ANALELE UNIVERSITĂȚII "TITU MAIORESCU"

"TITU MAIORESCU" UNIVERSITY LAW REVIEW

Drept

Serie nouă

2023

– anul XXII –

Editura Hamangiu
2023

ANALELE UNIVERSITĂȚII "TITU MAIORESCU" SERIA DREPT
"TITU MAIORESCU" UNIVERSITY LAW REVIEW
https://www.utm.ro/facultatea-de-drept-bucuresti

INDEXATĂ:

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CEEOL

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

Editura Universității "Titu Maiorescu"
București, România, Calea Văcărești nr. 187, sector 4
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ISSN: 1584-4781

TITU MAIORESCU UNIVERSITY LAW ANNALS

Drept

Law

2023

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SOME ASSESSMENTS ON ISSUES RELATED TO THE LEGAL STATUS OF PERSONS BELONGING TO NATIONAL MINORITIES

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

ABSTRACT

The protection of the rights of persons belonging to national minorities is an issue that primarily interests the international community. At the supranational level, standards and requirements have been created over time for national minorities to enjoy adequate protection, designed to accommodate their particularities. The evolution of international instruments in the field of national minorities was incongruous: standards and guarantees were created in the absence of a clear definition reflecting the meaning of national minorities. Secondly, the State is called to answer for the national minorities that it supervises, being developed complex relations between the kin-State and the home-State depending on the geographical positioning of the national minorities. In this paper we will explore the right to self-identification of individuals belonging to national minorities and the effects produced by it in shaping supranational guarantees in the matter. Taking into account the individual (and not collective!) nature of the rights of persons belonging to national minorities, the relationship between the individual and the State on specific protection issues must be analyzed with priority. Finally, the paper aims to analyze the legal status corresponding to the rights of persons belonging to national minorities, with an emphasis on the scope of content of cultural identity and how it interacts with linguistic and religious identity.

KEYWORDS: *individual rights; self-identification; cultural identity; ethnicity; kin-State;*

[*] *Professor Ph.D., Director of the Council of Doctoral Studies, "Titu Maiorescu" University, Bucharest, Romania, Alternate member MB, European Union Fundamental Rights Agency.*

[**] *Lecturer Ph.D., Faculty of Law, "Titu Maiorescu" University, Bucharest, Romania, diplomat Romanian Ministry of Foreign Affairs.*

The issue of recognizing national minorities in the absence of a universal definitional framework

The concept of *minority* is the main premise of studying the issue of protecting the rights of persons belonging to national minorities.

At the international level, experts in the field of human rights had hesitated to give clear definitional lines to the concept of *minority* – an aspect that, over time, generated some inconsistencies in the application of the standards of guaranteeing the rights of persons belonging to national minorities.

Conceptual clarifications regarding the notion of *minority* lead to the establishment of the correct perspectives for approaching the correlative guarantees of the protection of their respective rights.

In the United Nations system, the definition attached to minorities is conceived in quantitative terms, analyzing the minority as a group distinguished from the majority by means of the quantitative requirement of representing less than half of the majority.

Nevertheless, some features are added to the quantitative criterion designed to characterize the peculiarities of the minority group:

(1) although it evokes two distinct concepts, Indigenous Peoples can benefit from minority rights if they comply with the previously presented quantitative criterion by reference to the territory of a State;

(2) the space according to which the minority character of a group is assessed is the entire territory of the State and not only its political or territorial units[1].

By placing the concept of *national minority* at the regional-European level, we note that the Framework Convention for the Protection of National Minorities[2] exceeds the standard definition of *minority*, proceeding to make nation States responsible for recognizing groups constituting national minorities in accordance with national legislation and principles of national law. However, as shown by the interpretation of Article 1 of the Convention presented in the corresponding Explanatory Report, the protection of persons belonging to national minorities is an

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[1] Electronic documentation in the computer system made by accessing the website https://www.ohchr.org/en/special-procedures/sr-minority-issues/about-minorities-and-human-rights, on 27 November 2023, time 10:08 a.m.

[2] Adopted on 1st February 1995 and entered in force on 1st February 1998.

issue that also exceeds the State decision-making process as it is transferred to the sphere of international cooperation[3].

In addition to the quantitative criterion, national minorities can also be characterized by means of substantial requirements such as their cultural-identity core, but also by means of the moment of ethnogenesis. This extensive approach is likely to outline a more correct understanding of the term *national minority* with the aim of guaranteeing a more generous level of protection. The cultural aspects related to language, culture, tradition, religion are a given of the recognition of their identity independence, while the criterion of ethnogenesis involves some additional clarifications. According to the latter, the majority group has attested its historical existence on the State territory prior to the historical attestation of the existence of national minorities. This fact leads to the conclusion that the cultural, religious, linguistic features of minorities have been recognized as discordant compared to those of the majority group.

