts previously cited, the analysis of the limits of the right to free expression is a very concrete one, and in all cases interference with another person's private life is sanctioned, with the courts analyzing in detail how the non-pecuniary damage was caused and what is the most effective way of reparation.

V. Conclusions

Through this work, we wanted to highlight in particular the relationship between the right to free expression and the right to private life, dignity and honour, as they have been analyzed in the ECHR jurisprudence and in national jurisprudence.

Considering that we are far from exhausting the subject under analysis, we appreciate that through this work we have brought together both the legal provisions that regulate the legal means of defending the rights of the personality, as well as a pertinent analysis of the judicial practice generated by the abusive exercise of the right to free expression.

As we stated throughout the paper, the exercise of subjective civil rights must be done in such a way that the rights of others are not harmed and without harming others in an excessive and unreasonable way, contrary to the principle of good faith.

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INCOMPATIBILITY OF THE JUDGE. "THE FRIEND" FROM FACEBOOK. A NEW APPROACH OF INCOMPATIBILITY IN THE ROMANIAN CODE OF CIVIL PROCEDURE?

Liliana Cătălina ALEXE[*]

ABSTRACT

Analyzed so many times under the authority of procedural rules (those from the provisions of art. 41 paragraph 1 and art. 42 paragraph 1 points 1-13 of the Romanian Code of Civil Procedure), the incompatibility of the judge from the composition of the trial panel can be (or not) put in a new reality of our days - the connection from the online environment? Despite the question (what is the role of introduction and, why not, that of defining the theme of the present article) the research aims to indicate the situations (some, obviously, in fact) in which the judge from the composition of the panel would (could) be in a situation of incompatibility that could raise doubts about his impartiality, when, alongside the party or the party's representative, he is part of the same social network and if this case should be included in point 13 of art. 42 para. 1 of the Code. Starting from the imperative "tone" of the rules of procedure and in the context of the legislator of the Code that expressly regulated the case of incompatibility from point 13, this would appear to be the correct framing of the situation containing the hypothesis under discussion.

KEYWORDS: *incompatibility; impartiality; judge; Code of Civil procedure; social networks; Facebook; relationship; friendship;*

1. Social networks – socialization factor

We are in the age of the Internet and of determined social interactions, maintained by the creation of networking networks, a state of fact with which we all agree.

But how quickly we will understand that these networks will lead us to redefine well-rooted terms and values is up to each of us.

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It is clear, however, that the paradigm of the word friendship has been profoundly reconfigured or adjusted; what this future brings is not hard to imagine.

The phrase in the title of the article - "The friend" from Facebook - was used only for the popularity of the most widespread social network in the world - Facebook, although the dilemma in the title also applies when the other social networks enter the field of reference and analysis. social media (Instagram[1], Twitter, Linkedin, Flickr, etc.).

The polemic "social networks" instead of "social networks", in terms of the correct use of the two phrases, is less important for the subject addressed by the article.

What is important and constitutes the reference point in the analysis is the meaning of the word "social", an attribute that defines both terminologies.

However, starting from the original definition of the term[2], we are not wrong to say that social networks (or social networks, if the terminology is closer to the reality of each of us), belonging to contemporary society, have given the term a different meaning when the field of discussion it is placed in the sphere of socialization.

In this context of the online space, the word "friendship" also finds its place in other patterns and, contrary to some widely circulated opinions in the digital space, the meaning of the word has not changed, on the contrary.

Our own analysis begins by affirming that belonging (and) to a virtual environment is a right, the right to be part of social networks.

The man cannot be deprived of inter-human, interpersonal or social relations.

And this right cannot be denied to the judge, even in spite of the various regulations (and not a few) that have it at the center, imposing the conduct to be followed.

[1] Instagram is an online photo-sharing, video-sharing, and social networking service that allows users to upload pictures and videos, apply digital filters to them, and share them on a variety of social networks, such as Facebook, Twitter, Tumblr and Flickr (*https://ro.wikipedia.org/wiki/Instagram*, accessed on November 28, 2022).

[2] sociál, -ă, social, -e, adj. (according to DEX): 1. Created by the company, owned by the company; which is related to the life of people in society, to their relations in society or to society; which concerns human society. 2. Belonging to a certain type of society; related to belonging to a certain social category, to a certain social group.

We would not go on without mentioning the main acts in the legislative framework (domestic and international) that define the standards of the judge's conduct, in predetermined patterns, all under a common note, with a strong imperative "air":

- ***The ethical code of judges and prosecutors approved by Decision no. 328 of August 24, 2005*** *(published in the Official Gazette, Part I, no. 815 of September 8, 2005)*:

Article 9: "(2) Judges and prosecutors must refrain from any behavior, act or manifestation likely to alter confidence in their impartiality.

Article 17: "Judges and prosecutors are obliged to refrain from any acts or deeds likely to compromise their dignity in office and in society."

- ***Bangalore Principles of Judicial Conduct 2002*** *(Draft Bangalore Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening the Integrity of Justice, as revised at the Round Table of the Presidents of the Supreme Courts held at the Peace Palace, The Hague, 25-26 November 2002):*

"Value 2
IMPARTIALITY

2.2 The judge will strive to adopt a conduct, both in and out of court, that will maintain and strengthen the confidence of the public, jurists and litigants in the impartiality of the judge and the judiciary.

2.3 The judge will try, as much as he can in a reasonable measure, to adopt a conduct that will reduce to a minimum the number of situations of recusal of his.

Value 4
LABEL

4.2 Being permanently in the public eye, the judge must accept, freely and willingly, certain personal restrictions that would seem like a burden to the ordinary citizen. In particular, the judge must have a conduct that is consistent with the dignity of the position of magistrate.

4.8 The judge will not allow his family, social or other similar relationships to inappropriately influence his conduct and decisions as a judge".

- ***Consultative Council of European Judges (CCJE) -*** *Opinion no. 3 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the principles and rules regarding the professional imperatives applicable to judges and in particular deontology, incompatible behaviors and impartiality:*

b. Impartiality and extrajudicial behavior of judges

27. Judges must not be isolated from the society in which they live, since the legal system can only function well if judges maintain contact with reality. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, above all, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc.). Therefore, they must generally remain free to take part in extra-professional activities of their choice.

28. However, such activities may jeopardize their impartiality and sometimes even their independence. Therefore, a reasonable balance must be found between the degree to which judges can be involved in society and the need for them to be and be seen as independent and impartial in the performance of their duties. Ultimately, the question must be asked whether, in that social context and in the eyes of an informed and rational observer, the judge engaged in an activity that could objectively compromise his independence or impartiality.

We observe, therefore, a process of legislating the conduct of the delicate magistrate, with a so-called guiding role, of an intrusive type, which is shown to be powerless in front of the most popular phenomenon - the daily browsing on social networks and the overwhelming, growing interest, for their content (audio/video).

2. The value of the notion of "friendship" in the age of the Internet

The concept of "social networks" works on the interaction between chosen, accepted "friends".

Often blamed, accused of not having the attributes of a direct relationship between people, of not having as its premise a real friendship, the virtual interaction proved to be strong enough, capable of overturning these "accusations" and determining another "way" in how people relate to online friendship and the ways in which they can communicate in this environment.

If we start the analysis of the concept of friendship, the most invoked in the online space, from its usual meaning (a feeling of sympathy, esteem, respect, mutual attachment that binds two people; a bond that is established between people, based on these feelings; benevolent, friendly attitude towards someone[3]) we could conclude, without much error, that virtual friendship is not devoid of these attributes at all.

This kind of friendship - just a click away - cannot be condemned ab initio not to turn into a real, consistent one, even more so for those who have formed communities in the virtual space.

And the judge integrated himself into the online environment, in professional or non-professional groups, and he could not have stayed away from the social media phenomenon.

As the scope of this article is the incompatibility of the judge who is in a relationship of "friendship" on social networks with one of the parties or his representative, we return to the procedural norm in point 13 of article 42, the only one that allows (from the point of view of procedural view) framing a possible situation of incompatibility, in order not to lose from the analysis even the landmark points contained in the norm, decisive in the settlement of the procedural "dispute":

Article 42 under the marginal title "Other cases of incompatibility" also enshrines the existence of the case of incompatibility from point 13: *"(1) The judge is also incompatible to judge in the following situations: 13. when there are other elements that raise reasonable doubts about his impartiality",* ***a text with generous terms, quite present in the field of law ("elements", "birth", "grounded", "doubts") and with explicit reference to a great principle of judicial conduct - impartiality.***

Until other regulations, this is the text through which the terms will be supported for further analysis:

Elements that give rise to reasonable doubts about impartiality can also be given by those that have as their source the (virtual) friendship relationship with the judge of the case.

It is obvious that in the online space friendship has been released in a new dimension, which, in my own opinion, is not at all negligible, even more it has all the attributes of getting extremely close to the so-called friendship resulting from the interaction within front of.

[3] Definition according to the most comprehensive general use dictionary of the Romanian language – Explanatory Dictionary of the Romanian Language.

Online friendship is the new social phenomenon that concerns any owner of an account on a social network, who has accepted the friendship request and added another user (close people, but also unknown people) to their list of friends.

About the reason for accepting this "friendship" I would not allow myself to issue any reasoning, one of an inductive/deductive type, because the motivations of this kind are deeply internal and, under this aspect, difficult to reveal even to substantiate any conclusion in this regard.

And, why not admit it, we wouldn't even have such a right.

Returning to the area of procedural law, we would note that the authors of the Code of Civil Procedure did not care to pay attention to the *friendship relationship* with the consequence of retaining in the space of reasons for incompatibility and the implications of such a relationship, thus joining it to the types of relationships which have entered the regulatory sphere of the Code, with the aim of protection for the opposing party:

- ✓ marriage relationships or former marriage relationships, kinship, affinity (point 2, point 3, point 4),
- ✓ the conflicting ones (litigious, of a criminal nature - point 5 and point 6),
- ✓ relations regarding legal measures to protect the person (guardianship, conservatorship - point 7),
- ✓ hostile relations (point 9),
- ✓ relations derived from the right of representation (from point 12).

Although it paid attention to family relationships, but also to those that have sentimental support (of a certain nature, such as enmity, a litigious state, a state of protection or the capacity of a representative), the Code excludes, but not deliberately, friendship ties, perhaps those deeper and with the highest level of emotional intimacy that is created.

Thus, remaining outside a rule of prohibition, they can only be analyzed through the lens of the incompatibility case of point 13, generous enough to cover under its protective umbrella these relationships, reduced, according to the rule, to elements strong enough to affect the impartiality of the judge.

The current context of the life of each of us unfolds on two levels:

- ***real*** and ***digital*** (online) or
- ***real-life activities*** versus ***virtual activities on the Internet***.

We will not put them in the mirror, and perhaps there would be No. point. The common link of both is undoubtedly the interaction.

Online interaction seems to be becoming the preferred and most important social interaction nowadays.

This part of the material - devoid of the intention of dividing the conflict between the valences of face-to-face interaction (in the opinion of some, the only one with real credibility) in opposition to online interaction - did not at all have the role of bringing to the fore - the research plan of against the types of reactions that may interest us from a procedural perspective.

It has been argued - until recently - that interacting online is not the same as interacting directly, face-to-face, and the arguments for and against have supported this opinion for a long time.

And for a long time people have even vehemently tried to support this position in clearly expressed antithesis.

We can ask ourselves: is such a belief still correct, is it still real?

The answer, in our own opinion, is a negative one if we analyze the trajectories of these relationships and the fact that there are not a few who have built, over time and in this way, communities of friends.

Condemned to this feeling of inferiority only through the prism of the environment in which it takes place - a digital, technological one - "online friendship" is one with the same valences as the one that opposes it with the "air" of superiority and which, in the last time, it made a spectacular comeback, proving to be sufficiently real, consistent and durable, aspects that are often minimized[4].

The feeling of inferiority, generated by the environment that supports it (online), is greatly diminished and has proven over time to even be a strong stimulatory factor.

"Online friendship" managed to compensate for much of this emotional deficit, and the opposition between the two types of interactions lost its argumentative force.

The psychology expounded above might fit into some theory of psychoanalysis, but I have by No. means intended such a goal, nor has it anything in common with it.

[4] Aristotle defined the human being as a social animal.

It was necessary for us in our own analysis system to claim as an object of research (from the present article) the online friendship judge - party / representative of the party and reveal the points of contact, tangent (those in the procedural sphere) in order to be considered as a possible cause of incompatibility.

Likes, notifications and follows in social networks are ways of interaction, ways of connection and support, going beyond the stage of being a passive spectator, being able to reach a rather increased interactivity.

Can't this interaction be as important as any social interaction?

Or why would it be lower?

Or why wouldn't it offer the same level of satisfaction, if technical limitations No. longer seem to be an obstacle[5]?

The Like, Adore or Follow buttons, the use of emoticons through which one interacts (even in different degrees of appreciation) with posts, photos, comments, discussions are not the only parameters in the Facebook algorithm that assigns different values to each interaction tool in the network space.

With such tools at hand, we are in the immediate "neighborhood" of the judge's space (from the Facebook page, the Instagram account) and we interact (according to the set degree of visibility and audience) with his private life.

If it were to leave the technical language, these kinds of interaction can not be appreciated that they can convey real emotions starting from the etymological meaning of the word "interaction"?

3. Independence of the judge from the parties of the case

This requirement was raised to the rank of principle[6] and sufficiently debated in the field of law.

[5] One should consider the useful approach of Terry Anderson of Athabasca University in Canada who proposed an interaction equivalence theorem which in a sense absolves us of the concern of including all types of interaction, as long as a type of interaction is used well and to a high standard of quality.

[6] The principle of independence of judges is enshrined in art. 124 para. 3 of the Constitution, according to which "Judges are independent and obey only the law", in art. 2 of Law no. 303/2004 regarding the status of judges and prosecutors, which stipulated that "Judges are independent, obey only the law and must be impartial" (update: In the Official

It is undoubtedly of interest in the new reality how this concept (that of impartiality) can be appreciated in the hypothesis that is the subject of the present article, that of the relationship between the judge of the case and the party or representative of the party present but in the "List of friends" section ".

If we fixed ab initio the elements in the analysis then they could not be considered fair, without easily giving way to misinterpretations, except those of the kind of presence in the List and the interaction starting from the judge, the links that attach to the online world, the perception generated, degree of involvement.

Impartiality means the absence of prejudice or bias.

According to the European Court on Human Rights jurisprudence (CEDO), the existence of impartiality must be determined according to a subjective criterion, which takes into account the behavior and personal beliefs of a certain judge, if the judge has proven prejudice or bias in a given case; and also according to an objective criterion, i.e. determining whether the tribunal itself and, inter alia, its composition, provide sufficient guarantees to exclude any legitimate doubt as to its impartiality.

In most of the relevant cases, the Court focused on the objective criterion. He noted, however, that there is No. notable difference between subjective and objective impartiality, as the conduct of a judge may not only raise objective doubts regarding impartiality from the perspective of an outside observer (the objective criterion) but may even lead to issues related to his personal beliefs (the subjective criterion).

This type of interaction discussed in the article is subject to a law of online social communities, they are directed and shaped by features specific to the environment in which they are maintained, in a graduated nuance of development, which does not prevent the configuration of many character traits specific to friendships traditional type.

Or, even this perspective that opened and motivated the study in this article and to assess the "benefits" of friendship, in this type of interaction.

Gazette, Part I no. 1102 of November 16, 2022, Law no. 303 was published, 2022 on the status of judges and prosecutors).

4. Closing word

The professed purpose of the article is to show, starting from our own conviction, that real points of contact and communication can be established in the online environment as important as the so-called social aspect of face-to-face relationships and that the attitude of ignoring or misrepresenting the nature of these relationships does not help in any way.

The article did not intend to ensure the promotion of such a case of incompatibility, difficult to establish from a procedural point of view or that, once established, should have as the only valid remedy the retention of the state of incompatibility and the withdrawal of the judge from the trial.

Searching for the meaning of such a friendship (online) between the judge of the case and the party or the party's representative present in the "*List of friends"* is not easy to establish when elements such as the social aspect of the relationship, feelings of social communion nuanced in the degrees of interaction enter into the discussion or the ethics of the judge.

Or even if there was No. state of incompatibility, the litigating party still has the feeling of "comfort" and I mean, with evidence, the "procedural comfort", thinking that the judge - friend will maintain the degree of impartiality required by the rules and principles previously evoked?

At this stage of the work, we would hasten with an affirmative answer. Or at least we would not find, in the context of the previous conclusions, sufficient guarantees of bias to say otherwise.

As long as friendship is based on the feeling of social communion, a universal panacea, it would be a shame to remove it.

The party does not become procedurally vulnerable if it has access to more extensive contact or shares (online) a greater degree of intimacy with the judge of the case than is presumed to result from a friendship relationship.

We conclude with an optimistic air: These relations cannot be transferred easily into a field of incompatibility in which to act... procedurally.

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BRIEF CONSIDERATIONS ON VALIDATION OF GARNISHMENT

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ABSTRACT

Garnishment is one of the methods of enforcement provided by the Romanian Code of Civil Procedure. The subject of garnishment may be "amounts of money, securities or other intangible assets traceable due to the debtor or held in his name by a third person or which the latter will owe him in the future, based on existing legal relationships. Also in accordance with Article 733. paragraph 1 may also be seized the movable bodily property of the debtor held by a third party on his behalf. 781 C.P.C. Object of attachment).

KEYWORDS: *attachment; validation of attachment; enforcement court; third party attachment; debtor;*

I. Preliminary notions about garnishment

Garnishment is one of the methods of enforcement provided by the Code of Civil Procedure. The subject of garnishment may be "*amounts of money, securities or other intangible assets traceable due to the debtor or held in his name by a third person or which the latter will owe him in the future, based on existing legal relationships. Also, in accordance with Article 733. paragraph 1 may also be seized the movable bodily property of the debtor held by a third party on his behalf. 781 C.P.C. Object of attachment).* Therefore, from the definition of attachment, it follows that the goods mentioned above and belonging to the debtor, but which are in the hands of another person, who in turn is in a contractual relationship with the former, can be seized by the debtor's creditor in order to recover the debt. The third person may be a legal person or a banking institution. The legislator does not provide whether a natural person can be a third party and if so, in what way.

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Attachment, as a measure of enforcement and as a means of recovering the debt owed to the creditor by its debtor, can be established only by the bailiff, based on the enforceable title authorized by the competent enforcement court according to the provisions of the Code of Civil Procedure. In this analysis, we do not discuss the tax garnishment that is separately regulated in the Fiscal Procedure Code or the insurance period, which is provided separately, by Article 970-971 CPC.

Attachment, in our opinion, is the handiest way to recover the debt, assuming minimal formalities, the nature of a written address to which relevant documents are attached. The bailiff, based on the enforceable title given by the enforcement court at the debtor's headquarters, will transmit to the third party entitled – employer, banking institution, third party in commercial relationship with the debtor – a written document called the garnishment establishment address. The document shall include, in addition to the identification data of the enforcement body, the file number, the date on which the garnishment is made, as well as the identification data of the person entitled. The enforceable title under which the forced execution is made, based on the creditor's request, but also the conclusion of the foreclosure of the forced execution, as well as the due debit will be indicated. Through the garnishment establishment address, the bailiff will consider the third party the prohibition to pay the amount of money owed by the debtor, the third party having the obligation that within 5 days the amount will record the amount on account and at the disposal of the bailiff.

The garnishment procedure, as an indirect means of enforcement, is preferred not only because of its affordability, but also because of the advantages it offers to the creditor, by this way following the salary or other periodic sums assimilated to him, which, unlike other property, are the subject of the right of the creditor. it cannot be evaded from prosecution, thus reducing the risk of not making the claim.[1]

Following the address of the bailiff, the third party who has been depritus has the obligation to answer regarding the garnishment ordered. Attachment, usually having as object amounts of money, puts the creditor in the position to appreciate from the beginning of the investigation the

[1] S. Zilberstein, V.M. Ciobanu, *Forced execution Treaty*, ed. Lex Light, 2001; I. Leş, *Tratat de procedură civilă*, Ed. All Beck, Bucureşti, 2001, p. 883; I. Deleanu, *Tratat de procedură civilă,* vol. III, Universul Juridic Publishing House, Bucureşti, 2013.

certainty of the satisfaction of the claim, not as in the case of the tracking of securities or real estate, which involves the capitalization of these goods by public sale and the transformation into cash, sometimes not enough to pay the claim in full.

II. Subjects in the garnishment validation procedure

The garnishment usually involves three parties – the debtor, the debtor and the third party who is the debtor, the ratio of which is represented by the receivable which the debtor holds against the debtor. The debtor is also the creditor of the third party who is the debtor in the light of the legal relationship he has with the latter. The third party is the debtor to the first, that is, to the debtor creditor.

In this chapter, we will give some examples, most common, regarding the way of establishing the garnishment and the consequences of its establishment.

One of the most common situations is when the third party is a banking institution. The garnishment sent by the bailiff, in physical or newer format, online with electronic signature, is considered established from the moment (day, hour and minute) of transmission to the banking institution. The express term provided for in Article 787 CPC is 5 days: ***(1)*** *within 5 days of the notification of attachment, and in the case of money owed in the future, from their maturity, the third party entitled is obliged..."* he will reply to the bailiff whether or not there is a legal relationship with the debtor, or the latter does not have available at the time of the establishment of the attachment, but that he has established the garnishment and the amounts that will credit the debtor's account in the future, they will be detained and registered with the court executor. The third party who has been charged will also indicate other creditors of the debtor and the amounts charged.

If the third party is an employer, he/she has the obligation to pay monthly to the bailiff or to the creditor in case of the maintenance or child allowance obligation but, based on the forced execution started against the debtor, the amount of money from the monthly remuneration of the latter. According to the legal provisions, the monthly amount will be one third if there is a single garnishment or up to half of the income, if there are two or more attachment. This means that the amount paid will be

divided monthly by the employer, in order to in estate each of the debtor's creditors.

If both the debtor and the creditor are legal persons, it can be "assigned" the status of a third party, to a business partner of the debtor. In order for the bailiff to know the business partner who owes a sum of money to the debtor, the first one will address the tax authorities at the debtor's head-quarters, in order to be notified of the declaration D394, (*"information statement on deliveries/supplies and purchases made on the national territory by persons registered for VAT purposes)*. In this respect, the bailiff will send the address for the establishment of the attachment, as well as the conclusion of the agreement, to the business partner of the debtor, who will become a third party with all the rights and obligations that a third party has, according to the legal provisions.

If both the debtor and the creditor are natural persons, the third party may be another natural person, if the creditor is aware of the debt that the third party has toward the debtor. In this respect, the bailiff will inform the third party that he has acquired the status of a third party and that any amount of money that he owes to the debtor, has the obligation to record it with the bailiff.

The rules also apply if the debtor or the creditor are natural or legal persons and vice versa.

Against attachment, the debtor may appeal against enforcement if it is considered dissatisfied with the measure taken against him. As provided for in Article 712(1) of the CCP, "those interested or injured" may challenge enforcement, and in most cases, the subjects of the enforcement challenge are the pursuing creditor and the pursued debtor. [2]

The third party who has been taken is not entitled to appeal against enforcement against seizure but may file his/her defense in the court of enforcement *(Article 787, paragraph 5 CPC).*

It is considered that the third party who has been depraved cannot be interested or harmed by the forced execution made on the debtor and in this way would not justify any interest in the enforcement or the appeal to enforcement. The third party, in this stage of the procedure becomes a simple executor, having only obligations without the order-maker – bailiff, creditor.

[2] E. Oprina, I. Gârbuleț, *Theoretical and practical treatise of forced execution* vol. I, Universul Juridic Publishing House, Bucharest, 2013, pp. 577-578.

In conclusion, any natural person, legal entity, state institution, bank etc, may acquire the status of a third party, with the obligations established by law.

The sanction for failure to meet the obligation of the third party entitled to transfer the amounts of money, within the express term of 5 days from the establishment of the garnishment or in case of lack of availability, from their maturity, is provided by Article 790 CPC and is called "validation of attachment".

III. The procedure for the validation of the garnishment

The validation of the garnishment could be considered a third part of the garnishment procedure, which occurs when the third party who is the debtor fails to fulfil his obligations to perform the attachment, including where, instead of making a record of the amount to be sought, he has released it to the debtor who is the debtor who is the debtor, the creditor who is the creditor. The debtor or the bailiff, No. later than one month from the date when the third party who was seized was to record or pay the amount to be sought, may refer the matter to the enforcement court for the purpose of validating the attachment[3] *(Art. 790, paragraph 1 CPC*).

From the summary of the article given above, we understand that the validation of the garnishment is a sanctioning measure, taken against the third party who is entitled under the condition of not fulfilling his obligation.

The parties may be the creditor, the debtor and the bailiff. Interestingly, even the bailiff can make a request for validation of attachment, without the need for the creditor's request or consent. We consider that the legislator allowed this, given that the bailiff is also affected by the failure to fulfil the obligation of the third party. The forced debtor is also obliged to pay all the execution expenses and the bailiff's fee, and the failure to fulfil the obligation of the third party entitled to record the amount of money directly affects him. The creditor, in turn, is entitled to submit a request for validation of garnishment if he is aware that the third party who has been seized has either failed to comply with the garnishment or has ordered the release of the available to the debtor. The legislator provided

[3] E. Oprina, I. Gârbuleț, *Theoretical and practical treatise of forced execution* vol. I, Universul Juridic Publishing House, Bucharest, 2013, pp. 747-749.

for the debtor also the right to submit a request for validation of the attachment. In practice, there are rare cases when the debtor makes a request for validation of garnishment against the third party.

The material competence to judge the request for validation of the attachment, regardless of the debit due, is always the court. The territorial court for judging the request for validation of the garnishment is the enforcement court. The competent court, in relation to the provisions of Article 652 CPC, is the court in whose jurisdiction, at the time of the application for enforcement, the domicile or the place of establishment of the debtor is located. If the debtor's domicile or seat is not in the country, the jurisdiction to hear the request for validation of garnishment lies with the court in the district in which to find, at the time of commencement of enforcement, the domicile or seat of the creditor. And if the domicile or the seat of the creditor is not in the country at the time of the commencement of the enforcement, the jurisdiction shall be the court in whose district the office of the bailiff appointed by the creditor is located.[4]

By **Decision no. 20/2021**[5], the ICCJ – *the panel competent to hear the appeal in the interest of the law*, has set the "problem" of the enforcement court and decided that the court which granted the application for enforcement is also the court competent to resolve the appeal for enforcement and consequently, any other requests in connection with such enforcement, including the request for validation of attachment.

The request for validation of the garnishment is 20 lei, according to OG 80/2013, updated, under the sanction of cancellation.

The request for the validation of the attachment, although as we have shown that it is a third part of the execution procedure, respectively of the attachment, it turns into a genuine process, following the entire procedure

[4] Dinu, R. Stanciu, *op. cit.,* pp. 115-124; N.H. Tiț, *The execution*, pp. 108 and then.

[5] Decision no. 20/2021, I.C.C.J. – *the panel competent to judge the appeal in the interest of the legally* constituted law, solved an appeal in the interest of the law, being pronounced the following solution: *"It accepts the appeal in the interest of the law formulated by the Management College of the High Court of Cassation and Justice and, accordingly, establishes that: "In the unitary interpretation and application of the provisions of Articles 651 (1), 666, 712, 714 and 112 of the Code of Civil Procedure, the enforcement court having territorial jurisdiction to resolve the enforcement challenge itself made by one of the debtors to whom the enforcement order refers is the court that has granted enforcement of that enforcement order, unless otherwise provided by law. Mandatory, according to the provisions of Article 517 paragraph (4) of the Code of Civil Procedure. Delivered in public today, 27 September 2021".*

prior to the trial phase[6]. The judgment of the request for validation of the garnishment is made with the summoning of the parties, meaning that the enforcement court will quote the creditor, the debtor and the third party who is the debtor, and, if applicable, the interveners, communicating to each of them, a copy of the request for validation of the garnishment and of the attached documents. The respondent parties shall be able to make defense within the framework of the meeting under the conditions laid down in Article 205 CPC. The legislator did not provide the documents necessary to support the validation request, so we embrace the opinion of the established authors in the matter of forced execution as necessary to submit the executive file in order for the enforcement court to have the possibility to verify the observance of the garnishment procedure. [7]

The enforcement court will quote the bailiff only if he is the holder of the request for validation of attachment, meaning he will have the same rights and obligations as another petitioner.

It is also worth noting that, although the legislator does not provide, the request for garnishment is an "individual" request, that is, it will be introduced against a single third party. If there are several third parties for whom it is desired to validate the attachment, the petitioner will introduce an action to validate the garnishment against each third party. Without exception, the decision on the validation of garnishment is only enforceable against the validated third party, it is not also enforceable against other third parties of the same debtor.

We also expose a case situation, namely, through the same request for validation of the attachment, it is required the validation of the garnishment established at two entities, namely the Ministry of Finance and CEC Bank. The two institutions have a common connection, namely, the Ministry of Finance owes a sum of money to a debtor, and the actual payer is the state bank CEC Bank, but on the order of the first. In order for the debtor to be "surprised" with the amount due in his account, the garnishment must be established at both entities, both at the ordering party and at the actual payer, the reason being that the creditor cannot control the moment when the Ministry of Finance will order the payment to CEC Bank, so that, If

[6] E. Herovanu, *The Theory of forced execution – researches in the field of its fundamental problems*, The Library of R. Cioflec Publishing House, Bucharest, 1942, p. 212.

[7] E. Oprina, I. Gârbuleț, *Theoretical and practical treatise of forced execution* vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 750.

neither of them gives an answer or does not communicate a response regarding the address for establishing the attachment, the request for validation of the garnishment will be made for both because the petitioner cannot control the moment when the Ministry of Finance will order the payment to CEC Bank.

The legislator also provided for a peremptory deadline for the submission of the application for validation of the attachment, which is No. more than one month from the date when the third party had to record the amount of money at the bailiff or, as the case may be, the creditor.

Therefore, the one-month term is related to the 5-day term that runs from the date of communication of the garnishment (art. *787. (1) "within 5 days from the communication of the attachment, and in the case of the amounts of money due in the future, from their maturity, the third party entitled is obliged…"*.

We consider that, in most cases and especially at the moment, the garnishment is signed electronically with the digital signature issued by one of the authorized operators in this regard and is immediately transmitted to the third party sent by electronic means of communication type email. In the present situation, the garnishment is considered communicated with the transmission by email and the reception of the court by the third party. However, when the garnishment is sent by postal means, the date of communication is the date on which the third party who has been sent has received the address for the establishment of the attachment, meaning that the rules regarding the communication of procedural documents will apply, in accordance with the provisions of Article 163-165 CPC. Basically, the one-month period will begin to run after the 5 days in which the third party has the obligation to act or to formulate a response regarding the established attachment. Thus, if the garnishment was established on March 01, 2022, the one-month deadline for the submission of the application for the validation of the garnishment will be fulfilled on April 6, 2022.

IV. Effects of validation of garnishment

The decision by which the request for validation of garnishment was admitted has enforceable power, representing an enforceable title of the creditor toward the third party who is entitled to attachment. Instead, if the

garnishment has not been validated, the enforcement court will order the abolition of the attachment.

In the first case, if the enforcement court considers that, based on the evidence administered, the seizure was legally established and the third party who was entitled did not fulfill the obligations established by law, it will order the admission of the request for validation of attachment. By accepting the application for validation of attachment, the third party who is placed on the garnishment will become debtor to the creditor-applicant of the application for enforcement and will owe the claim that the debtor has toward his creditor. Although the legislator did not foresee, we believe that the initial debtor will continue to be pursued for the claim he has toward his creditor, and at the same time will be pursued the third party who has been charged for the same debtor, in order to recover the creditor's debt.

In the second situation, if from the evidence administered, the enforcement court will assess that the conditions for validation of the garnishment are not met or the garnishment was not established in accordance with the legal provisions, by the decision it will pronounce, he will reject the request for validation of the garnishment and order the abolition of the attachment. We consider that the reason of the legislator regarding the abolition of the garnishment was that it would be the only remedy in the case that the garnishment was established in violation of the legal conditions. The application for validation of garnishment may be rejected as late introduced, if it exceeds the mandatory one month term. Also, if the creditor has not proved that there is a legal relationship between the debtor and the third party, the request for validation of the garnishment will be rejected as unfounded.

However, the garnishment under term or under condition may be validated for the future, but the decision may be enforced only after the condition has ceased or the period has elapsed.

The appeal against the decision to validate the garnishment is the appeal, which will be submitted to the enforcement court whose decision is appealed, within 5 days of communication.

Once the decision to validate the garnishment remains final, the third party who has been entitled to the right to voluntarily pay the obligations established by that decision. Otherwise, the creditor has the right to enforce the third party who is entitled by going through the same execution stages, respectively to make an application to the bailiff, to open a new

enforcement file and to enforce the enforcement. In practice, it was considered that the bailiff, based on the same enforcement case, can proceed to the forced execution of the validated third party, No. need to go through the stages as if a new validation of garnishment has the effect of assignment of the receivable by judicial means of forced execution because the effect. [8]

When the third party who was complied only partially with the garnishment establishment address, the garnishment validation could be done partially, for the amount for which he did not comply, the petitioner of the application also providing proof in this respect[9] *(Trib. Bucharest, s.. The fourth, Dec. civ. No. 1060/A of 24 March 2017).* The reason is obvious, that the third party may not be burdened and cannot be obliged to pay an amount exceeding the enforceable title or the debtor's debt.

The garnishment will also be dissolved when the situations that led to its establishment have ceased to exist. If the enforcement court has ordered the rejection of the request for validation of the attachment, the consequence provided by law is the abolition of the attachment.

V. Conclusions

In conclusion, garnishment is a measure of enforcement and one of the ways of recovering the creditor's claim from his debtor, the third party being liable, by means of validation of garnishment for the debt owed by the debtor, his creditor. it is done only in certain situations, such as, for example, when, in the trial of the application, it was found that the measure of garnishment was unlawfully established. However, if at the time of the trial of the validation request attachment, action has been introduced beyond the legal term, for example, garnishment should remain in existence on the grounds that the request for validation of garnishment aims to hold liable the third party who has not complied with the provisions of the judicial executor and who has No. right to consider the basis of attachment. Therefore, in this latter situation, with the invalidation of the garnishment

[8] E. Oprina, I. Gârbuleţ, *Theoretical and practical treatise of forced execution, vol. I,* Universul Juridic Publishing House, Bucharest, 2013, p. 764.

[9] M. Dinu, R. Stanciu, p. 790, *Forced execution...,* 2nd ed., Hamangiu Publishing House, Bucharest, 2019.

as late formulated, it should not automatically lead to the abolition of the attachment.

De lege ferenda proposal, we believe that it should be clearly enumerated, on the principle that the law must be clear and predictable, of the situations in which the invalidation of the garnishment will automatically lead to its abolition, as well as the situations in which the invalidation of the garnishment will not automatically lead to its abolition.

We believe that the judicial practice in the field of garnishment validation should be unified, at the present time, in practice, with different solutions for similar cases.

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CONSIDERATIONS ON THE TRANSACTION AGREEMENT AS AN ALTERNATIVE DISPUTE RESOLUTION WITHIN THE PROFESSIONAL TRADERS ACTIVITY

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ABSTRACT

Currently, the transaction agreement seems to have valences not sufficiently exploited by the professional traders, the significance of the transaction as a modality of settling disputes before the Courts being widely known. Thus, many situations can arise in the economic activity that can generate blockages or present a real risk of litigation. Through negotiations conducted in good faith, signing a transaction agreement can be an effective alternative way to resolve inherent disputes and move forward. Of course, if the parties request the intervention of a mediator, this is possible, according to the law, but signing a transaction agreement can be a real alternative from the perspective of the celerity required by the commercial activity. This article aims to highlight the real benefits of the transaction agreement as an extrajudicial means of amicable settlement of disputes, so with an emphasis on the intention of the parties to prevent a litigation, with proposals de lege ferenda, a fact that can be useful to the business professionals and legal professionals.

KEYWORDS: *mutual renunciations; preventing of litigation; transaction agreement; mediation; mutual waivers; transaction;*

I. The transaction and the transaction agreement

In the general sense, the term **transaction** denotes the will or agreement between two or more parties by which a situation is regulated, such as a commercial exchange or the transfer of rights.

From the perspective of the legal regulation, the transaction is the contract by which the parties prevent or settle a dispute, including in the foreclosure phase, through mutual renunciations or waivers of rights or by the transfer of rights from one to the other, according to the Article 2267 from the Civil Code.

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It should be noted that the cited legal text refers to the **prevention of a litigation**, without the mandatory condition of an already initiated litigation nor of an imminence with a reasonable degree of probability or certainty regarding the initiation of a litigation in Court, a fact materialized by the undertaking of preliminary steps to start a process.

This fact is deduced from the wording of the text that refers to a litigation, without any other distinctions and where the law does not distinguish, neither can the interpreter distinguish.

Of course, the litigation is premised by a divergence, dispute, claim or mutual claims of the parties, even if these do not envisage with certainty the notification of the competent Court by a party. If the misunderstanding between the parties persists, a judicial or arbitration dispute can be reached.

The wording from the legal text **renunciations or mutual waivers of rights**, although tautological, since the renunciation is a waiver, has in mind the limitation of the claims by a party by the party's own free will.

Such a limitation may be reciprocal, so it meets a limitation of claims from the other party, or it may be a unilateral limitation of claims, the party concerned wanting to resolve the dispute amicably as soon as possible, without claiming anything in return from the other part.

The renunciations of the parties have rights as an object, but they can also refer to the transfer of the rights from one to the other (or exchange of rights). Similarly, the assumption of the transfer of rights can be reciprocal or unilateral.

The legal norm also expressly provides for the foreclosure stage that falls within the scope of the transaction, unlike the old wording of art. 1704 of the former Civil Code, which only concerned the **termination of a started process and the prevention of another that could be born.** In this way, any doubts in this regard are eliminated, the foreclosure being a phase of the judicial process, of course, where there are obligations that can form the object of the foreclosure, according to the Civil Procedure Code.

In addition to the aspect of preventing a dispute, there is also the hypothesis of the **termination of an already started dispute before a Court**.

Also, the transaction may create, modify or terminate legal relations, different from those that are the subject of the dispute between the parties, according to the Article 2267, 2nd paragraph from the Civil Code, it may

be about legal relations derived from the main ones, object of the transaction or it may be about legal relations different from the main ones, but being in a causal relation or necessary connection with the litigation. We consider that it is not absolutely necessary that this relation of causality to be directly related to the respective litigation, it may also be an **indirect** relation of causality with the respective litigation.

Thus, by reference including to the previously mentioned, the legal characteristics of the transaction contract are the following:

a) it is a **named** agreement, because it has its own, distinct regulation in the Civil Code;

b) it is a **commutative** agreement, since the parties' rights and obligations are known from the beginning;

c) it is a **consensual** agreement, because it arises through the agreement of will of the parties, with the mention that, if it is a transfer of real rights, the authentic form of the transaction agreement is required.

In the event that there are No. real rights, the parties may have an interest in concluding the deed in authentic form with Notary Public, because such a deed is writ of execution, on the due date of the ascertained claim, if this claim is certain and liquid, according to the Article 101 of the Law on public notaries and notarial activity no. 36/1995, further amended and completed, *hereinafter referred to as Law 36*. Or, the transaction contract is built around a claim, so the rights object to the transaction having an economic value.

In this hypothesis, when it is not about real rights for which the law provides the authentic form of the deed in respect to the creation or modification of the real right, according to the Articles 888 and 1244 from the Civil Code, if the parties voluntarily choose the authentic form of the act, thereby the transaction agreement does not become an authentic act, because the authentic form here is not *ad validitatem*.

The transaction agreement could be considered a **solemn act**, if, on the basis of the transaction agreement, real rights are created or modified for which the authentic form is required, according to the law.

Even in this case, we consider that the nature of a solemn act is **ancillary**, because such acts are concluded in authentic form in consideration of the nature of the real right and of the imperative legal obligation regarding the authentic form and not in consideration of the transaction agreement.

In the event that the extrajudicial transaction contract is concluded by a deed under a private signature, such a deed is a writ of execution if it was enrolled in **a public register.**

Thus, if that agreement is not authenticated by a Notary Public, but it has the signature specimen legalized by a Notary Public and the Notary Public also gives a certain date to that document, the document being subsequently archived by that Notary Public, we appreciate that the Notary Public's archive can be considered **public register** by reference to the provisions of the Article 163 tom the Law 36, according to which these archives are of **public utility** and **certified copies** of these documents can be released upon request.

If it is a **judicial** transaction, the agreement of the parties is comprised by the decision issued by the competent Court.

d) is an agreement with **onerous title**, because the parties directly or indirectly pursue a patrimonial benefit derived, above all, from mutual waivers or from the transfer of rights;

e) it is a causal agreement, in the sense that the parties seek to settle some dispute or to prevent a dispute. The existing cause is lawful and moral, in line to the Article 1236 from the Civil Code;

f) it is an agreement with **immediate execution**, which comes into being by signing it regarding the extrajudicial transaction;

g) it is a **synalagmatic** agreement because it gives rise to rights and obligations for both parties;

h) it is a **declaratory act of rights** as a rule, the exception being given by the establishment of real rights in the patrimony of one of the parties, as an effect of the transfer of the rights assumed by the transaction;

Also, the declarative effect of the transaction means that it produces retroactive effects (only for the past), from the date of birth of the respective rights, the parties not being obliged to guarantee the rights recognized by the transaction[1].

If one party recognizes the property right of the other party in a real estate recovery action, the transaction has **constitutive** effects, it produces

[1] Florin Moţiu, *The Special Contracts In The New Civil Code*, Wolters Kluwer Romania Publishing House, Bucharest, 2010, p. 322.

effects only for the future and the parties will guarantee against the hidden defects and eviction[2].

h) it is an **indivisible** act in the sense that the transaction is indivisible in terms of its object (art. 2269 of the Civil Code), so it can be partially abolished based on an express provision in the transaction agreement, in the decisions issued by the Court or in the law;

g) it is a **written act**, requirement *ad probationem*;

h) is an **secondary** act in the sense that its existence depends on the main acts regarding the rights on which it is transacted, a fact deduced from the systematic interpretation of the Articles 2274 and 2275 from the Civil Code according to which (i) the transaction concluded for the execution of a legal act affected by the absolute nullity is null, unless the parties have expressly transacted on the nullity and (ii) the transaction based on documents later proven to be false is null.

Regarding the wording **except when the parties have expressly transacted on the nullity** of the Article 2274, 1st paragraph from the Civil Code, we reasonably deem that it is about transacting on the **effects** of the absolute nullity or about the validation of the null act, being pointed-out here the restoration of the null act (which will produce effects only for the future), according to the Article 1259 from the Civil Code or the conversion of the void deed into the deed for which the substantive and formal conditions provided by the law are met, according to the Article 1260 from the Civil Code[3].

Although the current Civil Code does not expressly regulate the **validation** of the null act, we emphasize that the validation of the absolute null legal act through the subsequent fulfillment of the legal requirement about was mentioned in the civil doctrine.

Thus, we reasonably consider that the validation of absolute nullity can find the same grounds invoked by Gheorghe Beleiu in the previously cited work also in the current Civil Code, respectively:

[2] Florin Moţiu, *The Special Contracts In The New Civil Code*, Wolters Kluwer Romania Publishing House, Bucharest, 2010, p. 322.

[3] Gh. Beleiu*, Romanian Civil Law. Introduction To The Civil Law. The Subjects Of The Civil Law,* the 11th ed., further amended and completed, Universul Juridic Publishing House, Bucharest, 2007, p. 225.

(i) the Article 1246 1st paragraph from the Civil Code refers to the **validation** of a contract affected by a cause of nullity (without distinguishing between the relative and absolute nullity) which is achieved when the nullity is **covered** (and not confirmed, the confirmation being specific to relative nullity);

(ii) the clauses of an act are interpreted in the sense of producing legal effects and not in the sense of not being able to produce any, according to the Article 1268 from the Civil Code.

There are, of course, also limitations regarding the object of the transaction, in the sense that it is not possible to transact on the capacity or civil status of the persons, nor on rights that the parties cannot dispose of according to the law, in line to the Article 2268, 2nd paragraph from the Civil Code.

The limitation regarding the capacity or civil status of persons is an effect of the fact that a transaction agreement is an act with onerous title, non-patrimonial rights not falling within its scope.

However, it is possible to transact on the civil action deriving from the commission of a crime, according to the same legal text, specifying that the transaction can only concern the civil aspects of the case in this context, the criminal aspects being strictly regulated by the applicable legislation, and can only be implemented by prosecutors or the Court, according to the law.

With regard to the capacity required by law for the valid conclusion of the transaction contract, the parties must have the full capacity to exercise, respectively to make acts of disposition, according to the Article 2271 from the Civil Code.

As a result, if it is a judicial transaction and one of the parties does not have the capacity to dispose of the rights object of the transaction, this fact is subject to the censure of the judge who can limit the object of the transaction to what the parties can transact according to their legal capacity.

In line with the previously mentioned, the Article 2270 from the Civil Code stipulates that the transaction is limited only to its object, regardless of whether the parties have expressed their intention through general or special expressions or their intention necessarily results from what was provided in the transaction.

Such a provision is one for the protection of the parties and for ensuring the security of the civil circuit, respectively the legislator subordinates the parties' freedom of transaction only to those aspects that strictly concern

the object of the case, independently from customs or general principles of law as sources of law.

The customs can be used as arguments in the preliminary negotiations and even in the content of the transaction agreement they can be transacted only if they concern the object of the case.

As a consequence, limits are also legally established on the interpretation of the act regarding the transaction, respectively this act cannot be given any other meaning or interpretation than that which exclusively concerns the object of the case, therefore independently from the use of general or special expressions by the parties in the transaction agreement.

Being a legal act, the transaction agreement can be affected by the same causes of nullity as any other agreement, the legislator establishing as an exception the situation of annulment due to legal error regarding the matters that constitute the object of the parties' misunderstanding and the situation for injury (the Article 2273 from the Civil Code), a fact justified by the need to protect the interests of the parties (the injury that exists in cases when the person is in a state of need, does not have the necessary knowledge or experience) or to sanction the negligent conduct of the parties (respectively the parties must inform themselves and have clear representation of the object of the transaction and its effects).

Also, the subsequent discovery of documents unknown to the parties and which could have influenced the content of the transaction does not represent a cause for its nullity, unless the documents were hidden by one of the parties or, with their knowledge, by a third party, according to the Article 2276, 1st paragraph from the Civil Code. This legal text is an application of the legal principle of good faith, by established rule and sanctions the manifestation of bad faith by the established exception.

The paragraph (2) of the same article stipulates that the transaction is void if the discovered documents show that the parties or only one of them had No. right to transact.

The legal provision is susceptible to some reservations if the documents discovered were not unknown to the parties, because the parties relied on the documents known at the time of signing the transaction agreement,

Moreover, the regulation of the sanctioning regime of nullity regarding the transaction must also consider the nature of the protected interest.

In the present case, we consider it reasonable that it is a private interest, in the sense that by law, the proposal is for the transaction to be considered

voidable if those documents were not known to the parties at the time of signing the transaction agreement.

The argument that the legal incapacity of the parties would result from the documents discovered later may not be sustainable from the perspective of the security of the civil circuit and towards third parties who based themselves in good faith on the transaction agreement already entered into the civil circuit.

Keeping the specific differences, the previously proposed solution is correlated with the one provided by the Article 2278 from the Civil Code according to which the transaction on a trial can be annulled at the request of the party who did not know that the dispute had been resolved by a Court decision entered into the power of *res judicata*.

Regarding the judicial transaction, its regime is provided by the Article 2278 from the Civil Code, according to which the transaction that, putting an end to a started process, is ascertained by a Court decision can be abolished by an action for nullity or action for resolution or termination, like any other contract. It can also be challenged with a revocation action or with the action in declaring the simulation.

This legal text reinforces the contractual nature of the transaction even ascertained by the Court decision. It should be emphasized that the judicial transaction represents an integrant element of the decision issued by Court which is writ of execution for the obligations derived from the parties understanding[4].

Without minimizing the advantages of mediation according to the Law no. 192/2006 on mediation and the organization of the mediator profession, which regulates in detail the mediation procedure (which involves the prior presence of the parties to the mediator, the summons to mediation, the signing of a mediation agreement, the actual mediation sessions), the signing of an out-of-court settlement agreement can be an alternative for resolving disputes in the activity of professional traders, at least from the perspective of speed and the relatively easy/simple nature of the transaction regulatory framework.

Of course, the condition precedent is that the parties previously receive appropriate assistance and negotiate in good faith.

[4] G. Boroi, M.-M. Pivniceru, C.-A. Anghelescu, B. Nazat, I. Nicolae, T.-V. Rădulescu, *Civil Law Sheets*, 2nd ed., further amend and completed, Hamangiu Publishing House, Bucharest, 2017, p. 682.

II. Conclusions

The transaction, through the accessible nature of its regulation, can represent an effective solution from the perspective of costs and allocated resources, available to the professional traders, in response to the multiple situations/disputes that may arise in their current activity. Moreover, the transaction contract is not subject to any form of mandatory publicity.

Undoubtedly, the parties must be aware that the most suitable solutions can be identified by them, through communication, cooperation and negotiation in good faith, calling to alternative dispute resolution methods being an indicator of the level of legal civilization in a society.

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BRIEF CONSIDERATIONS ON HISTORICAL DEVELOPMENT OF REAL ESTATE ADVERTISING SYSTEMS IN ROMANIA

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ABSTRACT

The real estate advertising system creates the legal certainty of the way of establishing, transmitting and extinguishing the real estate rights, of the legal acts and facts related to the real estate, by registering them in the land register, thus facilitating the possibility for interested persons to become aware of the legal situation of real estate, in order to protect one's own interests with a profound legal character, thus determining a specific rigor, based on clear and certain rules, erga omnes opposable, which excludes subsequent interpretations, evictions and/or legal actions.

KEYWORDS: *real estate advertising; registers of transcriptions and inscriptions; land registry;*

1. General-historical aspects regarding real estate advertising

According to the legal dictionary[1], real estate advertising is that operation through which the transparency of the legal act is achieved, namely the knowledge and compliance by third parties of the legal acts regarding the property right, but also the protection of those legal subjects who were not informed about the existence of the real right.

On the territory of Romania, the publicity of the right of ownership has its origin, in a preliminary form, since the period of the Roman occupation, in this sense there are as evidence the demarcations made in Dacia, signalled in the II-III century in the area of Dobrogea and Sibiu. At that time, the Romans called "hotarnici" demarcated the borders of the territories by marking them with gatherings of stones or mounds of earth, based on the testimonies and documents on the spot, later recording the data obtained in a so-called "choice book of borders".

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[1] M.N. Costin*, Civil Law dictionary*, vol. I, Lumina Lex Publishing House, Bucharest.