The promotion, at the international and European regional level, of a restrictive vision (which primarily considers the quantitative element) in relation to the persons belonging to the national minority is likely to lead to limitations regarding the guarantee of the rights of the persons belonging to the national minorities. In addition, placing the decision regarding the recognition of a group as belonging to a national minority in the power of the State may decrease the level of protection of that national minority: it is possible for the State to subliminally deal with issues related to minorities less represented quantitatively or historically, placing them in a subordinate position to that of the majority.

On the other hand, the uncertainties attached to the protection of the rights of persons belonging to national minorities also exist from the perspective of a wide margin of appreciation granted by international standards in favor of the individual.

Article 3 of the Framework Convention for the Protection of National Minorities enshrines in favor of the individual a right to personal choice in the sense of self-identifying or not with a certain minority. Although the principle of self-identification is absolutely necessary, in the absence of contextualization, it can lead in practice to unexpected results such as excessive division within a minority or uncontrollable multiplication of

[3] *Explanatory Report to the Framework Convention for the Protection of National Minorities*, Strasbourg, 1 February 1995, pp. 3-5.

minority groups. As the Explanatory Report of the Convention stipulates, the individual's option is not an arbitrary one: it starts from the person's inner forum, but, in its concretization, it must be based on objective criteria[4].

The intersection between the objective and the subjective element is a factor that multiplies the uncertainties. Some legitimate questions arise:

(1) what is the share in the application of the two elements (subjective/objective)?;

(2) how many objective elements are necessary/sufficient to justify a person's choice to identify with a certain minority group;

(3) how can it be observed in practice the feeling of adhesion, as a subjective element?

We consider that, taking into account the two margins of appreciation in question (that of the State and that of the individual), the right to self-identification can be configured by taking into account both elements (subjective and objective) within the following logic: the person can decide to self-identify as a member of a certain minority by virtue of her sense of belonging, justified by the cultural identity ties she borrows from that minority group in daily practice.

From definitional uncertainties to challenges in the application of the rights of persons belonging to national minorities

The criterion of territorial occupation – although it is not specifically contested in the process of identifying persons belonging to national minorities- it produces practical consequences.

We observe that the international standards mention in passing the criterion of the geographical location of the minority, thus being sufficient for the persons belonging to the national minorities to be physically present on the territory of the State whose protection is requested, without any additional requirements.

The practical problems arise in the hypothesis that, on the territory of the respective State, coexist groups that assume an autonomous cultural identity and some of them claim their historical pre-existence on the territory of the State (the case of Indigenous Peoples) while others have a

[4] *Explanatory Report to the Framework Convention for the Protection of National Minorities*, Strasbourg, 1 February 1995, p. 6.

recent existence, determined by extreme situations such as: migration, statelessness, internal displacement, etc.

Anticipating this problem, the Human Rights Committee included in the General Commentary on Article 27 some directions of construing the criterion of the duration of the existence in a certain territory relating to the members of the minority. In this sense, starting from the premise of the individual self-identifying with a certain minority, the State must grant the rights established in favor of persons belonging to national minorities, regardless of the duration of the stay of the individual belonging to that minority on the territory of the State.

In the wording used by the Human Rights Committee when interpreting Article 27 of the International Covenant on Civil and Political Rights, the following is mentioned: *Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights*[5].

The situation-premise of the interpretation by the Human Rights Committee of article 27 of the International Covenant consists in the fact that the individual who is passing through the territory of a State identifies himself as a member of a national minority. Practical problems become incidents when the individual is temporarily on the territory of a State and he does not identify with a certain national minority even though his personal situation has some special characteristics (we reiterate the cases of Indigenous Peoples, internally displaced persons, persons facing statelessness or persons who have a justified fear of persecution on the territory of their country of origin).

Each of the previously listed categories has a different status in the sphere of human rights protection and benefits from specialized rules that

[5] Human Rights Committee, *General Comment 23, Article 27* (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 38 (1994), para. 5.2.

take into account their particularities. Thus, Indigenous Peoples enjoy the protection offered to them by the UN Declaration on the Rights of Indigenous Peoples[6], refugees have a status acknowledged by the UN Convention on the Status of Refugees[7], stateless people are granted the guarantees provided by the UN Convention on the Status of Stateless Persons[8] and internally displaced persons are protected by appealing to the Guiding Principles[9] adopted in the matter.

Consequently, from the point of view of the documents that substantiate their legal status, the categories listed in the lines above are autonomous, not being traditionally included in the category of national minorities.

Some additional explanations are required to clearly and distinctly operate the conceptual demarcation between each of these categories and the group of national minorities.

First of all, in the case of refugees and stateless persons, the dominant characteristic resides in the nature of their transnational existence: (1) refugees leave their country of origin in the light of a well-founded fear that, in case of return, they will be subjected to persecution based on expressly stated criteria such as race, religion, nationality; (2) stateless persons are deprived of the citizenship of any State due to exceptional situations such as State secessions or interstate conflicts (weather active or latent).