Later, when the delimitation of estates began and, implicitly, their transmission in a restricted way within the family or the province, the real estate advertising operation was carried out "in front of the good and old people" and by "shouting across the village".

Then, when real estate was alienated, based on a hrisov (order with the value of princely approval), a committee consisting of 6-12 members, called decision makers, would meet, who drew up a "boundary selection book" also called "decision book". Opposability operated in front of this commission, being registered in the "circumference", on the basis of which the ruler of the state applied a record. Also, the opposition was achieved through consecutive shouts, on three Sundays in front of the church or in the church.

In 1671, there was the custom of registration in the land registry of the fair or the city, the ownership being transmitted through the consent of the parties, similar to French law, and through the remittance of the asset, similar to Roman law. Monasteries and great boyars used to register property under special conditions.

The legal regulations emerged much later, being determined by the historical evolution of the Romanian state, depending on the different administration method related to each province, with many similarities with the one existing in the neighbouring territories, but also its own features[2].

In Wallachia, in 1780, Alexandru Vodă Ipsilanti's Condica appeared, also called "Pravilniceasca condica" or "Little legal rule", written in Greek and Romanian, making an important step in the sense of modernizing the organization of justice, civil law and family law. [3] Through this typical feudal condition, the provisions of Byzantine law are intertwined with the custom of the land, protecting property rights, this regulation being applied until September 1, 1818, when it was abrogated by the Caragea Code.

The Caragea Code, published in its turn in Greek and Romanian, brought together the unwritten judicial practices with the royal laws and charters, existing up to that time, in order to administer justice.

[2] S. Sztranyiczki*, Real estate advertising according to the new Civil Code* – Praxis, C.H. Beck Publishing House, 2013, p. 13.

[3] E. Cernea, E. Molcuț, *The history of the Romanian state and law*, Universul Juridic Publishing House, 2006, p. 194.

In the same historical period, namely in 1817, the Calimach Code was promulgated in Moldova, also called the "Civil Code of Moldova"[4], written in Greek, combining national law also based on the custom of the land with Byzantine law.

When drawing up this code, the main source of inspiration was the French Civil Code of 1804 and the Austrian Civil Code of 1811, while preserving the feudal regulations regarding private property and capital.

Through these two regulations from Moldova and Wallachia, among other things, the measurement of real estate was legislated, and starting from 1868, the "Organic Regulation of Decisions" entered into force, which established the obligation to draw up maps by engineers specialized in the field named "decisive".

During this period, in Bucovina, Banat and Transylvania, territories under the influence of the Austrian Empire, the publicity of property rights was carried out through cadastral regulations and the land register, according to the Imperial Decree of 1849.

On December 1, 1865, the Civil Code of ruler Al. I. Cuza, applied in the United Romanian Principalities, representing an important legislative means of historical unification of the Romanian territories. This code also regulated the mode of transmission of property through legal documents concluded between living persons and through deeds "mortis causa"[5], repealing the Calimach Code applied in Moldova and the Incidental Caragea Legislation in Wallachia, as well as other civil laws, royal ordinances and ministerial instructions.

The civil code was also applied in Bucovina from 1865, but also in Transylvania in 1938, and from September 15, 1943, pursuant to Law no. 389 of June 22, 1943, and in Northern Transylvania, being processed and adapted to Romanian realities.

On October 1, 2011, the Civil Code of 1864 expired as a result of the promulgation of Law no. 287/2009 regarding the New Civil Code.

[4] O. Puie, *Cadastre and real estate advertising Special litigation in the matter of the cadastre and the land register*, Universul Juridic Publishing House, Bucharest, 2019, p. 8.

[5] I. Predescu, *Praise of the Civil Code.*

Also by reference to the historical period, namely after the Great Union of December 1, 1918, the legislative method for the execution of topographical measurements is regulated, as follows:

- "Decree Law no. 3922 of December 31, 1918 regarding the establishment of the central house of cooperation and ownership of villagers" issued by King Ferdinand I;
- "Law no. 23/1933 for the organization of the land cadastre and for the introduction of land books in the Old Kingdom and Bessarabia";
- "Decree Law no. 115/1938 for the unification of provisions regarding land records, published to supplement Law no. 23/1933".
- "Law no. 7/1996 of the cadastre and real estate advertising", followed by the Civil Code from 2011 and a series of subsequent normative acts, among which we mention the "National Program for the Cadastre and Land Registry 2015-2023, based on which the systematic works are currently being carried out of the cadastre and land register in order to officially register the properties in the cadastre and land register records, create the cadastral plan of the properties and open the land registers at the level of all administrative-territorial units."[6]

The normative acts identified above aimed at a common objective, the creation of a unitary and efficient but mandatory system regarding land records, both at a technical level, as well as at an economic and legal level on real estate throughout the country, also including acts and facts legally.

2. The system of personal publicity of the registers of transcriptions and inscriptions

This personal real estate advertising system was established since 1865, in accordance with the provisions of the Civil Code of 1864 and the Code of Civil Procedure of 1865, being taken from French and Belgian legislation and applied to the territories of the provinces of the old Kingdom, until the documentation was drawn up cadastral.

The name personal real estate advertising system comes from the fact that the records of entries and transcriptions in the registers regarding the

[6] O. Puie, *Cadastre and real estate advertising Special litigation in the matter of the cadastre and the land register*, Universul Juridic Publishing House, Bucharest, 2014, pp. 685-752.

real estate rights are made according to the names of the owners, and not according to the buildings, without being based on precise cadastral measurements, so that the identification of their legal situation is could only achieve by successively verifying the names of the owners, an aspect that later generated many deficiencies.

Being made up of registers of transcriptions (transcriptions) and registers of inscriptions (registrations), the record of this real estate advertising system structured by communes/villages was kept by the Land Registry Offices of the courts. In this sense, specific registers were used for the transcriptions of the acts regarding the transfer of property, for the inscription of privileges and mortgages and for the transcription of pre-foreclosure proceedings.

The transcriptions from the relevant register consist of the complete copying of the legal documents by which the real right over a property was transmitted, constituted or extinguished, being carried out in the order of submission of the applications and documents subject to this operation.[7]

Inheritance, legal or testamentary transmissions, partition deeds, court decisions with declaratory effect of rights (legal deeds) or real estate usufruct and accession (legal deeds) were not subjected to transcription.

In the register of inscriptions, parts or clauses of legal documents related to special real estate and mortgage privileges were recorded, with the exception of the buyer's privilege, which was subject to transcription.

The purpose of the personal advertising system was to achieve the opposability to third parties of legal acts translating or constituting rights, as soon as the act was concluded. In the situation of successive transmission or establishment of rights, in favor of several persons, the principle "*qui prior tempore, potior jure*" is applied, respectively "the person who first fulfilled the formalities of transcription or registration had a stronger right, opposable to third parties, even if his title of ownership was post-dated to the acquisition titles of the others".[8]

Later, in 1950, through a circular of the Ministry of Justice, the keeping of a single register of transcriptions and inscriptions was regulated, ac-

[7] C. Stătescu, C. Bîrsan, *Civil Law*. *The general theory of real rights*, University of Bucharest, 1988, p. 306.

[8] S. Sztranyiczki, *Real estate advertising according to the new Civil Code* – Praxis, C.H. Beck Publishing House, Bucharest, 2013, p. 17.

cording to which the transcriptions were replaced by mentions of the legal documents of ownership.[9]

Since this system had a personal character, the omission of a single subsequent owner who was not subject to registration led to the lack of records on ownership titles and the manner of acquisition. As such, it was criticized over time by referring to the partial opposition conferred and the fact that these registers could not provide accurate information regarding the legal and chronological situation of the buildings, not ensuring the certainty of the right of the new owner.

Another deficient aspect of this personal real estate advertising system consists in the fact that the judicial bodies entrusted with the resolution of litigious legal reports had No. obligation to analyze the validity, legality of the legal act presented for transcription or registration or the existence of the right of the transmitter, third party acquirers not having the guarantee of acquiring the rights from the real owner.[10]

The system of personal advertising of transcriptions and inscriptions was related to a temporary criterion determined by the person holding the right to the building, and not to the durable, perpetual nature of the building, the lack of clear record data and plans provided by the cadastre representing another inconvenience significant.

3. The advertising system with real character

The land registry system was gradually introduced in the Romanian provinces under Habsburg and Austro-Hungarian authority at the Austrian legislative initiative consisting of the Imperial Decrees of 1770 and 1849 and the Austrian Civil Code, so that starting from 1794 this system was adopted in the border communities Transylvanian and then in 1870 in the other Transylvanian communities and then in 1855 in Banat, Crișana and Maramureș. In contrast to these, in Bucovina the land registry system was introduced by the Law of 1873, inspired by Austria and Germany.

After the unification of the Romanian principalities, by "Law no. 23/1933 for the organization of the land cadastre and for the introduc-

[9] N. Boș, O. Iacobescu, *Cadastre and land register*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, p. 308.

[10] S. Sztranyiczki*, Real estate advertising according to the new Civil Code* – Praxis, C.H. Beck Publishing House, Bucharest, 2013, p. 18.

tion of land books in the old Kingdom and Bessarabia" the expansion of the land book regime for the entire Romanian territory was started. The responsibilities regarding the drafting and judicial administration of the "land" books were assigned to "judges from the districts of the Courts of Appeal in Bucharest, Chisinau, Constanța, Craiova, Galați and Iași, each section of the land register being headed by a judge in office, a director of land registry, a land registry assistant and the necessary auxiliary staff".[11]

However, due to the lack of measurements that were the basis for the preparation of the national cadastre, operations were made more difficult on the territory of the former principalities of Wallachia and Moldova, compared to Transylvania, where it was initially implemented by order of Emperor Joseph II, in the year 1786. As a result, for the territories previously subject to the system of personal real estate advertising, the new real system of the land register took place on insignificant areas, to be even terminated around the Second World War, so that, in the end, in terms of real estate advertising, the land register only included the territory of Transylvania, Banat and Bucovina.

Later, it was regulated "Decree law no. 115/1938 for the unification of provisions regarding land records", which was implemented by Law no. 241/1947.

Although the concept of land registry was also understood in other variants, such as a "real estate advertising system, legal institution, land registry office or cadastral register of real estate advertising"[12], the basic notion meant the existence of an official register, intended for the public, in which immovable property was described and which indicated the full and definite way of establishing, transmitting, modifying or extinguishing real rights, personal rights, facts and other related legal relations, in accordance with the cases expressly provided by law.

In addition to the legal importance, the land book system also had a social importance for the holder of the registered right, therefore of opposition, having probative force guaranteed by the state, but also an obvious

[11] See article 5 of Law no. 23/1933 for the organization of the land cadastre and for the introduction of land books in the old Kingdom and Bessarabia.

[12] C. Cucu, *Real estate cadastre and advertising legislation. Comments and explanations,* All Beck Publishing House, Bucharest, 2005, p. 70; N. Boș, *The land register and technical topo-cadastral expertise*, All Beck Publishing House, Bucharest, 2003, p. 20.

economic implication, through the easy way of exploiting the right, under legal security conditions.

Thus, in an opinion[13], the land registry system was characterized by the following elements: the object of the advertisement is the real estate, and not the person holding the right to the real estate; it is based on the complete and effective cadastral identity of the building conferred by plans and maps, which can be analyzed successively on the occasion of the alienation or establishment of the right; registration in the land register is absolute, with effect from the date of registration of the application.

In another opinion[14], it was shown that "the real estate advertising system of the land register is not only real, but also personal, resulting in a mixed character as in certain situations the preparation of the land register could not be done only on the basis of data about the property, being accepted, by way of exception, its preparation based on the register of transcriptions and inscriptions existing at the time of the adoption of the law introducing the new real estate advertising system".

To support this theory, we can consider the fact that according to the legal provisions, the land register is composed of three parts and a title, through which the public is informed about the number and name of the locality where the building is located, a structure that provides clarity and speed in its research, the registrations being grouped as follows:

- "Part I is called the asset sheet or the property sheet, containing descriptive data of the property;
- Part II, called the property sheet, which provides information on the registered rights;
- Part III, called the assignment sheet, which includes entries regarding the dismemberment of the ownership right and the assignments to which it is attached."[15]

So, in the broadest sense, the real estate advertising system of the land registers represents a centralized record of real estate located on a certain territory, made through cadastral documentation and which includes information easily accessible to the interested public regarding the real

[13] N. Boș, O. Iacobescu, *Cadastre and land register*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, p. 308.

[14] E. Chelaru, *Civil law course. Main real rights*, All Beck Publishing House, Bucharest, 2000, p. 213-216.

[15] M.N. Costin, *Dicţionar de drept civil*, *vol. I*, Lumina Lex Publishing House, Bucharest.

estate, the right holder as well as a series of numerical elements and descriptive.

4. Comparative view

Synthetically analyzing the two aforementioned real estate advertising systems, we find that, over time, the evolution of the real estate advertising system legislation started from the model conferred by the real land registry system, given that it was based on the real estate, a fixed landmark sufficiently individualized by administrative territory, plan, neighbours, while the personal system implied variations in the owners over time, the legal means offered in this regard - the witnesses - did not present sufficient procedural guarantees.

Another shortcoming of the personal system was that the organization of registers of transcriptions and inscriptions was difficult and partial compared to the land register, which was comprehensive and much more accessible to a larger number of people.

While the transcription was a basic condition, complete both topographically and legally, in order to acquire the right to the real estate, it was not necessary in the context of personal advertising, the evidence being deficient.

5. The real estate advertising system today. Regulation

The Civil Code approved by Law no. 287/2009 republished, regulates through the provisions of art. 876-915 the real estate advertising system through land records, based on the topographical (cadastral) identification of real estate.

Real estates are described in the land register, showing the real rights attaching to these assets. According to the legal provisions, other rights, facts or legal relations can be entered in the land register, in relation to the immovable property and its owner.

In other words, "the land register represents the central point of the legal relations through which the real rights are established, transmitted, modified or extinguished, having at the same time the task of giving complete and reliable information on the legal conditions, the individualization of the immovable property and its content. At the same time, it supports the

identity of the entitled holder and the title on which the right is based, but also the fences and tasks that can limit its exercise".[16]

The current advertising system benefits from the advantages and support of the computer system, in various forms and which is carried out in working stages regarding the collection, storage and reporting of specific data, including cadastral plans. This computer system has a connecting role in the issue of real estate records, namely an "integrating role of the system, ensuring convenience in operation, yield and economic efficiency, as well as complete safety in the performance of works."[17]

The IT evolution of the real estate advertising system supports, in the current period, the evolution of the judicial act, so that, in the settlement of real estate disputes, the courts have admitted as a means of evidence the cadastral documentation recorded on magnetic media, thus giving them the equivalence of classic written documents.

The provisions of the Civil Code regarding the land register do not remove, in terms of the cadastral regime and real estate advertising, the provisions of Law no. 7/1996 of the cadastre and real estate advertising, but harmonizes with them, forming a unitary system of advertising legal rights, documents and facts.

According to an opinion to which we rally[18], the legislator, by Law no. 7/1996, aimed at the regulation of a unitary real estate advertising system, applicable for the entire territory of the country, based, as a support, on a real character of the cadastral register, in full accordance with the provisions of the Romanian Constitution regarding property rights, in order to eliminate deficiencies created through the personal real estate advertising system highlighted by the registers of transcriptions and inscriptions that existed in Oltenia, Muntenia, Dobrogea and Moldova.

However, in relation to the evolution of society, Law no. 7/1996 of the cadastre and real estate advertising has, since its entry into force, undergone numerous changes through subsequent normative acts, regarding especially the practical side of the technical specifications for carrying out

[16] S. Sztranyiczki, *Real estate advertising according to the new Civil Code* – Praxis, Publishing House C.H. Beck, 2013, *op. cit*., p. 47.

[17] N. Boș, O. Iacobescu, *Cadastre and land register*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2019, *op. cit.,* p. 20.

[18] O. Puie, *Cadastre and real estate advertising Special litigation in the matter of the cadastre and the land register,* Universul Juridic Publishing House, Bucharest, 2019, *op. cit.,* pp. 9-10.

systematic cadastral works in order to register real estate in the land register. These subsequent normative acts consisted of orders of the general director of the National Agency for Cadastre and Real Estate Advertising, published in the Official Monitor.

6. Conclusions

In view of these aspects, we support the opinion that real estate advertising of legal acts and facts has been carried out since ancient times, by registering real estate with owners and their rights, in various forms, which have evolved over time, together with the national state unitary Romanian, from simple gatherings of stones or lifting of earth, based on testimonies and documents from the site from the II-III century, followed by simple notes and sketches, later recorded in a so-called "choice book of borders", up to the modern ones, regulated by the land register, efficient and superior system, based on computerized cadastral plans on digital support.[19]

Thus, in agreement with the opinions expressed by other authors[20], the system of real advertising has become an important criterion in the Romanian society and economy, which is why the legislative power must ensure support in the completion, throughout the country, of the land registry regime, supporting the population in order to draw up the general cadastre documentation.

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SOCIAL DIALOGUE AND THE PRINCIPLE OF TRIPARTISM

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ABSTRACT

The social market economy is based on a balanced relationship between labour and capital, a relationship maintained thanks to a complex and comprehensive regulatory system, implemented by a multitude of institutions with a mediating function between the partners of social dialogue. In the European economic area, social peace is closely linked to the effectiveness of tripartite dialogue, which includes employers, trade unions and public authorities.

KEYWORDS: *social dialogue; collective bargaining; social peace; tripartism;*

Introduction

In today's developed economies, all paid work is extensively regulated in terms of working conditions and pay, as well as related issues such as further training and career paths, fringe benefits, gender equality and non-discrimination, protection of personal data, etc. All these elements that protect the employee from possible abuse by the employer are contained in collective agreements and, finally, in individual contracts, which are renegotiated annually or every two years. This situation in the field of labour relations - which we now consider to be absolutely natural - has come about with great difficulty, after a century of violent confrontation between labour and capital, with successive steps forward and backwards, depending on the power that the main players in the economic game have had: *employers and trade unions*. The employers have had economic power (ownership of the means of labour) and almost always the support of the repressive state apparatus. Trade unions relied on their membership, their ability to block production and the 'sympathy' of a society inclined to pact with the weakest. With these resources, they

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embarked on a tough bargaining process, at the end of which they succeeded in limiting the arbitrariness of the employer in relation to the worker by *transforming the individual relationship into a collective labour relationship*.

Collective agreements can be negotiated either through dialogue between employers' and employees' representatives (*bipartite* format) or through a broader dialogue involving the public authorities, which act as neutral mediators; in the latter case, the *principle of tripartism* applies.

The genesis of social dialogue and tripartism

Social dialogue became possible only after the legal right of workers to form trade unions and the right of trade unions to defend the economic rights of their members in court was recognised in the late 19th and early 20th centuries[1]. The removal of trade unionism and strike action from the scope of criminal sanctions redefined the relationship between labour and capital, transforming the two parties from natural and irreducible enemies into 'social partners'. This major paradigm shift was endorsed and encouraged by state authorities, as they understood its potential to maintain social peace.

Social partnership became the norm in Western economies during the first three post-war decades ('the thirty glorious years') until the crisis of 1974. During that period, "sharing the fruits of productivity provided a 'virtuous circle' of growth. Without the consumption of wage earners, mass production cannot, in fact, find its outlet. Following the Fordist principle, labour income will follow capital income. Wage indexation compensates for price increases, which it also allows workers' representatives accept the

[1] For example, in the French system of law, trade unions have been allowed to substitute individual legal action in defence of the employee's professional and moral rights, without having a mandate from the employee to do so, but with the possibility for the employee to denounce the intervention within 15 days of the union notifying him of its intention to defend him. "By way of derogation from the rule that 'in France No. one pleads through the public prosecutor', the trade union may bring individual actions before the civil and criminal courts in the following matters: temporary work; professional equality men/women; fixed-term work; illicit borrowing of labour and its sale; non-compliance with economic dismissal rules; home work; work of foreign workers; discrimination and harassment" (Alain Coeuret, Bernard Gauriau, Michel Miné, *Droit du travail,* 3e éd., Dalloz, Paris, 2013, p. 646).

modernisation of the production process, committing themselves to limiting their demands for wage increases and to respecting collective agreements. For its part, the state encourages the full use of the workforce through its spending, boosts purchasing power and combats unemployment by financing credit. These regulatory mechanisms, inspired by the ideas of the economist Keynes, are based on a generalised social compromise"[2].

But widespread social compromise is neither easy to achieve nor easy to maintain. The successive economic crises since the 1970s have eroded the consistency of social dialogue and compromise to some extent, as employers have become accustomed to invoking extraordinary economic circumstances that go beyond the will of management (but not that of politicians) to respond favourably to workers' legitimate demands. At the same time, the globalisation of production and trade, as well as of the labour market, has led to the dispersion of decision-making poles and occupational groups, leading to increasing confusion: what does 'social dialogue' mean and at what levels (i.e., with how many participants) is it conducted? What is the role of public authorities in this process and at what level (global, regional, state, local)?

In the literature, social dialogue is considered to be the means of achieving *economic and social democracy*[3] or *social peace between the partners involved in individual and collective labour relations*[4]. Given the often opposing interests of the parties, it is understood that dialogue between management and employees (trade unions or elected representatives) 'must be guided, facilitated, even arbitrated. This is why the state intervenes and sometimes not two, but three parties take part in this dialogue. This leads to *tripartism*[5].

[2] Marcelle Stroobants, *Sociologie du travail*, 4e éd., Armand Colin, Paris, 2016, p. 89.

[3] See Valer Dorneanu, *Dreptul muncii. Partea generală*, Universul Juridic Publishing House, Bucharest, 2012, p. 127.

[4] See Ion Traian Ștefănescu, *Considerații referitoare la rolul sindicatelor și al reprezentanților angajaților în desfășurarea raporturilor de muncă*, Dreptul nr. 1/2016, p. 105.

[5] Sanda Ghimpu, Alexandru Țiclea, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2000, p. 603.

Legal establishment of social dialogue. European and national perspectives

In Romanian legislation, the issue of social dialogue is generally regulated in Title VII of the *Labour Code* (Law no. 53/2003): "In order to ensure a climate of stability and social peace, the law regulates the modalities of consultation and permanent dialogue between the social partners" (Art. 214). The details of this economic and social mechanism are regulated by the *Social Dialogue Law* no. 62/2011, which states, in Art. 1, that social dialogue is "the voluntary process by which the social partners inform, consult and negotiate with a view to reaching agreements on issues of common interest".

But who are the social partners? In Article 1(a), they are defined as follows: "trade unions or trade union organisations[6], employers or employers' organisations[7], as well as representatives of public administration authorities, interacting in the social dialogue process". They are involved in *information*, *consultation* and *collective bargaining activities*, either in a *bipartite* format (Art. 1(c)), when only employers and trade unions participate, or in a *tripartite* format, when public administration authorities are involved (Art. 1(d)), which have a neutral, mediating function (their direct involvement being justified only if they are employers of staff in public institutions - in which case the law does not distinguish between the state employer and any other type).

[6] A trade union is a voluntary association of employees who defend/promote their professional interests in relation to their employer. The term trade union comes from the Latin *sindicus* and the Greek *sundikos*, both of which designate a person who represents or defends someone in court. In the Law on Social Dialogue No. 62/2011, trade unions are considered as non-political organisations grouping employees in a sector or in neighbouring sectors of activity, aged at least 16. It is possible to set up a trade union as a legal person if it has a minimum of 15 members. According to Art. 4 of the above-mentioned normative act: "Persons who hold positions of public dignity according to the law, magistrates, military personnel of the Ministry of National Defence, the Ministry of Administration and Interior, the Romanian Intelligence Service, the Protection and Guard Service, the Foreign Intelligence Service and the Special Telecommunications Service, units and/or sub-units under their subordination or coordination may not form and/or join a trade union".

[7] Employers' organisations are independent of public authorities, political parties, and trade unions. They are established by free association, by sector of activity, territorially or nationally (Art. 54 and 55 of Law no. 62/2011).

In her comments on the articles of the *Labour Code*, Prof. Magda Volonciu rightly points out the specific nature of social dialogue as an institutional framework for maintaining social peace, *through the gradual activation of information and consultation procedures* designed to give substance to social dialogue. The author points out that Romania adopted this system in the context of its accession to the European Union, where information and consultation are mandatory *under Directive 2002/14/EC of the European Parliament and of the Council establishing an informal framework for informing and consulting employees in the European Community*. The national legislation transposing the European Directive is *Law No. 467/2006 on the establishment of a general framework for informing and consulting employees* (published in the Official Gazette No. 1006 of 18 December 2006), which requires employers, under penalty of a fine, to provide employees (through their representatives) with all the information they need to understand the operation of the organisation[8], so that they can participate effectively in the next stages: consultation and collective bargaining[9]. It is therefore self-evident that the social partners inform and consult each other "with a view to reaching an agreement between them, if decisions by the employer which are likely to lead to significant changes in the employment relationship, including decisions on collective bargaining and transfer of the undertaking, are at issue. It should be emphasised that the decision on collective redundancies or transfer of undertakings is and remains the employer's decision, based on his organisational prerogative"[10], whereas consultation on this issue can only concern the identification of the best solutions for employees in the event of collective redundancies or transfer of undertakings.

It follows from the above that information and consultation are *two consultative instruments of social dialogue*. The same consultative nature

[8] Information on current and prospective economic indicators as well as on the current and prospective employment situation in the enterprise/group of enterprises/industry sector is mandatory. Information relating to transactions which include confidential clauses, specified as such, is exempt. For all information received, employee representatives are bound by the obligation of confidentiality to the extent that disclosure of the information in the public domain would be harmful to the employer.

[9] Magda Volonciu, *Dialogul social*, in: Alexandru Athanasiu, Magda Volonciu, Luminița Dima and Oana Cazan, *Codul muncii. Comentariu pe articole*, Vol. II. Articles 108-298, C.H. Beck Publishing House, Bucharest, 2011, pp. 168-169.

[10] *Ibidem*, p. 174.

of social dialogue also applies to the formulation of opinions on draft legislation and the proposal of judicial assistants who form the panels responsible for resolving labour disputes. When the social dialogue ends with the conclusion of a collective labour agreement or with the cessation of the strike by agreement between the parties, it *is deemed to have been concluded*.

Tripartism - a tool for strengthening social dialogue

Tripartism makes it possible to "secure" institutional frameworks and implement the results of social dialogue. This principle (and economic and social mechanism) was enshrined by the International Labour Organisation as early as 1919, but it was reiterated with visible effect in particular after the *Philadelphia Declaration* of 1944. The Declaration recognised the need for a joint effort (nationally but also internationally) by representatives of workers, employers, and governments to find the best way towards social peace and the common good. Tripartism implies, on the one hand, the participation of public authorities as facilitators of dialogue between employers and trade unions; on the other hand, it implies the collaboration of workers and employers in the development and implementation of economic and social policies in each country.

Such an understanding of tripartism - with a dual flow - is likely to make it operational in the complicated process of building a competitive but fair market economy. A good example of this is the institutionalisation of tripartism in the economies of the former communist countries that have subsequently become members of the European Union. After 1990, the former planned socialist economies could No. longer hide the systemic crisis, manifested in low labour productivity, hidden unemployment, loss of markets and export of products below the production price, energy-intensive and polluting industrial activity, inflation, etc. In global economic competition, the countries of the former communist bloc had No. chance of profit if they kept their production structure unchanged. The solution to the crisis, however, required sacrifices that neither the new (democratic) authorities nor central and eastern European societies were prepared to accept: accepting unemployment, closing loss-making factories, lowering the incomes of certain professional categories favoured under communism (miners, industrial workers), reorganising vocational training. It was also difficult to accept, in the collective mind, that the so-called 'working class',

which until recently had been considered the owner of the means of production, the producer and the beneficiary, had to be content with the role of mere employees, without any honourable 'ideological distinction'. The "heroic working class" that had built socialism was reduced to the status of... proletariat. At the other end of the spectrum, the former executives of the socialist economy, together with a hidden group of intelligence figures, took over the enterprises and privatised them, while the 'working people' were left with ephemeral 'vouchers' or 'shares' - symbolic residues of a great and perverse mechanism for building capitalism.

If all these changes had been carried out simply in the open, without recourse to rituals of legitimation, their orchestrators would have received the violent reaction of society, which still retained in its fibre the characteristics of national-communist socialisation. But the new capitalist class knew how to operate as if it were predestined to bear the brunt of the transition[11], so that the people would soon reach a level of prosperity similar to that of the West. The new bosses took ownership of the state's wealth and began to do a minimal efficiency sweep, with enterprise closures and massive layoffs.

In the face of the various manifestations of reform/transition, the newly established trade unions took the population to the streets to protest against rising unemployment and falling living standards, but the atmosphere of conflict did not degenerate (except for the miners' strikes). With *Law No. 15 of 11 February 1991 on the settlement of collective labour disputes*, the Romanian labour market entered the stage of tripartite social dialogue. Thus, in the event of a labour dispute, in addition to direct conciliation between employers and employee representatives, conciliation organised by the territorial bodies of the Ministry of Labour and Social Protection (County Labour and Social Protection Directorates) became possible. Subsequent legislation refined the institutions and procedures of social dialogue, presenting it as the balancing factor of the European Union economy;

[11] Two decades after the Revolution, director Alexandru Solomon made a documentary (Kapitalism – Our Secret Recipe) with and about some of the great businessmen of post-communism: Dan Voiculescu, George Pădure, George Copos, Dinu Patriciu, Dan Diaconescu and George Becali. All of them showed that destiny led them through the meanders of the transition to great fortunes, thanks to their intuition about profitable areas and the right moments to invest or sell assets. They all presented themselves as honest people with economic flair and immense social responsibility.

thus, Romania's integration into the EU could not be achieved without naturalising the institution of social dialogue, in its tripartite formula.

Through tripartite dialogue, countries with economies in transition (and 'dependent capitalisms') have managed to save social peace, to convince the population to accept tough (but absolutely necessary) economic reforms and not to compromise the image of democracy and the Western-style social market economy[12]. Of course, tripartism has had and still has an important political legitimising function, but we must recognise that "its existence at national level is strictly necessary and essential; without tripartism, the market economy is inconceivable"[13].

Institutions of tripartite social dialogue

How, and in particular through which specialised bodies, is tripartite social dialogue achieved? In order to clarify this question, it should be pointed out that tripartite social dialogue takes place at the following levels, arranged in a pyramid: global, European, national and sub-national.

At the global level, social dialogue takes place within the framework of the International Labour Organisation. ILO member states send their governments, national employers' and workers' representatives to the two bodies that develop ILO labour standards and policies: the Governing Body and the International Labour Conference (informally called the 'international labour parliament'). These bodies bring two main partners to the table: on the employers' side, the International Organisation of Employers; on the trade union side, the International Trade Union Confederation.

The ILO's normative framework, according to which member states determine their social dialogue policies, comprises the following documents: ILO Convention No. 87/1948 concerning Freedom of Association and Protection of the Right to Organise; ILO Convention No. 154/1981 concerning the Promotion of Collective Bargaining; ILO Convention No. 98/1949 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; ILO Convention No. 135/1971 concerning the Protection of Workers' Representatives in Enterprises and the

[12] See Violaine Delteil, *Le "tripartisme de légitimation politique" ou la face (post-) démocratique des "capitalismes dependants": les cas de la Bulgarie et de la Roumanie*, *La Revue de l'Ires*, vol. 88, no. 1, 2016, pp. 91-127.

[13] Sanda Ghimpu, Alexandru Țiclea, *op. cit*., p. 604.

Facilities Granted to Them; ILO Convention No. 144/1976 concerning Tripartite Consultations to Promote the Application of International Labour Standards.

At EU level, social dialogue is conducted through the European Economic and Social Committee[14] - the EU's consultative body, which brings together 329 members from the Member States, divided proportionally into three groups: Employers (Group I); Workers (Group II); Diversity Europe (Group III). According to the Treaty on the Functioning of the European Union, the Council or the Commission may take decisions only after consulting the EESC in the following areas: agricultural policy (Art. 43); free movement of persons and services (Art. 46, 50 and 59); transport policy (Art. 91, 95 and 100); harmonisation of indirect taxation (Art. 113); approximation of single market legislation (Art. 114-115); employment policy (Art. 148, 149 and 153); social policy, education, vocational training and youth (Art. 156, 165 and 166); public health (Art. 168); consumer protection (Art. 169); trans-European networks (Art. 172); industrial policy (Art. 173); economic, social and territorial cohesion (Art. 175); research and technological development and space (Art. 182 and 188); environment (Art. 192). For any other matter, the European institutions may voluntarily request opinions from the EESC. When these institutions consult the Committee (whether mandatory or voluntary), they may set a time limit (not less than one month) after the expiry of which the absence of an opinion cannot prevent them from acting (Article 304 TFEU).

[14] The EESC was established by the 1957 Treaties of Rome to involve economic and social interest groups in the creation of the common market and to provide the institutional mechanism for informing the Commission and the Council of Ministers on European issues. The Single European Act (1986) and the Maastricht Treaty (1992) extended the range of issues to be referred to the Committee. The Treaty of Amsterdam extended the range of areas to be referred to the Committee and authorised Parliament to consult it. The EESC issues consultative documents and opinions, which are published in the Official Journal. The purpose of the EESC is to inform the decision-making institutions at EU level of the views of representatives of economic and social activities. The distribution of EESC seats is as follows: 24 for Germany, France, and Italy; 21 for Spain and Poland; 15 for Romania; 12 for Austria, Belgium, Bulgaria, Czech Republic, Greece, Portugal, Sweden, the Netherlands and Hungary; 9 for Croatia, Denmark, Finland, Ireland, Lithuania and Slovakia; 7 for Estonia, Latvia and Slovenia; 6 for Luxembourg and Cyprus; 5 for Malta. (https://www.europarl.europa.eu/factsheets/en/sheet/15/european-economic-and-social-committee).

At national level, we note that Romania has several bodies with roles related to the promotion and effective implementation of social dialogue, regulated by the following legislation: Law no. 53/2003 - *Labour Code*, with subsequent amendments and additions; *Law no. 62/2011 - Social Dialogue Law*, with subsequent amendments and additions; *Law no. 248/2013 on the organisation and functioning of the Economic and Social Council*; *Law no. 467/2006 on the general framework for information and consultation of employees*; *Law on European Works Councils No. 217/2005; GD No. 187/2007 on information and consultation of employees in European companies*; GD No. 188/2007 on information and consultation of employees in European cooperative societies; GEO No. 28/2009 on the regulation of certain social protection measures (sectoral committees).

The list of institutions set up for tripartite dialogue includes:

a) *The National Tripartite Council for Social Dialogue*, established by the *Law on Social Dialogue*, is a tripartite body set up at the highest level to promote good practice in the field of tripartite social dialogue. Its remit covers: Providing the consultation framework for setting the guaranteed minimum wage in payment; debating and analysing draft programmes and strategies developed at government level; developing and implementing strategies, programmes, methodologies and standards in the field of social dialogue; resolving social and economic disputes through tripartite dialogue; negotiating and concluding social agreements and pacts, other agreements at national level and monitoring their implementation; analysing and, where appropriate, approving requests for extending the application of collective labour agreements at sectoral level to all units in that sector; other tasks agreed between the parties.

b) *Economic and Social Council* (governed by Art. 212 para. (1) of the *Labour Code* and art. 1 of *Law no. 248/2013 on the organisation and functioning of the Economic and Social Council*) is a public institution of national interest (similar to the social cooperation between the European institutions and the EESC), tripartite, autonomous, set up for the purpose of carrying out tripartite dialogue at national level between employers' organisations, trade union organisations and representatives of organised civil society. The ESC has the status of a consultative body to the Romanian Parliament and Government, and is consulted on the adoption of specific legislation in a wide range of areas (economic, financial and fiscal policies; labour relations, social protection and equal opportunities; agriculture, rural development, environment and sustainable development;

consumer protection and fair competition; cooperation, liberal professions and self-employed activities; citizens' rights and freedoms; public policies in health, education, scientific research, culture, youth and sport). Depending on the areas listed, the ESC has specialist committees which operate on a permanent or temporary basis. The ESC's tasks are as follows: it approves legislation in its fields of competence; it draws up, at the request of the Government, Parliament or on its own initiative, analyses and studies on economic and social realities; it draws the attention of the Government or Parliament to the emergence of economic and social phenomena requiring the drafting of new legislation; it monitors the fulfilment of the obligations arising from ILO Convention No. 144/1976 concerning tripartite consultations to promote the application of international labour standards, adopted on 2 June 1976 in Geneva, ratified by Romania by Law No. 96/1992.

c) *Social dialogue commissions set up at the level of ministries and other public institutions*[15], as provided for in Annex 1 to Law No. 62/2011. The committees have a consultative role and their activities include: ensuring partnership relations between the administration, employers' organisations and trade unions; mandatory consultation of the social partners on legislative initiatives of an economic and social nature.

d) *Social dialogue commissions organised at territorial level* (including the county prefect, the president of the CJ / mayor-general of the Capital, representatives of the employers' confederations and of the nationally representative trade union confederations).

A separate category of tripartite bodies includes national institutions dealing with employment and training: the National Agency for Employment and Training[16] with its county agencies; the National Commission

[15] According to Article 216 of the Labour Code: ″Within the ministries and prefectures there operate, under the law, commissions for social dialogue, of a consultative nature, between the public administration, trade unions and employers″.

[16] Law No. 202 of 22 May 2006 (republished) on the organisation and functioning of the National Agency for Employment, published in its original form in the Official Gazette of Romania, Part I, No. 452 of 25 May 2006.

for Employment Promotion[17]; the National Agency for Qualifications (formerly the National Council for Adult Vocational Training)[18].

Finally, Romania also has institutions in the field of labour and social protection which are *administered on a tripartite basis*: the National Health Insurance House,[19] the National Public Pension House[20]. They also have some social dialogue tasks.

We have been able to observe that, in Romania, "social dialogue has a pyramidal structure, at national, sector, branch and entity (public or private) level. At national level there are both bipartite and tripartite forms of social dialogue, involving the representative trade union and employers' confederations, and the main instrument of social dialogue at this level is the Economic and Social Council (ESC), which is the expression of tripartite dialogue. There are also bipartite and tripartite forms of social dialogue at sectoral level, where the dialogue partners are sectoral or national trade union and employers' federations and the relevant ministries. The main instruments of social dialogue at this level are the committees set up within the ministries, which have an advisory role on legislative initiatives. At branch level (e.g., bakery or other industries) the social partners can conclude (specific) collective agreements. This is in fact the first level at which they go beyond the consultative role and discuss in terms of bargaining. At entity level, social dialogue is conducted between trade unions or elected employee representatives and management"[21].

[17] Regulated by Articles 105-109 of Law No. 76/2002 on the unemployment insurance system and employment stimulation, published in the Official Gazette, Part I, No. 103 of 6 February 2002.

[18] It is a public institution with legal personality, a specialised body under the coordination of the Ministry of Education, based on Government Decision No. 556/2011 on the organisation and functioning of the National Authority for Qualifications.

[19] The functioning of the CNAS was regulated by Law No. 95/2006 on health reform. The law was published in the Official Journal of Romania, Part I, No. 372 of 28 April 2006, rectified in the Official Journal of Romania, Part I, No. 391 of 5 May 2006 and subsequently amended and supplemented by around 50 emergency ordinances and 18 laws.

[20] Regulated by Law No. 263 of 16 December 2010 on the Unified Public Pension System, published in the Official Gazette No. 852 of 20 December 2010, as subsequently amended and supplemented.

[21] Constantin Victor Ogneru, Dan Nițu, *Studiu comparativ privind dialogul social în administraţia publică din România şi Norvegia,* Editor: Agenția Națională a Funcționarilor Publici, Bucharest, 2014, p. 23.

The endless list of institutions through which tripartite dialogue takes place in Romania is not necessarily a sign of a developing culture of dialogue between labour market partners. Just as at the beginning of the 1990s we had over two hundred parties but No. functioning democracy, so we have, for over a decade now, a rich institutional framework for tripartite dialogue, but it has not made any notable contribution to solving the pressing problems of our time: the erosion of employees' purchasing power, lockdown work, the labour shortage, shortcomings in the vocational training system, inequalities in the pension system, etc. The institutions of the tripartite dialogue have been content to mirror similar bodies in the EU, as their genesis has also been closely linked to the habit of the authorities in Bucharest of justifying their public policies by invoking the requirements coming from Brussels...

This slow and ineffective development is well documented in the comparative study of social dialogue in the administration in Romania and Norway, which I quoted above: "The period 1990-2000 can be considered a period of accommodation, when a type of social dialogue of intervention, ad hoc, crisis response, was practised. Against the backdrop of the transition from public to private ownership that began in the 1990s, the state, still in the position of employer, also played the role of legislator, which led to an unnatural situation of overlapping roles in terms of regulation. Against this background, social dialogue did not exist in the proper sense, and when it did take place, it was between two partners, the state and the trade unions, and on a limited range of issues, usually in the field of wages. In Romania, the specific structures of social dialogue are based on a mixture of inherited and borrowed cultural values and mechanisms which, when transposed into legislation, have ended up over-regulating the field, with a multitude of institutions being created to implement social dialogue, without it actually taking place. The agglomeration of structures (a situation that exists in Romania) does not bring with it a culture of social dialogue, but rather an increase in competition as a result of the effects of legislative reform"[22].

Beyond the multitude of bodies (formally) involved in social dialogue, there is increasing talk in the area of the principle of tripartism of "plus" tripartite social dialogue, a term promoted by the International Labour Organisation and well established in countries such as Ireland, for

[22] *Ibidem*, p. 21.

example. The term 'plus' implies the extension of tripartite social dialogue, involving civil society organisations from local communities and the voluntary sector, including representatives of the unemployed, women, disadvantaged communities, people with disabilities, young people, older people and rural groups. Through their representation and participation, the content of the agreements has been broadened to address more comprehensively issues of concern to socially disadvantaged and socially excluded groups. Although Romania has not regulated this form of dialogue, we note an increased participation of NGOs in tripartite consultations in the social dialogue commissions, but their status is that of guest, not member; their right to express their opinion is limited by the agreement of the commission members. In relation to public administration, dialogue with NGOs is conducted through the ESCs (of which they are members), as well as under Law No. 52/2003 on transparency in public administration.

Conclusions

The European Union economy, established by the founding treaties as a "social market economy", is based on the idea that private property and free enterprise (the building blocks of individual prosperity) must be harmonised with social justice (equity). Free competitive market mechanisms are not sufficient to preserve *social peace*. They must be 'helped' by political interventionism, which defines the frameworks of the so-called social dialogue between employers and trade unions.

In order to ensure that social dialogue is not an empty mechanism, EU and Member State legislation establishes the *tripartite formula*, which brings central and local public authorities, and sometimes even civil society organisations, to the discussion table between employers and employees. The tripartite dialogue is conducted through institutions such as the European Economic and Social Committee, which has national 'counterparts'; the system is complemented by an impressive number of other institutions and organisations that mediate between labour and capital.

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GOOD DELIVERY OF JUSTICE. JUDICIAL ERROR

Delia-Mihaela MARINESCU*

ABSTRACT

The good administration of justice is an essential element of the functioning of any state of law, representing a national security objective through the prism of the implications and dysfunctions it can create at the level of society, but also a fundamental pillar in ensuring an act of justice in accordance with the law. That is why the State has the primary obligation to organize the activity of judicial bodies, being liable in the event of a violation of this mission, considering the fact that the errors produced in the act of justice produce serious effects on the fundamental rights and freedoms of citizens, including material damages and morals. The foundation of the State's liability for judicial errors is free access to the court and the right to a fair trial, with national legislation effectively guaranteeing a high quality of the judicial act.

KEYWORDS: *judicial error; administration of justice; state security; rule of law;*

Introduction

The good administration of justice and the construction of an independent, impartial and efficient judicial system represent the basis of any rule of law, whose duty is to ensure respect for the supremacy of the law, the affirmation of democratic principles and their application in court practice.

The correctness of the judicial act is a state priority, which determines the need to adopt a continuous reform, with the aim of removing possible pressures and deficiencies of the judicial system, so that the administration of justice, as one of the most important attributes of a democratic state[1], to

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[1] I. Adam, *Tratat de drept civil. Obligațiile. Volumul II. Responsabilitatea civilă și extracontractuală. Faptul juridic civil,* C.H. Beck Publishing House, Bucharest, 2021, p. 817.

be carried out by qualified personnel, recruited objectively and transparently, in order to reduce cases of judicial errors.

The quality of the judicial act can be influenced by the accumulation of some negative aspects of the judicial system, but also by the lack of continuous training of the judicial staff, which are factors favouring the appearance of judicial errors, as an expression of the decrease in the standards of judgment, but also of the impossibility of guaranteeing of the separation and balance of powers in the state.

The fundamental role of magistrates is to ensure respect for human rights and fundamental freedoms, their independence being an essential element of the normal functioning of the judicial system, but also of the transparency of the judicial act, by virtue of respecting the European concept of creating a space of freedom, security and justice, but also of the fundamental values of the current European society, namely equality, the rule of law and the protection of human rights.

That is why the analysis of the current judicial system in Romania must be carried out in a wider context, compatible with international and European principles, which aims not only to guarantee free access to justice and the efficiency of the judicial system, but also to reduce cases of judicial errors, which attract the direct and immediate responsibility of the State[2].

The organization of the judicial system in Romania

The judicial system in Romania is organized in accordance with the principles enunciated at the international and European level, with the main purpose of respecting the right to a fair trial and judging cases by courts in an impartial manner, with the removal of any possible external interference.

The judicial power is one of the three powers in any democratic state, whose role is to guarantee the very existence of the rule of law and ensure the proper application of the law in an impartial, fair and efficient manner.

For the efficiency of the judicial system and for the full realization of the essential role of justice in a state of law, the fundamental rules of a trial cannot be limited in application only to the period when the file is in the trial phase, including appeals, but must be extended both to the stages prior

[2] L. Pop, *Tratat de drept civil. Obligațiile. Volumul III, Raporturile obligaționale extracontractuale*, Universul Juridic Publishing House, Bucharest, 2020, p. 615.

to the start of the judicial proceedings, and to the last phase of the process, which is the execution of the court decision, being related both to the activity of the parties and the judge[3].

So, in civil, criminal or other legal matters, the effectiveness of the court decision resides including in the way it is implemented, in order to fully understand the effects produced and the implementation through the coercive force of the state, if not is executed voluntarily, in order to ensure the security of the legal act.

According to article no. 126 of the Constitution[4], in Romania, justice is carried out through the High Court of Cassation and Justice and through the other courts established by law, noting that the competence of the courts and the court procedure are exclusively provided for in the law, by assigning at the constitutional level an essential role in favour of the Superior Council of the Magistracy, as the guarantor of the independence of the judiciary, which has powers regarding the recruitment of judges, their disciplinary sanctions, in case their activity does not comply with legal norms, but also the defense of their independence and reputation.

It is important to specify that in exercising its role, the Superior Council of Magistracy cannot intervene in the substance of court decisions[5], in order not to replace a court of judicial review and cannot verify the legality of the evidence administered, the way of applying the legal norms or the solution pronounced, this being the exclusive attribute of the judges to adopt a solution in the interest of effective justice.

[3] S. Cristea, *Teoria generală a dreptului,* ed. 4 rev. and added, C.H. Beck Publishing House, Bucharest, 2020, p. 178.

[4] Article no. 126 of the Romanian Constitution revised in 2003 has a counterpart in article no. 125 of the Romanian Constitution in the form adopted in 1991. There is a broader regulation in the 2003 Constitution regarding the courts, which also refers to the role of the High Court of Cassation and Justice to ensure the interpretation and uniform application of the law of to the other courts, to the composition of the High Court and its rules of operation, but also to the judicial control of the administrative acts of the public authorities.

[5] See Notice no. 1 of November 23, 2001 of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe regarding the standards regarding the independence of the judiciary and the immovability of judges (Recommendation no. R (94) 12 regarding the independence, efficiency and role of judges and the importance established standards, as well as other standards to current issues in these fields), text available online at *https://rm.coe.int/1680747c0f,* accessed on 20.11.2022.

The constitutional provisions are supplemented by Law no. 304/2004 on the judicial organization which establishes that the judicial power is exercised by the High Court of Cassation and Justice and by the other courts established by law, reiterating the role of the Superior Council of the Magistracy as guarantor of the independence of the judiciary.

In Romania, justice is organized in a pyramidal system, through courts consisting of the High Court of Cassation and Justice, courts of appeal, tribunals, specialized tribunals, military courts and judges, all of which have the common goal of respecting the rights of citizens and defending interests general of society, which outlines the essential role of justice, as a public service, within any state of law.

The judicial system is governed by the principles of random distribution of cases, to remove possible reasons for impartiality in the division and resolution of cases, of equality of arms between prosecution and defense in criminal cases, but also between parties in civil cases, these aspects even emerging from the way lawyers and prosecutors are seated in the court-room, as well as the principle of publicity, which establishes that court hearings are public, except in cases where the law provides otherwise, especially for the protection of the right to private life of the persons involved in folder.

These principles outline the fact that justice is made available to citizens, being unique, impartial and equal for all, as an expression of respecting equality and reducing the possibility of restricting free access to the courts for any Romanian or foreign natural or legal person who fights for the protection his legitimate rights.

Judges are prohibited from denying justice, which determines their obligation to receive and judge requests, by applying the rules of law to the factual situation deduced from the judgment, but also to respect the right to a fair trial, in which the parties are given all procedural and procedural guarantees related to the resolution of cases.

These principles are complemented by the principle of legality, which represents the fundamental pillar of the judicial system in Romania and which requires that in the activity carried out, for the implementation of their essential mission, the magistrates comply with the legal provisions in force, applicable on the territory of the country, including the priority international law and the European Union, in relation to the fact that they are the main actors in the protection of the fundamental rights and freedoms of citizens, not only because they apply the law to a concrete

practical situation, but also because they have a mission to interpret legal norms, in accordance with good faith and equity, for the purpose of a fair resolution of the case.

Access to justice is transparent, and cases must be resolved expeditiously, in an optimal and predictable term, taking into account alternative ways of resolving disputes efficiently and faster than the normal duration of judicial proceedings that are held by certain terms established by legal norms, such as through mediation, administrative or notarial procedures.

The role of judges in a state of law

Justice represents a fundamental element of any democratic state, therefore the status of judges is a special one compared to that of other public officials, taking into account the importance of their mission to ensure the state balance, but also the fact that they are invested with state authority to ensure the position judiciary, which determines the need to take measures for their protection against abuses, as a guarantee of effective justice.

The normative legal framework that regulates the activity of judges is established by art. 124, para. 3 of the Constitution which stipulates that judges are independent and obey only the law, their activity presupposing the absence of any pressure and interference in the act of justice from the other powers of the state[6], as proof of their importance and essential role in a democratic state.

One of the most important aspects related to the activity of judges is respecting their independence, as a fundamental condition for the functioning of the judicial system as a whole, which must not be limited only to a thorough legal regulation in this matter, but also to its implementation, both from a functional and financial perspective.