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[6] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on 13 September 2007.

[7] *Convention relating to the Status of Refugees*, adopted 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950, entry into force: 22 April 1954, in accordance with article 43.

[8] *Convention relating to the Status of Stateless Persons,* adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, entry into force: 6 June 1960, in accordance with article 39.

[9] Commission on Human Rights Fifty-fourth session Item 9 (d) of the provisional agenda, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Human Rights, Mass Exoduses and Displaced Persons Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 *Addendum Guiding Principles on Internal Displacement.*

Although stateless persons enjoy a distinct legal regime, benefiting from a particular regulation, this statute does not exclude, *de plano*, the protection offered to persons belonging to national minorities.

It cannot be denied that, in State practice, citizenship is one of the requirements established in order to ensure the specific rights of persons belonging to national minorities. However, the interpretation advanced by the Advisory Committee of the Framework-Convention relating to this topic was also a flexible one. The Committee showed that conditioning the recognition of the rights of persons belonging to national minorities to the requirement of citizenship leads to effects contrary to the principles of equality and non-discrimination, tolerance and intercultural dialogue. Likewise, the rigid imposition of the citizenship requirement as a precondition for accessing the rights of persons belonging to national minorities can be understood as an instrument of forced assimilation of the members of that minority. Or, the standards derived from the Framework Convention promote the integration of persons belonging to national minorities in accordance with the recognition and affirmation of their identity. On the contrary, forced assimilation denies the specific cultural difference of national minorities as well as its application as a specific element in ensuring equality and non-discrimination for the members of that minority[10].

Secondly, internally displaced persons differ from other groups because they have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, though they have not crossed an internationally recognized State border[11].

The case of Indigenous Peoples is a specific one given the fact that they have multiple similarities with national minorities. Within doctrinal studies, it has been established that minority communities can be identified by means of the following characteristics: (1) a group numerically inferior to the rest of the population of a State; (2) a group in a non-dominant

[10] Council of Europe, *The Framework Convention: a key tool to managing diversity through minority rights, Thematic commentary No. 4 The scope of application of the Framework Convention for the Protection of National Minorities*, 2016, p. 7 and following.

[11] *Annex Guiding Principles on Internal Displacement Introduction: Scope and Purpose*, p. 5, para 2.

position; (3) a group whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; (4) a group that shows, perhaps only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language[12].

On the other hand, Indigenous Peoples are cultural or tribal communities where the element of identity goes beyond shared religious, linguistic or cultural traits. In the case of Indigenous Peoples, they are defined according to the following substantial elements: (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an indigenous language, often different from the official language of the country or region[13].

From the comparative analysis of the defining features of national minorities, respectively those specific to Indigenous Peoples, some aspects that mark the conceptual distinction between the two categories become evident: (1) the right to self-identification is exercised differently depending on the perceived reality: in the case of national minorities, the person recognizes belonging to a group individualized by common religious, linguistic, ethnic features; in the case of Indigenous Peoples, the person recognizes belonging to a community that is defined by ancestral belonging to a geographical space and by the practice of ancient customs; (2) from a legal point of view, the status of persons belonging to national minorities and that of Indigenous Peoples is different: the right to self-determination is recognized only in favor of the latter[14]; conversely, we cannot recognize in favor of national minorities the right to territorial self-determination based on ethnic criteria; (3) Indigenous Peoples can be

[12] Francesco Capotorti, *S*pecial Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities,* 1979.

[13] *Indigenous Peoples Policy Framework*, available at: ***https://www.napocor.gov.ph/ images/asep/Annex_A-Indigenous_Peoples_Policy_Framework_mL.pdf.***

[14] *Resolution adopted by the General Assembly on 13 September 2007, no. 61/295, United Nations Declaration on the Rights of Indigenous Peoples*, Article 3.

recognized as holders of collective rights[15] unlike persons belonging to national minorities who have individual rights that can be exercised jointly.

In the light of the arguments presented above, it is clear that the status of Indigenous Peoples is preserved unaltered in relation to national minorities. Thus, the Advisory Committee of the Framework Convention for the Protection of National Minorities recognizes the application of the guarantees contained in the Convention including in favor of Indigenous Peoples. This recognition determines that, under the right to self-determination, members of Indigenous Peoples can also invoke the rights guaranteed by the Framework Convention without thereby renouncing their status or becoming members of a national minority[16].

The relationship between State and individual in guaranteeing the rights of persons belonging to national minorities

The peculiar feature of national minorities to be bearers of deep identity elements can determine the creation, at the intra- or inter-state level, of conflict situations, the management of which involves both State responsibility and international cooperation.