This independence needs to be analyzed from several perspectives, namely in relation to other judges, to citizens, but also to society as a whole, which is obliged to actively contribute to taking effective measures, able to ensure a high level of protection for judicial activity, related to its

[6] See principle I para. 2 lit. b) from Recommendation R(94) 12 of the Council of Europe regarding the independence, efficiency and role of judges and the importance of established standards, as well as other standards to current issues in these fields: "the executive and legislative power must ensure that judges are independent and that No. measures likely to endanger this independence are adopted", text available online at *https://rm.coe.int/1680747c0f,* accessed on 20.11.2022.

importance for ensuring state security, which can be easily observed in the situation of wrong applications and interpretations of legal norms, which, if done intentionally, to protect the interests of a certain part of the file, in flagrant violation of the principles of a democratic state, leads to the creation of a feeling of obvious dissatisfaction among the population, with a direct effect on the security of the state.

In order to avoid situations of judicial error, especially in case of serious negligence, an essential role is played by the High Court of Cassation and Justice, which gives a unified interpretation of the legal norms and unifies the jurisprudence, especially in relation to the fact that the non-uniform practice constitutes one of the most important problems of the judicial system, with an impact on the quality of the judicial act, as well as on the existence of judicial errors.

The non-uniform practice is noticeable both at the level of the same court, when the panels give different solutions, in the conditions of an identical factual situation, with evidence administered in the same sense, but also between courts of the same degree and of a different degree, which determines the need to adopt some measures for the standardization of practice, for a unified interpretation of the law, so that situations of discrimination between litigants do not arise, who, depending on the competent court to judge their case, receive different solutions, which implies the violation of the state's positive obligation to respect for the principle of equality[7].

This aspect is important for trust in the judicial act, which determines the adoption of effective measures both at the level of the courts, including the High Court of Cassation and Justice, as well as within professional education institutions for the uniform application of the legislation and for the correlation of legal norms taking into account the moment of their enactment, the legal force, but also the issuing institution.

The decrease in the cases of judicial errors can be achieved through a clear specialization of the judges that will give them the opportunity to inform themselves strictly on a certain field, from a normative and jurisprudential perspective, which limits the possibility of mistakes appearing in the act of justice bad faith or gross negligence, especially since judges are valued as the main pawn in the protection of citizens' rights.

[7] D.-L. Rădulescu, *Raporturile juridice de muncă. Discriminarea multiplă*, Didactică și Pedagogică Publishing House, Bucharest, 2021, p. 3.

That is why the judicial system must be based on objective criteria, which constantly identify possible threats that, through escalation, can affect the rule of law, an aspect that determines the fact that possible judicial errors must be corrected through appeals, not through methods of action against judges, which can constitute vulnerabilities in the judicial act.

Consolidation of the judicial system can also be achieved by adopting legal norms that create the conviction of citizens that they are adopted in conditions of fairness and good faith and that the activity carried out by judges is carried out in conditions of impartiality and legality, constituting a priority area in state policy, which is permanently open to constructive reforms that meet the needs of citizens.

The independence of magistrates must be analyzed including in relation to the mass media, considering the various forms of pressure that can have an influence on the judicial activity in the situation of excessive media coverage of some cases in which either the persons involved have notoriety, or the subject of the file is a of public interest, which can generate a control and subordination of justice to the press, leading to the adoption of court decisions that please public opinion for fear of generating a constant attack on the judges involved in the case and on the justice system, in general, even without carrying out a complex analysis of the evidence in the file that could determine a different solution on the merits.

Thus, the act of justice can become one marked by subjectivism, an aspect of such a nature as to constitute a threat factor including to state security, through the dissemination in the mass media of untrue information, without having documented sources as a basis, judges being exposed in these conditions in a potentially dangerous state, which affect the way in which they deliberate, these factors having a direct effect on the independence of the judiciary; therefore, actions that affect the proper administration of justice should be carefully monitored, in order not to affect the public image of judicial bodies and to regulate forms of sanction for attempting to influence judicial procedures.

The desire represented by the execution of a fair act of justice, in accordance with the law, can only be achieved if high professional standards are respected regarding judges, who, in addition to the recognized professional competence in the field, should present guarantees of morality in the personal sphere, an expression of compliance with the condition of good reputation, a notion closely related to the credibility of the magistrate

before the members of society[8] and have enough life experience to be aware of the practical implications of the case they have to solve; the strict application of legal norms to a practical situation is not enough to fully resolve the case brought to trial, so the judge must benefit from continuous professional training, acquired both through specializations to participate in and through a long practice, to understand the complexity of the case, which would allow him to adopt a fair solution.

In addition, it would be advisable for all judges to be able to participate in exchanges of experience with magistrates from other countries, in order to respect the right to dialogue, but also to be constantly informed about national and international legislative news, which would facilitate the avoidance of judicial errors, more chosen in relation to the obligation to provide the widest possible protection of the rights of the parties in the activity carried out, including by applying the provisions of the European Convention on Human Rights, but also of European jurisprudence, which implies the obligation to know them by the magistrates and outlines the need for a level of competence picked up.

The high-quality professional training of judges is the expression of the fact that they are exponents of a professional judicial system, created in the interest of citizens, with the role of protecting their rights, a fact that determines the importance of their specialization in a certain discipline of law and their constant information about to the normative acts adopted, to the jurisprudence of the Constitutional Court of Romania, of the European courts, but also with the doctrinal aspects that are debated by the theorists of law.

The administration of justice cannot be effective unless judges fully understand their essential role in a state of law, an aspect likely to accentuate their concerns for professional development and for showing an interest in strengthening the confidence of litigants in the judicial system and in the quality of the justice act, taking into account the fact that the efficiency of the judicial system must be reported to the litigants, but also to the other participants in the judicial activity, as they are indispensable actors of the judicial act, respectively lawyers, prosecutors, clerks or auxiliary staff, considering that the activity of all must to be circumscribed

[8] I. Gârbuleț, *Tratat privind răspunderea disciplinară a magistraților*, Universul Juridic Publishing House, Bucharest, 2020, p. 68.

by the requirements of legality[9], related to their status as legal professionals, who enjoy professional guarantees similar to those of judges.

The good administration of justice is not only represented by the solution that the court gives in the case brought to trial, but also by the conduct of the judges during the trial, by the complexity of the approved and administered evidence, by the way of manifesting its active role, all these defining elements in strengthening trust in the justice system and its quality.

Conclusions

The good administration of justice is the foundation of a democratic state, which has as an essential characteristic the protection of the rights of its citizens, an aspect that is in close interdependence with guaranteeing the independence of judges and ensuring their protected status, which allows them to exercise their function without external interference.

The quality of the judicial act cannot be dissociated from the need for continuous training of magistrates, from the perspective of constant updating of the normative framework, of the national and European jurisprudence, which constitutes a guarantee of the efficiency of the judicial system and the reduction of cases of judicial errors, as factors disruptive in the field of justice, but also at the state level.

Through the activity carried out, judges must apply the legal norms equally, without discrimination based on a non-unitary practice at the level of the court or the judicial system, as a whole, which can constitute a determining element of the existence of judicial errors and the shaping of a feeling of mistrust in court.

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A BRIEF INSIGHT INTO THE DEVELOPMENT OF THE CONCEPT OF ASSOCIATION AT THE LEVEL OF THE PUBLIC ADMINISTRATION

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ABSTRACT

In the context of today's society, in which the dynamism of daily life, complemented by the marked technological progress, requires a permanent updating of all the components of daily human activities, the concept of association for the better management of resources is a solution that must be approached with the utmost responsibility. At the same time, the current legal framework governing the organisation and functioning of local public administration authorities needs to be adapted to socio-economic realities and the complexity and dynamics of activities related to the provision of essential public services for citizens, to apply the principle of subsidiarity enshrined in both the Treaty on European Union and the Charter of Local Self-Government.

KEYWORDS: *county administration*; *public-private partnerships;*

The concept of the association at the level of territorial-administrative units, whether we are talking about a public-private partnership association or association of two or more territorial-administrative units, is not a new one for public administration in our country. It can be seen that there are two concrete forms of the association at the level of administrative-territorial units, namely between the public and private sectors and between two or more local public administration entities. The second type of association should not be understood as meaning only partnerships concluded at the level of town halls; the county administration, represented by the County council, may also be involved. For this reason, it is important to treat the two concepts of association separately, as they are seen both in European legislation and national legal provisions.

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Recognising the importance of public-private partnerships and the usefulness of such an instrument, the European Commission adopted the Green Paper on public-private partnerships and Community law on public contracts and concessions in 2004.

With Romania's accession to European structures, our country undertook a series of commitments, including the free movement of goods (Regional Policy and Coordination of Structural Instruments, etc.). Harmonisation of national legislation with Community legislation also involved the adoption of legislative instruments such as Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts[1], as well as Government Decision no. 71/2007 for approving the rules of application of the provisions relating to the award of public works concession contracts and service concession contracts provided for in Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts[2].

According to the *Guide for the implementation of public works and service concession projects in Romania* (the 1st Edition of 2009), a public-private partnership is any transaction that transfers the overall responsibility for the provision of a public service or a commercial investment to a private company, while the competent public authority retains its political responsibility and becomes a partner in profit and loss[3].

Fundamentally, public-private partnerships provide the public service in whole or in part, depending on the private funds attracted and draw on private sector know-how.

Cooperation between the public and private sectors can take various forms, from a simple relationship between the buyer and seller of an asset to complex joint ventures. It should also be noted that complex interdepen-

[1] Government Emergency Ordinance no. 34/2006, published in the Official Gazette of Romania no. 418 of 15 May 2006.

[2] Government Decision no. 71/2007, published in the Official Gazette of Romania no. 98 of 08 February 2007.

[3] I.-M. Doagă, *Câteva considerații despre parteneriatul public-privat în România*, *https://www.juridice.ro/623208/cateva-consideratii-despre-parteneriatul-pu blic-privat-in-romania.html.*

dencies also govern relationships within the public sector, linked to developments in public services[4].

The Romanian legislature introduces a new instrument in 2010, namely Law no. 178 of 1 October[5] for the public-private partnership.

Under this normative act, according to Article 1, the aim of the public-private partnership was "the design, financing, construction, rehabilitation, modernisation, operation, maintenance, development and transfer of a public asset or service, as appropriate". It also defined the main terms of the public-private partnership. As far as we are concerned, Article 4(i) defines the local public authority as "the public decision-making body established and operating, as appropriate, at the county, municipality, city or commune level, responsible for public-private partnership projects of local interest".

However, the normative act has not proved its functionality and was repealed by Law no. 100 of 2016 on works concessions and service concessions, based on Article 117[6].

Unfortunately, this law did not lead to the expected result either, which is why Law no. 233 of 2016 on public-private partnerships was adopted, which was also repealed by Article 45 of the Government Emergency Ordinance no. 39 of 2018[7].

The public-private partnership has two forms in the meaning of the *Government Emergency Ordinance no. 39 of 2018*, art. 4:

a) contractual public-private partnership - public-private partnership carried out under a contract concluded between the public partner, the private partner and a new company whose share capital is wholly owned by the private partner who will act as the project company;

b) institutional public-private partnership - public-private partnership carried out under a contract concluded between the public partner and the private partner, whereby a new company is set up by the public partner and the private partner, which will act as a project company and which, after registration with the Trade Register, acquires the status of party to the

[4] *https://www.mfinante.gov.ro/static/10/Mfp/PPP/definitie_PPP_vechi_01112009.htm*

[5] Law no. 178 of 1.10.2010 on public-private partnership, published in the Official Gazette of Romania no. 676 of 5 October 2010.

[6] Law no. 100 of 19.05.2016, published in the Official Gazette of Romania no. 392 of 23 May 2016.

[7] Government Emergency Ordinance no. 39/10.05.2018, published in the Official Gazette no. 427 of 18 May 2018.

public-private partnership contract in question and aims at implementing or, as the case may be, rehabilitating and/or extending an asset or assets which will belong to the assets of the public partner and/or operating a public service, under the terms of this Emergency Ordinance.

In the case of both contractual and institutional public-private partnerships, if another public entity intends to support the implementation of the project by assuming a payment or guarantee obligation(s) for the benefit of the public partner towards the private partner designated as the successful tenderer in the contract award procedure or towards the project company, it may do so only if the payment or guarantee obligation has been provided for in the substantiation study and the tender documents in a clear, precise and unequivocal manner, indicating the conditions under which it can be met.

Despite the legal framework in force, which is proving to be more up-to-date and more adapted to economic requirements than previous legislation, such projects are still not being initiated in Romania, as there are doubts as to the real, effective possibility for public authorities to implement public-private partnerships and there is a relatively low willingness on the part of private players to get involved in such novel projects for our country.

The European Court of Auditors presented statistics on the implementation of these partnerships in its Special Report no. 9 of 2018 on Public-Private Partnerships in the EU. Thus, since the 1990s, 1749 public-private partnerships worth a total of €336 billion have benefited from financial closure in the EU. The majority of public-private partnerships were implemented in the transport sector, which in 2016 accounted for a third of all investments for the year, ahead of the health services and education sectors[8].

Communes, towns, municipalities and counties are administrative-territorial units in which local self-government is exercised and in which the mechanisms of this form of administration are organised and operated.

Local public administration authorities at the level of communes, cities and counties may freely decide to set up bodies for cooperation between territorial-administrative units and entrust them with some of their com-

[8] European Court of Auditors, Special Report no. 9 of 2018 - Public-private partnerships in the EU: widespread weaknesses and limited benefits

petences. In this context, local self-government is defined[9] as the right and effective capacity of local public administration authorities to settle and manage public affairs on behalf and in the interests of the local communities to which they are elected, under the law. It is up to these authorities to initiate and implement cooperation projects to ensure the best possible management of local resources. Of course, all these partnerships are based on the instruments available to the administration, i.e., legal provisions. The most important instrument in this respect is the administrative code.

According to the provisions of the *Administrative Code* in force, the forms of association of administrative-territorial units are:

(1) Two or more administrative-territorial units have the right, within the limits of the competence of their deliberative and executive authorities, to cooperate and associate, under the law, forming inter-community development associations with legal personality, under private law. Inter-community development associations are legal persons of public utility.

(2) Inter-community development associations will be set up under the law for the joint implementation of regional or area development projects or the joint provision of public services. Metropolitan areas established with the express consent of the local councils of the constituent administrative-territorial units will have the purpose of developing infrastructure and common development objectives. The deliberative and executive authorities at the level of each administrative-territorial unit will retain their local self-government under the law.

At the same time, the administrative-territorial units will cooperate in the organisation and performance of activities for carrying out the duties laid down by law for local public administration authorities, particularly in the areas of control, audit, inspection, town and territory planning, cadastre and any other areas decided by the respective local councils on principles of efficiency, effectiveness and economic efficiency, at the level of inter-community development associations whose members are or at the level of county structures with legal personality of the associative structures or the level of associative structures of local public administration authorities recognised as being of public utility, according to the law.

Inter-community development associations are financed by contributions from the local budgets of the member administrative-territorial

[9] Art. 5 let. j) – Government Emergency Ordinance no. 57 of 03 July 2019 on the Administrative Code.

units, as well as from other sources of funding. The Administrative Code in force provides for the possibility for the Romanian Government to support the association of administrative-territorial units through national development programmes, financed annually from the state budget or from other sources provided for separately within the budget of the ministry responsible for public administration, under the law, governing local public finance. Inter-community development associations may also be supported by the county through county or local development programmes, financed annually from the county budget or other sources.

The bodies of inter-community development associations are the general assembly of the association, the board and the board of auditors. The organisation and functioning of the inter-community development association bodies and the technical body are laid down in the articles of incorporation and the statute of the inter-community development association, approved by the decisions of the associated local and county councils.

The general assembly is the governing body of the inter-community development association and consists of representatives of all the associated administrative-territorial units. This body adopts decisions under the statute of the association, the decisions of the general assembly being assimilated to administrative acts and falling under the provisions of the law on administrative disputes. The president of the inter-community development association is elected by the resolution of the general assembly.

The board is the executive governing body of the inter-community development association and consists of the president of the inter-community development association and at least 4 other members elected from the members of the general assembly of the association. By statute, associations may also provide for a larger number of members, provided that the total number of members on the board, including the president, is odd.

A successful example at the Brasov County level is the establishment of the Metropolitan Area. This entity was created following the elaboration of the Sustainable Development Plan for the Municipality of Brasov in 2005 and currently includes a significant number of members.

According to the Administrative Code, administrative-territorial units have the right, within the limits of the competence of their deliberative and executive authorities, to cooperate and associate also with administrative-territorial units abroad, under the law, by decisions of their deliberati-

ve authorities. They may also join international organisations of local public administration authorities, under the law. On this occasion, the expenses incurred in connection with participation in the activities of international organisations will be borne from the respective local budgets.

The territorial-administrative units may conclude agreements among themselves and may participate, including by allocating funds, in the initiation and implementation of the area or regional development programmes, based on decisions adopted by the deliberative authorities, under the law.

The administrative-territorial units near border areas may conclude cross-border cooperation agreements with similar structures in neighbouring countries, under the law.

In the case of association with administrative-territorial units abroad, the initiative of the association will be communicated through the mayors, respectively the presidents of the county councils, to the ministry in charge of foreign affairs and the ministry in charge of public administration. Draft cooperation agreements that administrative-territorial units intend to conclude with administrative-territorial units of other countries must be submitted for approval to the Ministry of Foreign Affairs and the Ministry of Public Administration, before being submitted for adoption by the deliberative authorities.

Cross-border cooperation agreements may also establish bodies on the territory of Romania that have legal personality under national law. However, these bodies do not have administrative-territorial powers.

The administrative-territorial units which have concluded cross-border cooperation agreements have the right to participate in other States in the bodies set up by those agreements, within the limits of the powers conferred on them by law. In all these cases, responsibility for the cooperation or association agreements concluded by the administrative-territorial units rests exclusively with them.

A concrete example of an association for the management of public assets is the collaboration for the management of forest land owned by administrative-territorial units. This example also includes a brief description of how the areas covered by the associations were regained once the legislation on forest land retrocession came into force.

Until 1990, the national forest land was state property since 1948 and was administered under the Forest land code. In this respect, Article 1 of

Law no. 3/1962 - Forest land code stipulated: "Forests and land affected by afforestation or serving the needs of forest cultivation, production or administration constitute state property and make up the forest land of the Romanian People's Republic".

The provisions of Land Law no. 18/1991 have made it possible to retrocede agricultural and forest land to former owners, natural persons, and the properties of legal persons, including territorial administrative units being exempted from retrocession.

Given the inequalities caused by these provisions, Law no. 1/2000 was adopted to supplement the Land Law, according to which the administrative-territorial units are also entitled to the retrocession of properties, as evidenced by documents, which became State property following nationalisation in 1948.

As the present example concerns the management of forest areas, their management was based on the Forest land code, which has been amended in line with the emergence of the new forms of property given by the retrocession laws. In this respect, the first amendment to the Forest land code came in 1996, namely Law no. 26/1996 which repealed Law no. 3/1962. Thus, the national forest land, until then the exclusive property of the State, was defined according to the nature of ownership:

– State-owned national forest land;
– national forest land privately owned by natural persons,

both forms representing the national property.

One example is the establishment of the KRONSTADT Local Public Forest Company in 2005 based on the decision of the Local Council of Brasov Municipality, whose purpose is to implement the national strategy in the field of forestry by acting for the protection, conservation and sustainable development of the forest land publicly owned by the Municipality of Brasov and other administrative-territorial units, the forest land privately owned by religious units (parishes, hermitages, monasteries) and educational institutions, the forest land privately and individually owned by natural persons (former co-owners, freeholders and churls or their heirs), the forest land owned by natural persons, which it administers on a contractual basis to exploit the specific products of the forest land through transactions and acts of trade, according to legal provisions, in conditions of economic efficiency, also exercising public service forestry duties.

Finally, given the above, we can conclude that association and the creation of partnerships of any kind is a solution for the sustainable and uniform development of communities, although sometimes the legislation applicable in this field creates inconveniences and confusion. We believe that clear, unambiguous legislation, adapted to the current economic and social environment, would make it easier to conclude more of these partnerships.

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LEGAL SECURITY IN THE PRE-CONTRACTUAL AREA

Rațiu Flavia Simona PETRIDEAN*

ABSTRACT

Starting from the assumption that we are in an era of negotiations and implicitly, in a moment of spatial expansion of pre-contractual relationships, there is a need for a specialized paper in the Romanian private law area to update the contemporary legal landscape from the perspective of the circumstances that precede the moment of the achievement of the legal agreement of wills, both in order to promote and develop a pre-contractual information policy, and from the perspective of achieving optimal connections between ethical and professional values, which future contractual partners must respect.

KEYWORDS: *pre-contractual period; ethics; contract negotiations; consent;*

Introduction

"*If you're going to play this game correctly, you'd better know the rules*".
(Barbara Jordan, US Congress, 1975)

The complexity of the civil contract represents a real *legal puzzle* built by the parties in a series of successive[1] stages, based on the principle of contractual freedom and starting from the fact that "*the foundation of the social and legal edifice lies in the individual, in its free will. Any relationship that arises between people can only have its source in their free will (...) in the absence of will it is impossible to imagine a contractual*

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[1] Pre-contractual stage → Contract formation stage → Contract performance stage → Post-contractual stage.

relationship"[2]. This possibility of acting according to one's own will stems from the fact that freedom is a mystery of the human being, as it is both a principle and a value of the human ethic, "*connected to the development of man and society*"[3], but at the same time constrained by a recessive character, because the state of freedom is never complete, being unstable in relation to the need for an existential order.

The treatment of freedom in legal science is based on the fact that "*law cannot be conceived outside the idea of freedom. The normative system (...) has its meaning and legitimacy in human existence, the latter having freedom as a given (...) it is a freedom of the legal norm, a constructed freedom and not an existential given*"[4].

In this context, the creative genesis of the future contract[5] is based on the will of the individual, in its moral dimension, enshrined in the attitude of the subject of law to achieve a fair legal agreement with the other contracting party. In essence, the contract is a fundamental legal mechanism for achieving the interests of the persons concerned, and since it lies at the basis of the deal, *«Freedom», i.e. the natural faculty to do as one pleases, (which is) the «natural state of man»*[6], there is a danger of abandoning ethical values, and the contemporary regulatory system requires the legislator to intervene to guarantee legal freedoms, even in the precarious pre-contractual phase.

Thus, despite the complexity of the domestic legal system, there is a tendency to approach the pre-contractual phase and any negotiations that may precede the conclusion of a contract in a galloping manner, placing

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[2] E. Safta-Romano, *Drept civil. Obligații*, Neuron Publishing House, Focșani, 1994, p. 33, *apud* I. Adam, *Tratat de drept civil. Obligațiile*. *Volume I. Contractul,* C.H. Beck Publishing House, Bucharest, 2017, p. 136.

[3] M. Andreescu, C. Andreescu, *De la libertățile juridice la libertatea ontologică*, in the Magazine Dreptul no. 12/2019, p. 119.

[4] M. Andreescu, C. Andreescu, *De la libertățile juridice la libertatea ontologică*, in the Magazine Dreptul no. 12/2019, p. 121.

[5] *"The correlation between will and contract is one of the kind of cause and effect, since the externalised legal will is the engine which sets in motion a whole complex of volitional and intellectual processes which generate the contract, if its clear purpose is to produce legal effects".* I. Adam, *Tratat de drept civil. Obligațiile. Volume I. Contractul,* C.H. Beck Publishing House, Bucharest, 2017, p. 137.

[6] L. Stănciulescu, *Curs de Drept Civil. Contracte*, Hamangiu Publishing House, Bucharest, 2014, p. 23; Ref. D. Alexandresco, *Principiile dreptului civil român*. *Vol. III,* Tipografia Curții Regale, Bucharest, 1926, p. 5.

us in terms of time at the moment of the agreement of wills and implicitly omitting the relevance of this pre-contractual phase in terms of the conclusion and execution of the contract[7]. A whole process summarised in the current regulation under the auspices of two principles and ethical thinking, a unification of human nature and morality with the specific order of the legal condition.

But... then, the concern of the approved study is conditioned by the complexity of both contracts and economic interests, which go beyond the classical scheme of traditional private law doctrine, from the perspective of the meeting of the two structural components of offer and acceptance[8]. The contractors, often do not assume the spontaneity of a final[9] conclusion of the act, but engage in persistent negotiations - *an exchange of expressions of will in both directions*[10] - to determine according to the primary interest, with clarity, most elements of the contract designed. A broad process in which the parties agree to set out their premises, a nucleus with a legal link (*vinculum juris*) in which they should reflect not only on the future content of the contract, but also on the positive consequences

[7] "*The pre-contractual period has and can have a relevant impact on the contract that will be finally formed. Thus, this period is the period during which facts are likely to vitiate the consent of the contracting parties; defects in consent have causes prior to or concurrent with the moment of conclusion of the contract. The analysis of the content of the pre-contractual negotiations is also important for the subsequent interpretation of the contract, where appropriate.*". L. Pop, *Despre negocierile precontractuale și contractele preparatorii*, in Revista română de drept privat no. 4/2008.

[8] "*Even if any contract is presented as an agreement of legal wills, generically and analytically called consent, it may happen that its analysis is fractured. Thus, the will of each party to the contract will be taken into account, which can be broken down analytically into its structural elements. The process is possible irrespective of the type or form of contract and makes it possible to unravel not only the structure of the consent but also that of the contract, the latter being of interest here. From this point of view, any contract can be understood as the union between two consents which, if privately separated, will allow us to talk about the offer and its acceptance; the two, legally united and not psychologically superimposed, form the contract"*. P. Vasilescu, *Drept Civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, p. 291.

[9] "*In general, in civil law, «contract formation» and «contract conclusion» have the same meaning. Strictly speaking, «formation» refers to the achievement of consent (through discussion, negotiation, etc.) and «conclusion» to the fulfilment of the conditions of validity laid down by law for the legal act.*". L. Stănciulescu, *Curs De Drept Civil. Contracte*, Hamangiu Publishing House, Bucharest, 2014, p. 37.

[10] I.I. Neamț, *Momentul calitativ al încheierii contractului. Elementele esențiale ale contractului*; in Revista Română de Drept Privat no. 4/2016, p. 125.

and implicitly on those unfavourable circumstances, foreseeable *a priori* to the conclusion of a contract. In fact, witnessing a maturation of consent, the mechanism of negotiation, being an instrument designed to moralise contractual relations, offering a period of reflection, during which partial consent will gradually be consolidated.

However, the civil law legal literature updates this contractual reality with the entry into force of the New Civil Code, realizing that "*due to the great and profound changes that have occurred in social life (...) the simple mechanism of the linear and instantaneous achievement of the agreement of the will of the contracting parties, through the unreserved acceptance of an offer to contract, although it continued to correspond to a segment of current contractual life, has often been overtaken by the realities that had and have their etiology in the new social needs and (...) the conclusion of a large number of contracts has sometimes turned out to be a particularly complex legal operation, involving and making it necessary to initiate and conduct discussions, negotiations, offers and counter-offers, the conclusion of negotiation agreements (...); it thus follows that the concordant meeting of offer and acceptance is often No. longer a simple and linear operation, but it is preceded by a pre-contractual stage (...)*.[11] This time interval, which is essential in terms of the effects it has on the balance and quality of the contractual clauses, is a veritable journey of morality, marked by preparatory activities and acts, on the development and success of which the achievement of the agreement of wills depends.

Although this pre-contractual phase benefits under the current regulation from a reforming legal regime, determined by the form that the parties engaged in these pre-contractual discussions assume, there is a need to implement a moral concept as a foundation in pre-contractual interpersonal relations, because, at the moment in terms of the mechanism of negotiation on the legal level, in case of pre-contractual liability, we are *either* talking about pre-contractual non organized negotiations, *or* contractually regulated, determining as the case may be the rules of tort liability, respectively the rules of contractual civil liability[12]. Negotiation

[11] Liviu Pop, *Despre deontologia negocierilor libere pentru formarea contractelor*, the Magazine Dreptul no. 12/2021 Year Cl New Series XXXII, p. 15.

[12] "*Pre-contractual obligations are distinct from contractual obligations in that they have their own sources and characteristics, and so, in fact, is the liability arising from their non-performance.*". Ioan Albu, *Răspunderea civilă precontractuală*, The Magazine Dreptul, Year IV, 3rd Series, No. 7/1993, p. 39.

is therefore such a complex social phenomenon that one of its specific features is its ability to conclude legal acts of a transitory nature, based on a series of configurations of a not only legal but also economic or psychological nature. Thus, there are a number of instruments that can be used in the conduct of pre-contractual negotiations, but the versatility of the doctrine and, implicitly, of the case law, leads to a distinctive analysis.

However, regardless of the way in which this agreement/consent is prepared, we believe that the behaviour of the contracting parties must be linked to those ethical and professional values determined by public order and good morals. Therefore, there are a number of principles and unwritten rules that must be applied to all negotiation[13] strategies and techniques, which we must both understand and respect, since we are engaging in a voluntary activity that creates opportunities for the development of personal interests and priorities. Although these circumstances do not necessarily relate to the intrinsic content of the future contract, they are a guarantee of the soundness and validity of the final contract. "*Thus, the development and completion of the pre-contractual phase often depends on the achievement of contractual balance, as well as the quality of the final content of the contract in question, in accordance with the interests and real will of the contracting parties*."[14].

Negotiation - a component of contractual genesis

Starting from the assumption that we are in an era of negotiations, as far as the pre-contractual phase is concerned, there is a tendency to deal in a galloping manner with the issues of the progressive formation of the actual contracts and implicitly with the possible negotiations, undertaken by the future parties, in order to prepare for their completion, the contract

[13] "*There are at least three standards for evaluating strategies and tactics used in business and negotiation: ethics, prudence and practicality* (M. Missner, 1980). *Judging ethics involves an evaluation of strategies and tactics based on some standard of moral behaviour, or in other words, judging what is right or wrong. Prudence judgments are based on what is most effective - i.e. what is beneficial or harmful to the people performing those actions. Finally, practicality judgements are based on what is the easiest, cheapest or fastest way to do something to achieve a goal*". Ioan Plăiaș, *Negocierea afacerilor*, Risoprint Publishing House, Cluj-Napoca, 2003, pp. 361-362.

[14] Liviu Pop, *Despre deontologia negocierilor libere pentru formarea contractelor*, in the Magazine Dreptul No. 12/2021 Year Cl, New Series XXXII, p. 16.

representing "*a complex legal act, which contains elements that follow a certain order, such as: the motivation of the contract; pre-contractual manifestations, individual wills in agreement, the moment of conclusion (completion) of the act, the legal relationship (the obligations of the parties) and the purpose, the end sought*"[15].

Even in the civil law legal literature, most authors, in their classical view, establish the moment of conclusion of the contract as the starting point, without basing the agreement of wills, regarding the progressive consolidation of consent, on the virtuality of the pre-contractual stage. Essentially, the circumstances anticipating the will of each person, embodied in the two types of contracts referred to in Article 1182 of the Civil Code, represent a new approach to contractual life, which creates a legal landscape that is updated to the realities of everyday life.

The aspects of pre-contractual negotiations represent an exploratory period, which relates the form of thinking, on the choices and options available to future contractors, in order to determine the contractual content. The viability of the pre-contractual system is based on the ethical behaviour of the parties, determined both by the intrinsic nature of the individual and by the current legal regulatory system. "*In such cases, the contract is not the result of a clearly definable offer and a correlative acceptance, but rather of a whole series of manifestations of will, each with the value of an offer and partial acceptance, several manifestations which ultimately converge towards an agreement of will*"[16].

Basically, the aim of the future contract's itinerary is the symmetrical meeting of two legal wills, materialised in a mutual agreement, which is as satisfactory as possible and which brings about a change in the present state of affairs. The formation of the agreement of wills involves both an internal, psychological phase, known as the internal agreement of wills, which takes the form of substantive elements such as the conditions of validity of the contract, and an external agreement, focusing on matters relating to consent as the perceptible manifestation of the legal will. In other words, the circumstances surrounding the consent, which is an indispensable element in the valid formation of the contract, "*have an internal and an external*

[15] L. Stănciulescu, *Curs de Drept civil. Contracte*, Hamangiu Publishing House, Bucharest, 2014, p. 30.

[16] I.I. Neamț, *Momentul calitativ al încheierii contractului. Elementele esențiale ale contractului*, in Revista Română de Drept Privat, No. 4/2016, p. 125.

course. The internal course of consent is the process of forming the legal will, and the external course of consent is the mechanism for forming the external consent of the parties (...) This second phase is in fact twofold: a) the phase of negotiation of the contract and b) the mechanism for forming the contract through the meeting of offer and acceptance"[17].

In the case of the exchange of consent[18] in dissociation, there is a perfect interweaving of conventional wills, unlike the contract negotiation phase, where "*the contractual product is formed progressively. The classical scheme of contract formation presents the agreement of wills as a veritable legal coup de foudre; the spontaneous and instantaneous union of offer and acceptance (...)"*[19]. At the other end of the spectrum, when the parties are engaged in extensive negotiations, the existence of exchanges of views prior to the conclusion of the contract, despite their optional nature, is necessary, depending on the complexity of the subject-matter of the legal act, in order to transparently establish its effects, i.e. in order to prevent

[17] L. Pop, I.-F. Popa, S.I. Vidu, *Curs de Drept civil. Obligațiile*, Universul Juridic Publishing House, Bucharest, 2015, p. 53.

[18] Also in our private law literature, a new approach to the composition of consent is reviewed, in view of the fact that the purpose of negotiation in the perspective of the New Civil Code and implicitly of art. 1182, is identified as an alternative technique to the conclusion of the contract, a role that raises questions, arguing that "*The NCC solution is fundamentally wrong. In reality, the contract is always concluded by the unreserved acceptance of an offer (...) Acceptance may occur either as a result of the first offer made by the person initiating the negotiations or as a result of an offer modified either by the original offeror or by the person making the original offer. What must be borne in mind is that under No. circumstances is acceptance merely an alternative way of concluding the contract, which is essential"*. In other words, the two-stage mechanism (offer-acceptance) is in fact a simplified negotiation, whereas the negotiation itself is essentially a series of legal proposals which, once accepted, will lead to the conclusion of the final contract. Consequently, there are two hypotheses, one in which "*the offer is simply accepted, in respect of which we are investigating the mechanism of supply and demand, and the hypothesis in which the offer is accepted, following an exchange of proposals. The rules applicable to the first hypothesis will be common to the formation of all contracts, while the particularities of the second hypothesis will be analysed separately"*. Therefore, we can conclude that consent is based on two vectors: offer and acceptance, because in all circumstances, the concordant meeting takes place through the legal proposal (poly-quotation) that a person makes to another person with the aim of concluding the contract. See in this respect, A. Almășan, *Negocierea și încheierea contractelor*, Publishing House C.H. Beck, Bucharest, 2013, pp. 178-183.

[19] J. Goicovici, *Formarea progresivă a contractului*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 15.

possible obstacles which may emerge during the execution of the contract. "*After all, the aim of negotiations is for each participant in the talks to get the best possible position in relation to the other party, with the ultimate consequence of making the deal as profitable as possible".* Thus, negotiation, although not an indispensable element, is therefore essential as a means of reaching a mutually acceptable agreement by giving the parties time to reflect on the terms of the contract and allowing their consent to mature on the balance of advantages and disadvantages that would be imposed on them.

For reasons of legal accuracy, it should be pointed out that this optional stage of the negotiations can have both a progressive and a regressive effect, being the period between the first presumed contacts of the future contracting parties and the mechanism for forming the agreement of wills or alternatively the moment of renouncing the conclusion of the final contract. "*There is No. general obligation to conclude the negotiated contract, but there is an obligation not to interrupt negotiations abusively or to conduct them in bad faith. Bad faith in the exercise of the freedom to contract is not limited to situations in which the person who interrupts negotiations is motivated by the intention to harm the other party, but also manifests itself in the following cases: initiating negotiations without the intention of concluding a contract (...); keeping the negotiating partner, without a real and serious reason, in a state of uncertainty as to the conclusion of the contract (...); breaking off without a legitimate reason, in a brutal and unilateral manner, advanced negotiations"*[20]. As a result, we are witnessing a genuine obligation of psychological preparation, which implicitly involves an investigation which is not only limited to the aspect of reaching an agreement of will between the contracting parties, but also to the analysis of the conditions of substance and form, which are essential for the conclusion of the contract under the auspices of contractual freedom and good faith.[21] In other words, "*the result of the negotiation is the contract itself. A successful negotiation is concluded by the formation of the contract, in this sense, the contract meaning the final legal*

[20] P. Vasilescu, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, p. 275.

[21] M. Floare, *Buna și reaua-credință în negocierea și executarea contractelor de drept comun*, Universul Juridic Publishing House, Bucharest, 2015, p. 178. See L. Pop, *Despre negocierile precontractuale și contractile preparatorii,* în RRDP No. 4/2008, pp. 100-101.

operation pursued by the parties. For this reason, it is necessary to analyse the legal implications of negotiation from three perspectives: (i) the mechanism of formation, (ii) the result of the negotiation and (iii) the legal regime applicable to the negotiation"[22].

This stage of negotiation is sometimes even a necessity, where the subject matter of the contract and the interests of the parties form an echo, which is reflected in the future rights and obligations assumed by the parties. This phase must therefore be governed primarily by the principle of freedom of negotiation (Article 1183 of the Civil Code), a legal freedom which is organically integrated into the principle of contractual freedom, identified in Article 1169 of the Civil Code, from which we derive the two general limits of freedom, i.e. public policy and good morals. In essence, the foundation of this principle is the theory of autonomy of will, which governs the legal will, since engaging in negotiations is the work of the human will, which can manifest autonomous behaviour that should not harm the interests of others. Thus, if the contract must be fair and legitimate, the pre-contractual relations matter must implicitly also fall under the shield enshrined in the legislative text. "*The hallmark of contractual freedom is the right of the parties to choose their own negotiating partners, to interrupt pre-contractual discussions when they consider it appropriate, to resume or to express their refusal to conclude the contract after negotiations have been exhausted*"[23].

However, the conduct of these discussions also falls under the imperative incidence of the principle of good faith, a normative concept, expressly provided for, which regulates both free and conventionally organised negotiations, being "*the key that opens the way to morality and to economic and social efficiency in contract law*"[24]. This open and flexible norm not only adjusts to the new legal realities that are manifesting themselves in the contractual area, but also conceives a series of obligations that help to create a path of pre-contractual morality, through the theoretical founda-

[22] Express regulation of good faith in the text of the UNIDROIT Principles: Article 1.7 (Good faith) (1) Parties have an obligation to comply with the requirements of good faith in international trade. (2) Parties may neither exclude this obligation nor limit its relevance. *https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-Romanian-bl.pdf;* accessed on 27 November 2022.

[23] A. Almășan, *Negocierea și încheierea contractelor*, C.H. Beck Publishing House, Bucharest, 2013, p. 169.

[24] L. Pop, I.-F. Popa, S.I. Vidu, *op. cit.,* 2015, p. 54.

tion that it imposes on legal life, where "*after the adoption of the new Civil Code, art. 14 NCC, instituting a general principle of good faith in civil relations, art. 1170 NCC reiterating the principle of good faith in contractual matters (both when negotiating and concluding the contract and during its performance), and art. 1183 para. 2 NCC removing any doubt and expressly providing for the obligation to comply with the requirements of good faith even from the mere engagement in negotiations*"[25].

Consequently, this principle is a general reference point in private law and is applicable at all stages of a contract. The texts of the New Civil Code reveal a number of forms of conduct which violate the requirements of good faith[26], but "*these forms of conduct contrary to the requirements of good faith, explicitly provided for by law, are not exhaustive; they may be added other forms of conduct which have been found and thus qualified in case law. Thus, for example, the French case-law has consistently held, in case law, that bad faith in the conclusion of contracts, including in the exercise of freedom of negotiation, is much broader*"[27]. It is certain that the conduct of a negotiator[28] should not be centred solely on his own interests, but he should enable a mutually satisfactory agreement to be reached, after all "*the freedom to initiate, continue and abandon negotiations must be done for a serious and legitimate reason*"[29]. A liberality, which allows the

[25] M. Floare, *Buna și reaua-credință în negocierea și executarea contractelor de drept comun*, Universul Juridic Publishing House, Bucharest, 2015, p. 25.

[26] *Ibidem,* p. 177.

[27] Express regulation of bad faith in the text of the UNIDROIT Principles: Article 2.1.15 (Bad faith in negotiations) (1) Each party is free to negotiate and cannot be held liable for failure to conclude the contract. (2) However, a party who negotiates or who breaks off negotiations in bad faith is liable for the damage caused to the other party. (3) It is in particular bad faith for a party to enter into negotiations or to continue negotiations knowing that it does not intend to reach agreement with the other party. *https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-Romanian-bl.pdf;* accessed on 27 November 2022.

[28] L. Pop, *Despre deontologia negocierilor libere pentru formarea contractelor*, in the Magazine Dreptul no. 12/2021 Year Cl New Series XXXII, p. 27.

[29] "*Negotiators are motivated to win a favourable outcome and even to maximise that outcome. Sometimes the pressure to achieve the best outcome leads negotiators to use either deception or some dirty tricks to achieve their goals. In addition, a strong competitive orientation can lead negotiators not only to seek to maximize their gain, but also to give special attention to strategies and tactics that allow them to outperform their partner, outperform or even harm the other party's ability to compete in the future*" Ioan Plăiaș, *Negocierea afacerilor*, Risoprint Publishing House, Cluj-Napoca, 2003, p. 364.

subject to put forward his own personal interests, but under the conjunction of good faith, the parties being obliged to negotiate fairly, there being as purpose, the serious intention to contract, with the duty not to bring dispensable harm. In this respect, there is a wide range of pre-contractual obligations, the breach of which can lead to the contract being prevented from being formed or even to the destruction of the contractual relationship.

In this regard, it is worth mentioning the *obligation of confidentiality*, provided for *expressis verbis*, in the legal text of art. 1184 NCC consisting in the fact of not disclosing or using for personal interest, the information that we become aware of during negotiations, otherwise the person who is proven to have acted adversely will be held liable. Unlike the obligation of good faith, this is enshrined in a dispositive rule, which allows parties to derogate from its applicability by narrowing or even removing the provision. "*It often appears as a corollary of the obligation to provide information, which, as we shall see, is an implicit obligation, having its basis and source in the general obligation to respect the requirements of good faith in negotiations*"[30].

As regards the general pre-contractual information obligation, it is a genuine means of protecting consent, since "*this information policy is based on a series of pre-contractual means and practices (...) grouped together in a set of rules (...) by which the non-professional consumer is made aware of a series of advantages and disadvantages resulting from the existence and performance of a given contract, thus avoiding the expression of consent without the consumer having first considered his decision*"[31].

We conclude this section by saying that the principle of freedom of negotiation and the principle of good faith, although they seem to act antinomically, help to insinuate morality into pre-contractual legal freedom, which is an issue depending on the contractual interest of each party. In reality, the interests of the parties are often heterogeneous, and in order to achieve them, negotiation is used as an instrument *of persuasion*, facilitating the implementation of agreements of will between the parties, giving rise to the contractual product, through a series of rights and obligations

[30] A. Bodnar, *Aspecte privind formarea contractului în viziunea Noului Cod Civil*, in the Magazine Dreptul no. 8/2013, p. 24.

[31] L. Pop, *Despre deontologia negocierilor libere pentru formarea contractelor,* in the Magazine Dreptul No. 12/2021 Year Cl New Series XXXII, p. 29.

that clarify the essential elements of the contract. This balance can only be achieved by observing these two principles, which play a guiding role in the context of positive law, being the source and the theoretical and practical foundation of other duties, known as implicit obligations. These pre-contractual legal or contractual obligations, which are designed *either* to protect the integrity of consent *or* to guarantee the effectiveness and security of negotiations.

Conclusion

In our private law literature, it is necessary that the new spatial expansion of pre-contractual relations be comprehensively and competently defined, addressing the issue of negotiation in contractual matters from the perspective of the complexity and dynamics that the narrative of the birth of contracts reflects in the current legal system. On the principle that "*there are a thousand kinds of time. There is deep time and there is angular time. Ineffable time. Time - friend. And the treacherous. The indecisive and the tender time. Threatening time and serene time, as if belonging to another world. We pass through countless kinds of time and gradually. We discover that every place we have ever been corresponds to a time - the contractual time - that is mysterious enough. For a contract to exist, to produce effects and to concern us, there must first be its time...* ".[32] Contemporary times therefore call for a review of negotiation as a phenomenon that reflects both art and science, and implicitly from the point of view of the form of "*liability which can be regarded as distinctive only because of its sources and the particularities that the various civil liabilities present when applied to pre-contractual acts and facts*"[33]. In essence, negotiation is an extremely important pre-contractual stage because it is here that the parties can obtain the desired effects from the future act to be concluded, in circumstances where most of the obligations governing this stage are still at an embryonic stage of development in terms of their legal effectiveness.

Good ethics underpin good business!

[32] I. Adam, *Tratat de drept civil. Obligațiile*. *Volume I. Contractul,* C.H. Beck Publishing House, Bucharest, 2017, p. 145.

[33] J. Goicovici, *Formarea progresivă a contractului*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 15.

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EFFECTS OF THE MANDATE ON THIRD PARTIES

Vlad-Ionuț SAVU[*]

ABSTRACT

In this article you can find out what a mandate means and what happens legally after it is concluded. It all started from a simple agreement between friends, nowadays the mandate contract being one of the most important in almost all fields, but especially for entrepreneurs, having a great practical utility. Throughout the article, we will analyse the effects that the mandate contract has on third parties, as well as the relations produced from a legal perspective between the mandatory and the third party.

KEYWORDS: *mandate; effects of mandate; usefulness of mandate; relationship of the mandatory with third parties; power of attorney;*

Under the name of mandate, this type of contract allows civil law subjects to conclude, in principle, any legal acts they deem necessary (of course, with the exceptions provided for by law, such as those strictly related to the person of the contracting party).

In this context, in the literature, in a notable expression, the mandate contract has been referred to as the "contract with a thousand faces" which "occupies a special place within civil contracts".[1]

Although the structure and physiognomy of this type of contract has not undergone major alterations in the course of civil regulations, it is nevertheless shown that it has enjoyed a remarkable evolution.[2]

"From a simple office between friends, the mandate has become the backbone of the invisible economy that nowadays dominates civil and commercial relations through the interposition of services provision, being

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[1] C.T. Popa, *Some considerations on the mandate contract*, 2020, *www.universulju ridic.ro,* accessed on 25th of April 2021, 13:03.

[2] *Ibidem.*

at the heart of business life and serving the interests of merchants, bankers, industrialists, entrepreneurs, businessmen".[3]

In the current regulation, the legislator defines the mandate contract, according to Article 2009 of the Civil Code, as a contract by which one party, called the mandatory, undertakes to conclude one or more legal acts on behalf of the other party, called the principal.

In this context, we note that the mandatory will be able to bind himself/herself towards the principal to conclude certain legal acts, which are to be concluded by means of the representation procedure, in the name and on behalf of the principal.

In the literature, it is pointed out that the conceptual essence of the mandate contract is precisely the power of representation which the mandatory obtains as a result of concluding this type of contract and which allows him/her, in this context, to carry out legal acts at the expense of the one who has given the representation. In other words, although representation will not operate in absolutely all cases, the effects of the legal acts concluded by the mandatory will in all cases be passed on to the principal estate (as if the principal had concluded these acts himself/herself). Of course, the effects of legal acts concluded on the basis of the mandate contract will only be felt to the extent that the acts comply with the limits of the power of attorney given, the law, morality and public policy.

It is pointed out that this type of contract is particularly useful in practice, as it is likely to provide from a legal point of view the "gift of ubiquity" which implies that the principal, through mandatory, can be present (from the same legal perspective) in several places at the same time.[4]

Just like any other civil contract, the mandate contract is to generate a series of rights and obligations for the contracting parties (generically called legal effects), in accordance with the provisions of common law.

However, taking into account the fact that one party empowers the other party to conclude certain legal acts, in his/her name and on his/her behalf, with another party, a third party to the mandate contract, we note that we

[3] M.L. Istrătoaie, *Special Civil Contracts*, C.H. Beck Publishing House, Bucharest, 2017, p. 172.

[4] L. Stănciulescu, G. Boroi, *Civil Law Institutions*, Hamangiu Publishing House, Bucharest, 2012, p. 473.

are in the presence of a tripartite legal transaction involving three distinct subjects of civil law.

In this context, in order to be able to analyse, in *general* and in a complete manner, the effects of the mandate contract, it is necessary to examine them from a threefold perspective, i.e. by reference to all the persons involved in this legal transaction, namely: the mandatory, the principal and the contracting third party.

In view of the subject matter of this paper, only the effects of the mandate contract towards third parties will be discussed below.

With regard to the effects that the mandate contract generates towards third parties, the analysis of these effects must be carried out from two points of view.

A first point of view is that which involves the analysis of the relations created between the principal and the third party, generated by the contract concluded, while a second aspect is to look at the relations produced from a legal perspective between the mandatory and the third party.

With regard to the relationship between the principal and third parties, we are primarily concerned with the hypothesis that the mandatory actually succeeds in concluding the legal act for which he/she has been empowered under the mandate contract.

In this situation, in practice, an independent civil legal act is concluded between the principal, through the mandatory, and the third party, which will produce its natural effects between these two parties. This will create a direct legal relationship between the principal and the third party. These legal relationships arise because the mandatory has concluded the legal act both in the name and on behalf of the principal.

In another expression, all the acts that the mandatory concludes with third parties, in the justification and execution of the mandate contract, are to produce their effects only in the person of the principal, since from a legal point of view it is the principal who has concluded the act, not the mandatory.

In this context, the principal will be bound to perform all the contractual obligations arising from the contract concluded and, naturally, all the rights arising from that act will arise in his estate.

Of course, this conclusion is only applicable insofar as we are discussing in this matter about a perfect representation. From the perspective of perfect representation, we point out that, as is clear from the provisions of Article 2009 of the Civil Code, which defines the mandate contract, in

order for this type of contract to be concluded, the mandatory must act in the name and on behalf of the principal (i.e. the contract is concluded directly with the principal, through the mandatory). Unlike perfect representation, imperfect representation, as provided for in Article 1297 of the Civil Code, the contract is concluded not in the name of the principal but in the name of the mandatory, and on behalf of the principal.

It should also be noted that in order for the above to be applicable it is necessary that the mandatory acts on the basis of the representation and within the limits of the representation, without exceeding them.

To the extent that the mandatory concludes the contract with the third party without having a power of attorney or exceeding its limits, the Romanian legislator stipulates, in accordance with the provisions of Art. 1309 para. (1) of the Civil Code that "*The contract concluded by the person acting as a representative, but without power of attorney or exceeding the powers conferred, does not produce effects between the represented and the third party".*

First of all, it should be noted that this provision of principle, although regulated in the section on representation in general and not in the section on the mandate contract, implicitly refers to the mandate contract.

Then, we note that the legislator uses the syntactic unit: the act has "*No. effect between the represented party and the third party",* which automatically implies the conclusion that the specific effect of the mandate with representation is removed. In this context we affirm that the conclusion of the contract without power of attorney or with the limits of the power of attorney exceeded will not bind the principal towards the third party. Implicitly, the contract concluded will have No. effect whatsoever on the person who gave the representation.

From this point of view, it has been stated in the literature that the act concluded with the third party will be considered as not existing from a legal perspective towards the principal. In other words, it is held that the act concluded is not enforceable against the principal. In this respect, a case law decision held that acts concluded by the mandatory in excess of the powers conferred under the mandate contract cannot be enforceable against the principal.[5]

In view of the above, it is held in the doctrine that "*at issue is not the enforceability/non-enforceability of the act performed by the mandatory,*

[5] C.A. Galați, Civil section, Decision no. 504/2002, *www.portaljust.ro.*

but the very fact of whether the mandatory is bound by the act or not, i.e. whether he is a party to it or not. In other words, if, as rightly observed, 'enforceability can be understood generically as the respect owed by third parties to a legal situation created by contract', and 'non-enforceability takes the form of authorising third parties to ignore the effects of a civil act', and the fact that 'unenforceability is a sanction applicable only to validly concluded contracts, imposed by causes arising after the conclusion of the act', being caused by the failure to comply with the formalities of ad opozabilitatem publicity, then it is clear that there can be No. question of unenforceability in the present case. In reality, the problem that arises is one of proof, the solution depending on proof of the existence/non-existence of the power of attorney, i.e. whether or not its limits have been exceeded, i.e., ultimately, whether or not the conclusion of the document by the mandatory has bound the direct legal relationship between the principal and the third party, which is the specific effect of representation (Art. 1296 Civil Code), and not a question of enforceability, i.e. whether or not a valid act concluded between the parties has been brought to the knowledge of third parties by fulfilling the formalities of publicity.[6]

Although we fully agree with the conclusion that unenforceability would be investigated only in the context of failure to comply with disclosure formalities, we believe that the situation of exceeding the limits of the mandate will also be subject to the notion of enforceability, i.e. unenforceability, simply because, as a consequence, the principal will be legally able to ignore the document.

However, as long as we are discussing the legal possibility for a person to treat an act existing in the civil circuit as not existing for him/her, ignoring the totality of the effects, it is certain that we are discussing the non-enforceability of the act.

Nevertheless, there are also certain situations in which, even though the act was concluded without a power of attorney or with the limits of the power of attorney being exceeded, it may still produce the desired legal effects.

One first exception to the consequence of the non-production of the effects of the act concluded by the mandatory in the person of the principal is the situation of apparent representation.

[6] D. Chirică, *Controversial issues concerning the mandate contract*, 2018, www.juridice.ro, accessed on 24th of April 2021, 14:45.

Thus, even if the act was concluded by the mandatory without having a power of attorney or without respecting its limits, this act will nevertheless be able to produce effects in the estate of the principal if the conditions of the apparent power of attorney are met.

As a general rule, when discussing apparent mandate, we note that the principal is to be bound by the contract concluded by the mandatory in his/her name and on his/her behalf as if the representation had been performed within the limits of the mandate contract.

In this respect, it is held that all the effects generated by the contract concluded with the third party, in the absence or beyond the limits of the power of attorney, arise by virtue of the law and not of the contract concluded, retaining the applicability of the principle of *erorr comunis facit ius* (principle of error of law).

Even so, what determines the effects produced under the law is precisely what was established by the "invalid" contract.

In other words, "*it is the deed concluded between the apparent mandatory and the third party who has been misled which determines the terms of the relationship between the principal and the third party: if, for example, a tenancy contract is concluded by an apparent mandatory in the name and on behalf of a landlord who has not given him power of attorney, the term of the tenancy, the rent, the terms of payment, etc. will be governed by the contract concluded between the mandatory and the third party who has been misled*".[7]

Finally, also by way of generality, we point out that the apparent mandate can only be invoked by the contracting third party, not by the principal or, even more so, by the mandatory. From this point of view, depending on its interests, the third party may choose to invoke the apparent mandate and may also refuse to invoke it. However, once the third party has expressed its position, it cannot go back on these points (the third party cannot change his/her mind), which is why, if the apparent mandate is invoked, the obligations arising from the contract will have to be performed as the parties have agreed.

We further point out that the Romanian legislator regulates three types of apparent mandate, the basic form of which is provided for in Article 1309 para. 2 of the Civil code.

[7] D. Chirică, *Controversial issues concerning the mandate contract*, 2018, *www.juridice.ro*, accessed on 25th of April 2021, 17:22.

According to this legal text, *"If [...] by his conduct the representative has led the third party to reasonably believe that the representative has the power to represent him/her and that he/she is acting within the scope of the powers conferred on him/her, the representative may not rely on the lack of power to represent against the third party."*

We also note that in order for the institution of the apparent mandate to be applicable, a set of three conditions must be met cumulatively.

First, the contracting third party must be satisfied that the mandatory had authority to conclude the act in the name and on behalf of the principal. This belief of the third party is to be assessed by reference to the time of conclusion of the contract.

Then, this belief of the third-party contractor must be reasonable, i.e. it could not have eliminated the existing error even if it had taken normal care.

The last condition that must be met in order to find ourselves in the situation of apparent mandate, was introduced by the provisions of the current Civil Code and has as its object the necessity that the error in which the third party was at the time of the conclusion of the act be produced by the principal.

If the conditions of apparent mandate are not met, the legal relationship between the principal represented beyond the limits of the authority and the third party will be governed by the rules of unjust enrichment.

Based on the above, and in particular on the way this legal text is drafted, we can conclude that the application of the apparent mandate mechanism is primarily for the benefit of the third party. Thus, only the contracting third party who fulfils the conditions required by law, and not the principal or the mandatory, can rely on these legal provisions to claim that the legal act he/she has concluded with the mandatory, produces effects between the third party and the principal.

In addition to the existing regulation in Article 1309, a subspecies of the apparent mandate is found in the provisions of Article 1306 of the Civil Code, which provides that *"The modification and revocation of the power of attorney must be made known to third parties by appropriate means. Otherwise, they may not be relied on against third parties unless it is proved that they knew or could have known of them at the time the contract was concluded."*

We note that this subspecies of apparent mandate concerns the situation where the act is concluded after the principal has modified or revoked the

mandate. In this situation, the principal has an obligation to inform third parties. If the third parties are not informed and if there is No. proof of knowledge or possibility of knowledge of the amendment or revocation, the act will be deemed to have been validly concluded.

The last situation of apparent mandate is provided for in the provisions of Article 1307 para. (4) of the Civil Code, according to which *"The termination of the power of representation does not produce effects with regard to third parties who, at the time of the conclusion of the contract, did not know and should not have known of this circumstance".*

With this legal text, the legislator regulates the hypothesis of the conclusion of the legal act after the termination of the power of representation of the mandatory (a circumstance distinct from the situation of revocation or modification of the mandate).

The second exception to the unenforceability of the act concluded without a power of attorney or with exceeding the limits of the given power of attorney, is generated by the hypothesis regulated in Article 1311 of the Civil Code, i.e. the situation where the mandatory ratifies the act.

As regards this situation, the principal who has been represented without a power of attorney or in excess of the power given, has a right of option. By virtue of this right, the principal has the possibility, depending on his/her interests, either to ratify the instrument or to ignore it.

First of all, we point out from the outset that the right to ratify is a potestative right which cannot be abolished without the consent of its holder.

However, the contracting third party and the person who has concluded the contract as a representative exceeding the limits of his power may agree to terminate the contract as long as it has not been ratified and without the principal being able to object.

Also, since the principal's potestative right of option creates a situation of legal uncertainty towards the third party, the principal may at most, by notice, grant a reasonable period for ratification. Once this period has expired, the principal's right of ratification lapses and the contract can No. longer be ratified.

If the principal chooses to ratify the legal act concluded by the mandatory, this will bind him towards third parties and exceeding the limits of the mandate will No. longer be important. In law, the ratification of these legal acts is equivalent to an extension of the mandate.

Once the act ratified, the principal enters into a direct legal relationship with the third party from the date of the conclusion of the initial contract, as if the principal had acted within the limits of the given power of attorney. It follows that ratification has a retroactive effect, with the exception of any prejudicial consequences for third parties of this retroactive act, which are not binding on them. By third parties we mean here any person other than the parties to the contract concluded in the exercise of the power of attorney and exceeding the initial limits of the power of attorney. Since ratification is equivalent to valid consent to the conclusion of a contract which had previously been concluded in the absence of such consent, it must take the form required by law for that contract.[8]

For the purposes of applying these legal provisions, it has been decided in judicial practice, in a case decision, that principals are still bound towards the contracting third party, even if the mandatory has exceeded the limits of the power of attorney given by the principals by contracting with a legal person other than the one intended at the time of the conclusion of the contract, since they have tacitly but unequivocally ratified these acts, which, from a legal point of view, is equivalent to a mandate. The principals are therefore bound towards the contracting third party within the limits of the ratified mandate.[9]

If the principal does not ratify the deed concluded by the mandatory with the third party, it "has No. effect between the principal and the third party", which means that it does not bind the principal to the third party and the third party to the principal.

In this respect, in the absence of a ratification, the mandatory shall be directly liable to the principal under contractual civil liability. However, there may be situations in which legal acts concluded outside the scope of the authority and not ratified may bind the principal in non-contractual obligations, for example, under business management. Of course, this hypothesis is to be taken into account only if the mandate contract does not expressly prohibit the mandatory from exceeding the limits of the

[8] T. Prescure, *Course on Civil Contracts*, Hamangiu Publishing House, Bucharest, 2012, p. 308.

[9] C. Bucharest, Civil section, Decision no. 1890/2003, *www.portaljust.ro.*

mandate, since business management can only be carried out without the mandatory's knowledge, but not against his/her will.[10]

Finally, as regards the refusal to ratify, we point out that the principal may express this option expressly or tacitly. In the case of an express refusal to ratify the instrument, it may be made either in writing or orally, but in both cases without any formal conditions and without the need for the court to intervene.

The tacit refusal to ratify the act will be considered as a result of the non-execution of the obligations arising from the act concluded by the mandatory, without having power of attorney or with exceeding the given power of attorney.

We point out that the court's intervention could be considered not to confirm the refusal to ratify, but only in the event that the third party chooses to bring an action against the principal to enforce obligations arising under the contract concluded without a mandate or in excess of it. However, it should be noted that the court's intervention will be limited to indirect confirmation of the refusal to ratify, which is necessary to dismiss the action.[11]

A second consequence of the principal exceeding the mandate or concluding the contract without having a power of attorney is that provided for in Article 1310 of the Civil Code, in the sense that in such a situation the principal "*is liable for damages caused to a third party who relied in good faith on the valid conclusion of the contract*".[12]

We therefore note that it is possible to oblige the mandatory to pay certain amounts to cover the damage caused to the third party.

In this regard, the third party shall formulate and support a claim against the mandatory who has acted without authority or exceeding the limits of the authority. In the action, it will not be sufficient to prove the manner in which the mandatory acted, but also that the third party has suffered concrete damage as a result.

We would also like to point out that the principal also has a direct action against the apparent mandatory to recover damages. This action will be in

[10] Fr. Deak, L. Mihai, R. Popescu, *Treatise on Civil Law. Special Contracts*, vol. II, 5th ed., Universul Juridic Publishing House, Bucharest, 2020, pp. 285-286.

[11] D. Chirică, *Controversial issues concerning the mandate contract*, 2018, www.juridice.ro, accessed on 25th of April 2021, 14:59.

[12] Art. 1310 C. civ.

tort, given that there is No. contractual legal relationship between the two.[13]

Finally, in the context of the analysis carried out, it should also be mentioned that, to the extent that the mandatory fails to conclude the legal act envisaged by the parties at the time of the conclusion of the mandate contract, naturally, No. legal relationship will arise between the mandatory and third parties.

Leaving aside the effects between the principal and the third party, which are, as we have noted, the central effects of the mandate contract, it is also necessary to analyse the situation created between the principal and the contracting third party.

In principle, No. legal relationship is created between the mandatory and third parties, because the mandatory contracts, in law, in the name and on behalf of the principal and only in fact personally. Consequently, for the mandatory, the legal act concluded by him is in fact only *res inter alios acta*.

In this context, we point out that when the mandatory has acted within the limits of the given power of attorney, the effects of the legal acts he/she concludes will be different. The difference is whether the mandate is with or without representation.

Therefore, where the mandate is with representation, and thus the legal acts have been concluded by the mandatory both in the name and on behalf of the principal, these acts will be considered as belonging to the principal himself. In this respect, the principal shall be directly liable to the third party with whom the mandatory has contracted as if the principal had personally concluded the acts in question. From these observations it can be understood that the mandatory is not a party to these acts, and therefore has No. position either as creditor or debtor of the obligations arising from those acts.

On the other hand, when the mandate is without representation, and thus the acts have been concluded by the mandatory on behalf of the principal, but not in his name, these acts directly bind the mandatory towards the third party. In this regard, we note that the legislator has expressly provided by the provisions of Article 2040 para. (1) Civil Code that *"third parties have No. legal relationship with the principal"*.

[13] D. Chirică, *Controversial issues concerning the mandate contract*, 2018, *www.juridice.ro*, accessed on 25th of April 2021, 15:46.

We also point out that if the mandatory has exceeded his/her powers and the third party with whom he/she has contracted knew this, he/she (the mandatory) will not be liable to the third party but to the principal, since it is presumed that in such cases the third party has assumed the risk of contracting with a person without a mandate.

However, if the third party was not aware of the powers given to the mandatory and the mandatory exceeded them, the mandatory may be held directly liable to third parties.

On the other hand, as a matter of principle, the mandatory is also not liable for the performance of obligations assumed by third parties by the conclusion of the legal act. Thus, if the third party does not perform the legal act concluded by representation, he is to be held liable directly by the principal by virtue of the contractual relationship.

However, we point out that the liability of the mandatory may be incurred in the hypothesis governed by Article 2021 of the Civil Code, namely when the insolvency of the third party contractors was or should have been known to the mandatory at the time the contract was concluded.

Nor should it be omitted that the mandatory has expressly assumed liability for non-performance of obligations assumed by third parties in the mandate contract. In practice, such a liability clause is not very common in the case of a civil mandate, especially in the case of a gratuitous mandate.

Finally, the specialist doctrine considers that, in order to protect the interests of third parties dealing with the conclusion of business with the mandatory, it would be necessary for the mandatory to assume an obligation to guarantee the solvency of the principal, at least at the time of the conclusion of the act, towards the contracting third parties.[14]

It should also be noted, from the point of view of the relationship between the mandatory and third parties, that in order for the third party to be able to verify whether the mandatory is acting within the limits of the power of attorney, the third party has the right to require the mandatory to provide proof of the powers entrusted to him/her, and if the representation has been conferred by a written document, the third party may require a copy of the document in question to be submitted for verification.

[14] Fr. Deak, L. Mihai, R. Popescu, *Treatise on Civil Law. Special Contracts*, vol. II, 5th ed., Universul Juridic Publishing House, Bucharest, 2020, pp. 285-286.

In this regard, it should be mentioned that in view of the purpose for which the mandate contract is concluded, namely to enable a person to "be present" at the signing of the acts necessary for the conclusion of the legal transactions pursued by him/her, the person is to use certain mechanisms justifying representation, made available to him by the legislator.

From the point of view of the documents proving the power of attorney, we point out that according to the provisions of Article *2012 paragraph 1 of the Civil Code, "Unless the circumstances indicate otherwise, the mandatory represents the principal in the conclusion of the acts for which he/she has been empowered. The power of representation or, where appropriate, the document evidencing it shall be called a power of attorney. (3) The provisions relating to representation in contracts shall apply accordingly.*

With regard to the actual content of the power of attorney, we point out that it must include, on the one hand, the indication of the legal acts to be concluded by the mandatory in the name and on behalf of the principal, and, on the other hand, the exact powers and limits of the power of attorney.

We point out that from this point of view, the power of attorney is a unilateral act emanating from the person to be represented in the intended legal transaction and justifying the representation.

From another point of view, we also point out that the legal literature, inspired by the specialized practice, shows that "*Power of attorney has become a common term covering both the mandate contract itself and its simplified form. The power of attorney, perceived by practice and doctrine as the document evidencing the principal's offer to conclude the mandate contract, requires the presence of the principal alone at the signing. This is useful from a practical point of view for the subjects of the legal relationship, as it is much easier for the principal alone to be present at the notary's office".*[15]

All the above aspects are useful because in practice, it has been observed that the unilateral form of representation, i.e. the power of attorney, whether authentic or in the form of a privately signed document, is used more frequently than the bilateral form, i.e. mandate contract in its proper form. It should therefore be noted that the presentation of the

[15] I. Popa, *Civil Contracts*, Notarom Publishing House, Bucharest, 2018, p. 470

mandate contract as an *instrumentum probationis* is less common in practice.[16]

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[16] Fr. Deak, L. Mihai, R. Popescu, *Treatise on Civil Law. Special Contracts*, vol. II, 5th ed., Universul Juridic Publishing House, Bucharest, 2020, p. 285-286

THE ROLE OF LANGUAGE IN EVOLUTION OF HUMAN COMMUNITIES. THE PARTICULAR CASE OF THE REPUBLIC OF MOLDOVA

Mihaela SĂFTOIU *

ABSTRACT

The study analyzes, based on doctrinal approaches and national legislation, the importance of language in the evolution in time of man as a biological entity, from the perspective of its attribute of an essential cohesive factor in the formation and development of human communities. Concerning the the state language in Republic of Moldova, the author proposes to amend paragraph 1 of article 13 of the Constitution of the Republic of Moldova by replacing the phrase "Moldovan language" with "Romanian language", an expression of the strengthening of national consciousness, an aspect of importance that cannot be denied, all the more as the internal and international context calls for a greater cohesion and action to safeguard the core values of the nation.

KEYWORDS: *right to identity; equality between citizens; language; spoken language; human community; evolution; continuity past-present-future;*

Introduction

The purpose of this study is to analyze the importance of language in the evolution in time of human beings as biological entities, from the perspective of its attribute of a cohesion factor essential in the formation and development of human communities and in ensuring the continuity of past - present - future.

The *objectives of this study* are:

- Analysis of language issues in national legislation and doctrine;
- Highlighting the role of articulated speech in the transition from animal to human and presenting the evolution of verbal and written language from Antiquity to the present;

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- Approaching the status of the Romanian language compared to the Moldovan language;
- Outlining the importance of preserving the state language in ensuring the cultural continuity of the population and ensuring the cohesion of the state.

Legislative and doctrinal approaches

Language is the prerogative of civilization, one of the elements that made the socio-biological transition from animal to human and that ensures the continuity of human communities on the past-present-future line.

The issue of the spoken language brings to the fore issues related to equality between citizens, but also the right to identity and the prohibition of discrimination. Both the Constitution of Romania and the Constitution of the Republic of Moldova guarantee the right to the expression of linguistic identity and equality between citizens, without discrimination on linguistic grounds.

Article 4 of the Romanian Constitution, which refers to the unity of the people and equality between citizens, states, in the second paragraph, that *"Romania is the common and indivisible homeland of all its citizens, without distinction from(...) language(...)"*[1].

Likewise, Article 6 paragraph 1 of the Romanian Constitution on the right to identity provides: *"The State recognizes and guarantees to persons belonging to national minorities the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity"*[2]. Article 13 of the Romanian Constitution states that *"in Romania, the official language is the language of the Romanian."*[3]

Article 10 of the Constitution of the Republic of Moldova on the unity of the people and the right to identity states that "*the state recognizes and guarantees the right of all citizens to preserve, develop and express their*

[1] *The Constitution of Romania, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union*, The 15th ed. updated on 1 September 2021, Rosetti International Publishing House, Bucharest, 2021, ISBN 978-606-025-068-5, p. 14.

[2] *Ibidem*.

[3] *Ibidem*, p. 16.

identity... of language... "[4], and article 13 states that *"the state language of the Republic of Moldova is Moldovan language...*[5]", not Romanian language. From the constitutional provisions it can be concluded that a privileged status is held by the Russian language, by its express mention: *"the state recognizes and protects the right to the preservation, development and functioning of the Russian language and other languages spoken on the territory of the country."* [6]

Prof. univ. dr. hab. in law, Alexandru Arseni defines the nation as *"the common destiny of individuals, destiny based on elements of specific cohesion and solidarity – common origin or past, common language and/or culture, customs, ideas, equally shared feelings – and which brings together within a community, identically, not only the individuals present today, but also the previous and future generations"*[7]. The same approach, which refers to the linguistic comunity, which, along with other common elements, connects the past-present-future trio, respectively the generations from these temporal periods, which follow each other from a historical point of view, we also meet at Ioan Muraru, Ion Deleanu, Gh. Meiţani and B. Negru[8].

Prof. Teodor Cârnaț and Dr. Andrei Iovu, speaking about the unifying role held by the state language, highlights how its knowledge *"has the role of increasing and facilitating the interaction between ethnic groups and improving the differences existing between them"*[9] and, at the same time, *"ensures real premises for the effective participation of all members of society"*[10].

Prof. Cristian Ionescu and Prof. Corina Adriana Dumitrescu state that *"the official language of a state is not only an element of linguistic stability*

[4] *Constitutionality Bloc 2022, Constitution of the Republic of Moldova, Declaration of Independence, Constitutional Court Decision no. 36 of December 5*, 2013, ©2022, Available: Constitution of the RM (parlament.md) [Accessed: 11.09.2022].

[5] *Ibidem.*

[6] *Ibidem.*

[7] A. Arseni, *Constitutional law and political institutions. Treaty. Vol. I,* ed. a III-a, updated and restructured, Chisinau: CEP USM, 2021, ISBN 978-9975-149-39-6, p. 179.

[8] *Ibidem*, p. 178.

[9] T. Cârnaţ, A. Iovu, *Integration of ethnic minorities in the Republic of Moldova*, Monograph, Print-Caro Printing House, Chisinau, 2018, ISBN 978-9975-56-553-0, p. 70.

[10] *Ibidem*, p. 70.

of a population, (...) but also civil, administrative and political stability (...)"[11].

Prof. Dan Claudiu Dănișor mentions that *"attachment to a language has the same character as attachment to a territory"*[12].

Prof. univ. dr. hab. in law Alexandru Arseni in Constitutional Law and Political Institutions, Treaty, vol. I refers to the *"constitutionality bloc"*[13], respectively to the hierarchy of legal acts established by the Constitutional Court in the Moldovan normative legal system, within which the Declaration of Independence comes first, not the Fundamental Law.

On 5 December 2013, the Constitutional Court interprets and decides some important elements regarding the state language, as a result of the contradiction between the Declaration of Independence proclaiming the language of the Romanian as the official language of the state and article 13 paragraph 1 of the Constitution of the Republic of Moldova which provides that the state language is the Moldovan language. Thus, in the event of divergences between the two acts, the Declaration of Independence takes precedence.

Prof. Dan Claudiu Dănișor, referring to art. 13 of the Romanian Constitution, which provides that the official language is the language of the Romanian, mentions that this provision *"has a normative character, not declarative, which means that it will be violated not only by a contrary norm, which would declare another language as an official language, but also by any legal provision that would defeat one of the normative consequences inherent in the official character of the language"*[14]. In the same sense is the position of the French Constitutional Council which *"examines the compatibility of its provisions with the normative content of the constitutional affirmation of the official character of the French language"*[15]. On

[11] C. Ionescu, C.A. Dumitrescu coord., *Constitution of Romania, Comments and Explanations*, C.H. Beck Publishing House, Bucharest, 2017, ISBN 978-606-18-0681-2, p. 237.

[12] D.C. Dănișor, *Modernity, liberalism and human rights. Constitutional law and political institutions*. *Vol. I,* Craiova, Simbol Publishing House, 2017, ISBN 978-606-94514-0-3, pct. 662.

[13] A. Arseni, *Constitutional law and political institutions*. *Treaty. Vol. I*, ed. a III-a updated and restructured, Chisinau: CEP USM, 2021, ISBN 978-9975-149-39-6, p. 112.

[14] D.C. Dănișor, *Constitution of Romania commented. Title I. General Principles*, Juridical Universe Publishing House, Bucharest, 2009, ISBN 978-973-127-128-6, 363 pages, p. 330.

[15] *Ibidem*, p. 331.

the contrary, the Constitutional Court of Romania regards Article 13 of the Constitution of Romania as having a *"simple declarative character"*[16]. We join prof. Dănișor's opinion on the normative character of art. 13 of the Romanian Constitution, and extrapolating to article 13 paragraph 1 of the Constitution of the Republic of Moldova, we can conclude that the provisions of the Declaration of Independence violate the constitutional provisions, not the other way around.

In this respect, it is necessary to amend the provisions of the Constitution, in the sense of aligning with the historical reality of the language characteristic of the population – the language of the Romanian, not the Moldovan language, since the latter represents in fact only a superficial reinterpretation, without scientific bases, of the Romanian language. At the basis of the deliberate replacement of the Romanian language with the Moldovan one is, besides the political reasons, a confusion of semantic nature. There is a Spoken Moldovan language in the Republic of Moldova, but there are multiple differences between language and language. Speech represents *"voice"*[17]. *"The language is always the same, but the language is different in every man"*[18]. From our perspective, the language represents the special way of expressing the speakers of the same languages, the voice imprint that each geographical region imprints on them. Thus, specific to the Oltenia area is the Oltenian language, specific to the Banat area is the Banat language, specific to the Area of Moldova is the Moldovan language and the examples can continue. The relationship between language and language is that of part-whole, without limiting the quantity, the variety of speeches of a language. Thus, the Moldovan attribute is typical of language, not language, and next to it should also be placed from a legal point of view.

The role of articulated speech in the evolution of human societies

In the study *Dialectics of nature*, Friedrich Engels, applying the materialist-dialectical method, presents and analyzes the structuring of the

[16] *Ibidem*, p. 330.

[17] *Difference between language and language*, Available: *https://wikidiferenta.ro/grai/limba* [Accessed: 08.09.2022].

[18] *Mentions a difference between language and language by taking as an example the language Romanian*, Available: *https://brainly.ro/tema/767533* [Accessed: 11.09.2022].

forms of evolutionary motion of matter, as the central element of the work, from the lower one – the physical displacement, to the superior one – the thinking. *"Man also appears through differentiation. Not only individually, by differentiating a single egg-cell to the most complex organism from what nature has created, but also historically. When after a struggle of millennia, finally the mine was differentiated from the leg, establishing the vertical gait, man separated from the monkey and laid the basis for the development of articulated speech and for the formidable development of the brain, which made from that moment on the chasm between man and monkey to become insurmountable"*[19].

The comparison can be extended, in the sense that the language differentiates us not only from monkeys, but from animals in general. At the root of the emergence of articulate speech is, according to Engels, work, respectively the need for people to communicate something in this context of work. Thus, the phonator apparatus and the oral organs develop gradually and the human communities gradually acquire a defining and necessary element – the peculiarity of communication through language.

Engels believed that labor was the main characteristic that separates human society from the herd of apes on the evolutionary scale. Man manages to perform more and more complicated tasks and activities *"due to the cooperation between the hand, the organs of speech and the brain"*[20]. *"To the hunting and cattle breeding were added agriculture, then torso and weaving, metalworking, pottery, navigation. Along with trade and crafts, art and science finally appeared; the tribes evolved into nations and states. Law and politics have developed."*[21]

After the end of the Middle Ages, the sciences develop suddenly and at a rapid pace, and among the most significant inventions, along with weaving, watchmaking, milling, painting, metallurgy, alcohol, glasses, Engels[22] mentions an extremely important element in the context of inter-human communication: printing. *"Books in the form of manuscripts have existed since antiquity. These were elaborated in the workshops where the scribes or scribes worked, who sometimes altered the text they had to copy by*

[19] F. Engels, *Anti-Dühring, Dialectics of nature*, vol. 20, in Opera Karl Marx Friedrich Engels, Political Publishing House, Bucharest, 1994, p. 342.
[20] *Ibidem*, p. 475.
[21] *Ibidem*.
[22] *Ibidem*, p. 483.

mistake or intentionally. The invention of printing by the German Johannes Gutenberg marked the beginning of a revolution"[23].

Language is important not only from the perspective of its oral character, but also from a written perspective. Ideas, opinions, information propagate in time much easier in this way, even if the written version is devoid of the specific musicality of the spoken language.

Dealing with the difference between the situation at the end of antiquity, about the year 300, and that of the end of the Middle Ages, 1453, Engels mentions that *"instead of the opposition between the Greeks, respectively the Romans, and the barbarians, there are now, without counting the Scandinavian peoples, etc., six civilized peoples with cult languages, who all developed themselves in so much that they could participate in the strong momentum of literature in the fourteenth century and which ensured a much greater multilaterality of culture than the Greek and Latin languages in decay and endangered towards the end of antiquity"*[24]. Among the many inventions that made the Burgeon revolution possible are *"the print, the printing characters, the linen paper, used by the Arabs and the Spanish Jews since the twelfth century; from the tenth century the cotton paper is gradually imposed, which knows a wider spread in the XIII-XIV centuries, while the papyrus disappears completely after the conquest of Egypt by the Arabs"*[25].

The eighteenth century, consisted in the spread of the Enlightenment, as the main current of thought, at European and world level. At the basis of the trends of those times were the special attention paid to human reason and the belief that a solid educational base and a well-defined cultural baggage are the essential trusts for human happiness. Prominent representatives of this era include Montesquieu, Jean Jacques Rousseau, Adam Smith, Cesare Beccaria, Francois Quesnag and many others. Language played an important role during this period, being a real transport vehicle for the ideas of the time.

In the twentieth and twentieth century, globalization is gaining momentum. Currently, the widespread use of an international language(s), the

[23] *Who invented the pattern? When did the printing press appear in Romania?* By M. Morcovescu, Available: *https://www.libertatea.ro/lifestyle/cine-a-invent-tiparul-johannes-gutenberg-3651594* [Accessed: 11.09.2022].

[24] F. Engels, *Anti-Dühring, Dialectics of nature*, vol. 20, in Opera Karl Marx Friedrich Engels, Political Publishing House, Bucharest, 1994, p. 488.

[25] *Ibidem*, p. 489.

permanent exchange of information, technology, negatively affects the official language, in the sense of undistilized borrowing from outside. Phenomena such as the Englicization of language have gained momentum and socio-cultural tendencies are in this direction, not towards a return to pure linguistic origins, devoid of borrowed terms. In this context, language protection is all the more important as past-present-future continuity can be irreparably affected.

Conclusions on the state language of the Republic of Moldova

Articulated speech is, without a doubt, a proof of man's evolutionary superiority. Language is therefore a pronounced historical character. It defines us as humans since ancient times. *"However, the content and form of one's own language can only be understood if the emergence and gradual development of that language is sought"*[26]. Therefore, the linguistic history of a people occupies a particularly important place in ensuring and strengthening the cohesion of the state.

Language is a specific element of each people, at the macro level, and at the micro level, a form of identification for the members of a group. This idea is a general one, but, viewed in the Romanian national political-historical context, it has an obvious peculiarity. The Romanian-Moldovan rupture occurred in law, but in fact it binds us inextricably, among other things, the language of the Romanian, which is not only the language of our ancestors but also of the generations to come and in whose interest the unity of the Romanian people and nation must be strengthened by regulating the protection of the official language.

Thus, *we propose to amend paragraph 1 of article 13 of the Constitution of the Republic of Moldova* by replacing the phrase *"Moldovan language"* with *"Romanian language"*, resulting in the following final provision*: "The state language of the Republic of Moldova is the Romanian language"*. In fact, this proposal is supported at an increasingly consistent level by society in the Republic of Moldova, an expression of the strengthening of national consciousness, an aspect of importance that cannot be denied, all the more so as the internal and international context calls for a greater cohesion and action to safeguard the core values of the nation.

[26] F. Engels, *Anti-Dühring, Dialectics of nature*, vol. 20, in Opera Karl Marx Friedrich Engels, Political Publishing House, Bucharest, 1994, p. 316.

The constitutionalization of the Romanian language as a state language contributes, alaso, to the restoration, welding of the broken ties, continues the historical congruence between the Moldovan territories and the motherland-Romania, through the continuity of linguistic identity on the past-present-future line.

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LEGAL INSTRUMENTS FOR THE PROTECTION OF ROMANIANS ABROAD

Titi SULTAN *

ABSTRACT

Through its fundamental law, the Romanian state undertakes to strengthen ties with Romanians outside the country's borders and acts to preserve, develop and express their ethnic, cultural, linguistic and religious identity, in compliance with the legislation of the state whose citizens they are and Romanian citizens abroad enjoy the protection of the Romanian state and must fulfill their obligations, except for those that are not compatible with their absence from the country. Moreover, in the current context of being a member state in the European Union, but also in other international organizations such as the Council of Europe or the OSCE, Romania has the necessary legal instruments to defend the rights of Romanian citizens who are part of the mobility diaspora, but also of the Romanian minorities on the territory of other states. There is an interdependent relationship between Romania and Romanians outside the country's borders, as the latter show a desire to identify with the Romanian state and need the Romanian authorities to defend and promote their rights and interests and they can, in turn them, a catalyst for development.

KEYWORDS: *diaspora; Romanians abroad; ethnic identity; legal protection; religious rites; legal instruments; cultural vein;*

1. Legal instruments

Romanian citizenship, as the natural person's membership of the Romanian state, membership by virtue of which any person can be the holder of the rights, freedoms and duties provided for by the Constitution and the laws, is in fact the political and legal link between the citizen and the state, which, through the effects its, determines the legal status of the person, wherever he is, both inside and outside the borders. Therefore, based on this membership, Romanian citizens who are abroad have the right to appeal to the protection of the Romanian authorities, and they have the obligation to grant them the necessary protection. Besides, there are

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already agreements and conventions between states that allow and regulate this legal collaboration.

Apart from the constitutional regulations, in the matter of the support granted to Romanian citizens abroad, a *series of normative acts were adopted regarding their legal protection,* namely: Law no. 156/2000 on the protection of Romanian citizens working abroad, republished[1], Law no. 321/2006 regarding the regime of granting non-refundable funding for programs, projects or actions regarding the support of the activity of Romanians everywhere and their representative organizations, as well as the method of distribution and use of the amount provided in the budget of the Ministry for Romanians Everywhere for this activity, republish[2], Law no. 299/2007 regarding the support given to Romanians everywhere, republished[3], Law no. 86/2016 regarding the establishment of Romanian community centers abroad[4], Law no. 62/2019 regarding consular activity[5], Government Decision no. 857/2013 regarding the organization and operation of the "Eudoxiu Hurmuzachi" Institute for Romanians everywhere[6], Government Decision no. 689/1994 regarding the granting of study, doctorate and specialization scholarships, other forms of support for young people of Romanian ethnic origin or for Romanian citizens residing abroad[7], Government Decision no. 780/1995 regarding the manner and conditions under which diplomatic missions and consular offices can provide assistance, as well as some services for Romanian citizens temporarily abroad, in special situations[8], Government Decision no. 420/1996 regarding the distribution of funds approved by the State Budget Law for the year 1996, Law no. 29/1996, in order to support the activity of Romanians outside the country's borders by the Council for the Problems of Romanians Everywhere[9], Government Decision no. 697/1996 on the

[1] Published in Official Gazette no. 227 of March 25, 2019.
[2] Published in Official Gazette no. 215 of March 9, 2018.
[3] Published in Official Gazette no. 261 of April 22, 2009.
[4] Published in Official Gazette no. 347 of May 6, 2016.
[5] Published in Official Gazette no. 299 of April 18, 2019.
[6] Published in Official Gazette no. 692 of November 13, 2013.
[7] Published in Official Gazette no. 310 of November 7, 1994.
[8] Published in Official Gazette no. 233 of October 10, 1995.
[9] Published in Official Gazette no. 127 of June 19, 1996.

awarding of scholarships for university and post-graduate internships abroad[10].

From the point of view of *international documents with reference to the protection of Romanians everywhere*, we mention: Resolution of the General Assembly of the United Nations (UN) 217(III)C - The fate of minorities, of December 10, 1948, the International Covenant on Civil and Political Rights of December 16, 1966, ratified by Decree no. 212/1974[11], The United Nations (UN) Declaration on the Rights of Persons Belonging to Ethnic, Linguistic and Religious Minorities, 1992, Framework Convention on the Protection of National Minorities (STE No. 157), entered into force on February 1, 1998, ratified by Romania through Law no. 33/1995[12], The European Charter for Regional or Minority Languages (STE no. 148), entered into force in March 1998, ratified by Law no. 282/2007[13], Resolution 1335 (2003) of the Parliamentary Assembly of the Council of Europe on the preferential treatment of national minorities by the State of origin, Recommendation 1735 (2006) of the Parliamentary Assembly of the Council of Europe on the concept of nation.

It should be noted that, unlike the majority of states that included such provisions in their Constitutions, Romania adopted quite late a legislative act that would concretize the constitutional provision, if we do not include in this category the few executive acts adopted especially in the field education and some institutional initiatives related to the creation of structures either under the Prime Minister, or within the Ministry of Foreign Affairs, or within the Department for Romanians Everywhere.

The basic principles that govern the rules regarding the legal protection of Romanian citizens abroad are based on the observance of international law, Romania's bilateral commitments and state legislation on the territory of which aspects of policies for Romanians everywhere and accepted good practices are carried out.

The *fundamental purpose of the policies* for Romanians everywhere is to facilitate the preservation of the Romanian cultural identity and the links between the people who value the Romanian identity and the connection with the Romanian space, with Romania, supporting the integration of

[10] Published in Official Gazette no. 199 of August 26, 1996.
[11] Published in Official Bulletin no. 146 of November 20, 1974.
[12] Published in Official Gazette no. 82 of May 4, 1995.
[13] Published in Official Gazette no. 752 of November 6, 2007.

individuals and communities in the societies of the states of residence or citizenship and discouraging any temptation to enclave and isolation.

As an element of originality of the Romanian regulation in the matter, taking into account the fact that international standards refer to the act of self-assumption of (ethnic) identity, Law no. 299 /2007 regarding the support given to Romanians everywhere requires a declaration on his own responsibility so that a person can become the owner of the rights granted, thus avoiding the issuance of any document that could attest to him a specific quality. The amendment made to the normative act almost immediately after its entry into force by the Government's Emergency Ordinance no. 10/2008[14], approved by the Parliament through Law no. 190 of October 21, 2008[15], concerns the rights of persons belonging to "Romanian communities outside Romania's borders", regardless of whether it is about "historical or recent communities". A more recent amendment, brought by Law no. 224/2018 for the amendment and completion of Law no. 299/2007 regarding the support given to Romanians everywhere[16], talks about "persons belonging to national minorities, linguistic minorities or autochthonous Romanian ethnic groups or who belong to the Romanian cultural and ethnic vein, existing in the states neighbouring Romania and other states, who assume the identity ethnic, linguistic and cultural Romanian towards the Romanian authorities, regardless of the ethnonym used".

2. Application of legal instruments

The promotion of protection towards Romanians outside the borders does not impinge on the relations that Romania maintains with their host states and does not influence the obligations they have towards the respective host states. The establishment of such an obligation for the Romanian state only imposes a specific conduct on the public authorities, regardless of whether they have powers in the field of external relations or not.

As an example, Decision of the Constitutional Court of Romania no. 69 of May 22, 1996[17] states that the provision in the former pension law that conditioned the right to a pension on residence in the territory of Romania

[14] Published in Official Gazette no. 131 of February 20, 2008.
[15] Published in Official Gazette no. 724 of October 24, 2008.
[16] Published in Official Gazette no. 673 of August 2, 2018.
[17] Published in Official Gazette no. 333 of December 10, 1996.

violates available art. 7 of the Constitution, its result not being that of stimulating and strengthening ties between the state and Romanians outside the borders, but a totally opposite one.

The concrete ways of granting protection are of course dependent on the legal system, in which the rules contained in the principles and other generally accepted norms of international law have their importance. Enjoying the protection of the Romanian state, the Romanian citizen who was outside the borders must fulfill his obligations according to the Romanian Constitution and laws. The fact that he, possibly temporarily, is outside Romania's borders does not exempt him from fulfilling these normal and natural obligations, unless they are incompatible with his absence from the country. It is important, however, that simple absence from the country does not exempt the Romanian citizen, for example, from the obligation to pay taxes for the property of which he is the owner, or from the obligation to raise, maintain and educate his minor child, etc. Likewise, the protection established by art. 17 of the Constitution "cannot be converted into a cause of impunity for antisocial acts committed on the territory of a foreign state".[18]

The contribution of each ministry and each institution in solving the specific problems of people belonging to Romanian communities outside the borders is carried out within the limits of legal competence, the Department for Romanians Everywhere being the one that ensures, according to the legal provisions regarding its organization and operation[19], interministerial coordination in the field of relations with Romanians everywhere, meaning that, through the Secretary of State, he will convene and chair the Interministerial Council for Romanians everywhere, which will include representatives of the Ministry of Foreign Affairs, the Ministry of Internal Affairs, the Ministry of Education, the Ministry of Culture, Ministry of Labor and Social Protection, the Ministry of Economy, Entrepreneurship and Tourism, the Ministry of Investments and European Projects, the Authority for the Digitization of Romania, as well as representatives of the Romanian Academy, the State Secretariat for Religions, the Romanian

[18] Decision of the Constitutional Court of Romania no. 134/2007- Published in the Official Gazette no. 190 of March 20.

[19] Decision of the Government of Romania no. 927/ 2021 regarding the duties, organization and operation of the Department for Romanians Everywhere, Published in the Official Gazette no. 853 of September 7, 2021 - Article 3 (2).

Orthodox Church, other religions and religious associations recognized in Romania, of other institutions and authorities of the central and local public administration with responsibilities in the field of linguistic and educational research, socio-professional reinsertion and investment attraction, as well as, if applicable, of other ministries and authorities of the central and local public administration, as of guests.

Respecting the elections and the freedom of decision of Romanian citizens abroad requires legal instruments through which ethnic Romanians, people who belong to the Romanian ethnic vein, originally from Romania, citizens of other states, can choose or not to recognize their ties with the Romanian people and our country[20]. Also, the Romanian state assumes the obligation to supplement the contribution that the citizenship states make for the benefit of ethnic Romanians, until the achievement of the fundamental objectives regarding the pre-existence of the unique Romanian element in the traditional or residential area and the preservation of its traditional weight in relation with other ethnic groups living in the same area[21], as well as ensuring the access of members of the Romanian communities outside the borders to education in the Romanian language, the development of a cultural life in the Romanian language, participation in the public debate in the Romanian language, information and the expression of opinions in the Romanian language, participation in their own religious traditions and rites.

Following the positions established by the Romanian state in relation to the fundamental wishes of the members of the Romanian communities outside the country's borders, *the concern for the legal protection of Romanians abroad is also based on*:

- the materialization of legally recognized rights and the granting of the best treatments from the states of citizenship and residence;
- the preservation of the ethnic, linguistic, cultural and religious identity and its collective expression within the Romanian communities outside the country's borders;

[20] In accordance with the standard proposed by the Framework - Convention of February 1, 1995 for the protection of national minorities, Published in the Official Gazette of Romania no. 82 of May 4, 1995 - Article (3)1. Any person belonging to a national minority has the right to choose freely whether or not to be treated as such, and No. disadvantage may result from such a choice or from the exercise of rights related to it.

[21] It is about the applicable goals of the 2030 Agenda for Sustainable Development.

- supporting neighboring countries in achieving the 2030 Agenda Objectives for sustainable development, in UAT that include traditional residential areas of ethnic Romanians, by which to ensure attractive living conditions in the traditional residential area of ethnic Romanians (minorities) - taking into account the fact that the survival of the minority is conditioned by remaining in traditional communities;
- supporting Romanian citizens living in a transnational context (mobility diaspora), both in aspects related to life outside the country (diplomacy, consular services, non-refundable funding granted for identity preservation projects) and in aspects related to their life in Romania (through internal policies related to the achievement of the 2030 Agenda Objectives for sustainable development), considering the continuity of their connection with the country and the orientation of their life in another country towards Romania;
- capitalizing on the presence of Romanian citizens in other states to work and develop businesses to stimulate Romania's exports and promotion abroad;
- capitalizing on human capital from communities outside the borders in the acquisition of Romania's know-how.

The concern of the states of origin for people who assume a connection with them, be it of an ethnic, cultural, linguistic or religious nature, but who are on the territory of other states, is not a novelty either in comparative law or in the level of public international law. Given that the phenomenon of cultural and social standardization during the formation of modern states did not coincide with that of political standardization and, in particular, as a result of the two world wars, practically today there are No. states that have a population perfectly homogeneous, with a single ethnic origin.

Almost all contemporary states have national minorities and, correspondingly, almost all states in the world have citizens or former citizens who live outside their national borders. In the application of the principles, customs and treaties of public international law, the legal protection of these persons falls, as a rule, to the states in whose territory the respective persons are located (host states). However, more and more States of origin are showing concern for those parts of the population, present, past or future, that are not under their jurisdiction from a territorial point of view.

The extra-territorial competences are thus amplified, and public international law today knows new developments.

Apart from the use of classic legal instruments in public international law, namely multilateral or bilateral treaties, more and more states of origin also use legal instruments specific to domestic law, namely *national normative acts*. In comparative law, the provision of art. 7 of the Romanian Constitution is not singular. Art. 10 of the Constitution of Croatia talks about "elements of the Croatian people from other states" who enjoy the protection guaranteed by the Croatian state, and art. 5 of the Constitution of Slovenia talks about "the watch of the Slovenian state over minorities" Slovenian nationals from neighboring States, on Slovenian emigrants and emigrants" and favors their contacts with the homeland. In addition, Slovenians who have lost their citizenship can enjoy special rights in Slovenia, specified by the legislator. Art. 6 para. 3 of the Hungarian Constitution specifies the responsibility of the Hungarian state for Hungarians living outside the national borders and encourages the maintenance of their ties with the state of origin. And the Constitutions of Macedonia, Slovakia or Ukraine contain similar provisions. In applying these constitutional provisions, some states have also adopted other internal normative acts, detailing the special rights granted to their nationals outside the country's borders and the way in which the respective state of origin understands to support ties with them.

In the spirit of international relations dominated by the principle of peace and good neighbourliness, such internal normative acts must limit their field of action to what can effectively be carried out *ratione personae*, without prejudice to the national sovereignty of the host state and without jeopardizing the relations of their beneficiaries with the host state. Most often, through such normative acts, the states of origin have granted preferential treatment to nationals outside the borders who No. longer have their citizenship and who do not benefit from a permanent residence permit on their territory, even going up to the third generation in the ascending line in the case of ethnic origin (Slovenia), sometimes making the benefit of the preferential regime conditional on the use of the mother tongue (Slovakia) or knowledge of some elements of tradition and culture (Bulgaria).

In general, the recognition of the benefits of this preferential regime is marked by the issuance by them of a document attesting to the special relations they have with the State of origin. In addition, during the process

of accession to the European Union, many of the States that became members of this organization in 2004 and 2007 undertook not only to implement the existing international standards in the matter (the Resolution of the UN General Assembly, "Fate of Minorities", adopted on December 10, 1948, the 1982 UN Declaration on the Rights of Persons Belonging to Ethnic, Linguistic and Religious Minorities, Convention - framework for the protection of national minorities, the European Charter for regional or minority languages), but also to address this area of interstate relations bilaterally, which many of them have done. Consequently, the Romanian state's preoccupation in the matter, far from constituting a NOVUM JURISDICTION, establishes rules in a field where international and national standards are in full mutation and dynamics, although we cannot speak of the existence of a true international custom. In Resolution 1335 (2003) of the Parliamentary Assembly of the Council of Europe regarding the preferential treatment granted to national minorities in their state of origin, the members of this regional forum came to the conclusion that the responsibility for the protection of national minorities rests primarily with the host state, but the objective phenomena recorded in several states, especially after 1990, they also make possible the extraterritorial manifestation of the states of origin, provided that they respect international standards and the sovereignty of the host states.

It should be stated that, unlike the vast majority of states that have included such provisions in their Constitutions, Romania adopted quite late a legislative act to implement the Constitutional provision, if we do not include in this category the few implementing acts adopted especially in the field of education and some institutional initiatives related to the creation of structures either under the Prime Minister, or within the Ministry of Foreign Affairs, or within the Ministry (Department) for Romanians Everywhere. Also, as an element of originality of the domestic regulation in the matter, also taking into account the fact that international standards refer to the act of self-assumption of (ethnic) identity, Law no. 299/2007 regarding the support given to Romanians everywhere requires a declaration on his own responsibility so that a person can become the owner of the rights granted, thus avoiding the issuance of any document that could attest to him a specific quality. The amendment made to the normative act almost immediately after its entry into force by O.U.G. no. 10/2008 concerns the rights of persons belonging to Romanian com-

munities outside Romania's borders "regardless of whether they are historical or recent communities".

A more recent amendment, brought by Law no. 224/2018 talks about "persons belonging to national minorities, linguistic minorities or autochthonous Romanian ethnic groups or who belong to the Romanian cultural and ethnic vein, existing in the states neighbouring Romania and other states, who assume the Romanian ethnic, linguistic and cultural identity by the Romanian authorities, regardless of the ethnonym used". The promotion of protection towards Romanians outside the country's borders does not impinge on the relations that Romania maintains with their host states and does not influence the obligations they have towards the respective host states. The establishment of such an obligation for the Romanian state only imposes a specific conduct on the public authorities, regardless of whether they have powers in the field of external relations or not.

3. Conclusions

As a consequence of belonging to the Romanian state, Romanian citizens abroad, based on art. 7 and art. 17 of the Romanian Constitution, enjoy the protection of the Romanian state authorities with competences in this field. This presupposes the existence of agreements and conventions that allow legal collaboration in accordance with the generally accepted norms of international law. Said in this way, the protection cannot be converted into a case of impunity for antisocial acts committed on the territory of a foreign state, the Romanian court being obliged to check only if the conditions for extradition are met, and in No. way to rule on the merits of the prosecution or conviction ordered by the foreign authority nor on the expediency of extradition. Otherwise, the principle of mutual recognition of criminal judgments would be infringed. Provision of legislative measures for the sanctioning of Romanian citizens or stateless persons domiciled on the territory of Romania, who commit acts of illegal crossing of the border of a foreign state or who collect, direct or guide several persons for the purpose of fraudulently crossing the border of a foreign state or organize these illegal activities, cannot represent a violation of the provisions of art. 17 of the fundamental law, regarding the obligation of the Romanian state to ensure the protection of its citizens abroad. On the contrary, these measures are established by law and justified by securing borders, as well as preventing negative consequences

such as illegal migration. Therefore, the legal mechanisms and instruments for the protection of Romanian citizens in/abroad will have to continue to be a permanent concern of the Romanian state, all the more so since the vein of Romanian communities everywhere shows a continuously growing dynamic.

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