The emergence of new conflicts or the recrudescence of previous conflicts stimulated by the ethnic and/or cultural element were facilitated by two primary factors: (1) the intersection between the States' margin of appreciation regarding the implementation of relevant international legal instruments and the individual's margin of appreciation consisting of exercising the right to self-identification; (2) the geographic flexibility of minority groups (discussed in the previous section of our paper).

With regard to the first point, there are practical situations in which the two margins of appreciation come into conflict, the result being likely to jeopardize the protection regime of persons belonging to national minorities. By way of example, the self-identification of an individual with a certain minority does not automatically determine the protection of that individual as a member of the minority in question, as it is the possibility

[15] *Resolution adopted by the General Assembly on 13 September 2007, no. 61/295, United Nations Declaration on the Rights of Indigenous Peoples,* Article 7, Point 2.

[16] Council of Europe, *The Framework Convention: a key tool to managing diversity through minority rights, Thematic commentary No. 4 The scope of application of the Framework Convention for the Protection of National Minorities*, 2016, p. 17.

that the State view may be different. Under its margin of appreciation, the State may withhold adequate protection from a particular minority for reasons of under-representation. The meaning of this idea directly depends on the understanding of the following context: the self-identification of the individual does not apply only in relation to his belonging to a certain national minority. On the basis of self-identification, the individual can claim some rights granted to his minority membership, just as he can decide not to exercise other rights that are granted in his respect.

The right to self-identification is not absolute given the fact that there are still situations that circumscribe its exercise – for example, the recognition and application by States of some rights related to national minorities depending on the numerical threshold existing in a certain region. Establishing the threshold as a necessary requirement for recognizing and ensuring the exercise of the rights of persons belonging to national minorities must be interpreted loosely. In this sense, State authorities must show diligence to prevent situations where there is a significant decrease in the number of members belonging to national minorities. Similarly, the exercise of the right to self-identification in a negative sense (for example, by renouncing the individual's status as a member of the national minority) must be assessed flexibly if it produces direct repercussions on the minimum threshold necessary for the recognition of independent existence of a minority and its related rights. As Article 3 of the Framework Convention on the Protection of National Minorities attests, the exercise of the right to self-identification (including its negative sense) cannot cause disadvantages relative to the status of a minority group or the exercise of the rights arising from the Convention[17].

The territorial flexibility of national minorities is also incidental to this point of discussion. National minorities benefit from their status independently of the territorial mobility of its members. The relocation of members belonging to national minorities from one geographical area to another does not determine, in principle, their removal from the legal guarantees specific to persons belonging to national minorities. However, in accordance with international standards, States are required to refrain

[17] *Explanatory Report to the Framework Convention for the Protection of National Minorities*, Strasbourg, 1 February 1995, p. 6.

from undertaking territorial or administrative reforms that may jeopardize the necessary numerical thresholds established for minority recognition[18].

The geographical issue is important in the protection of the rights of persons belonging to national minorities, especially if the ethnics of a State self-identify as a minority on the territory of another State. As a general rule, States assume the responsibility of guaranteeing the fundamental rights and freedoms of persons belonging to national minorities under the condition that the members of the national minority are present on their territory at the time of invoking the observance of the rights. Therefore, respecting the rights of persons belonging to national minorities is a primary responsibility of the State on whose territory they are located[19].

The situation is more complex if we take into account the possibility of undertaking actions by the State that is linked to the minority located in the territory of another State through ties of language, religion or ethnicity. In this case, the kin-State can act in favor of its own ethnic groups representing a national minority on the territory of another State only in compliance with the international standards to which both States are parties and by virtue of bilateral agreements.

The lines of action that can be applied by the kin-State in supporting its ethnics recognized as a national minority on the territory of another State are particularly sensitive and mainly concern the following considerations: (1) The State, based on its sovereignty, has limited jurisdiction over its territory and population; the existence of identity links (linguistic, religious or ethnic) between the kin- State and persons belonging to national minorities located on the territory of another State does not allow the kin-State to extend, by default, its jurisdiction over persons resident on the territory of another State; (2) the issue of protecting the rights of persons belonging to national minorities transcends the interest of the State (whether we refer to the kin-State or the State of residence) being an aspect that should be subject to international cooperation and analyzed through the application of specialized multilateral mechanisms; (3) guaranteeing the rights of persons belonging to national minorities may involve the application of special measures by the State of residence to ensure their

[18] Council of Europe, *op. cit.*, pp. 8, 10, 28.

[19] OSCE High Commissioner on National Minorities (HCNM), *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note*, Netherlands, 2008, pp. 2 and the following.

integration, but these must not be interpreted as derogations from the principle of non-discrimination; the regime of positive actions in relation to persons belonging to national minorities must properly applied; (4) the kin-State can grant, in accordance with the international standards adopted in the matter, benefits and advantages to its ethnic groups located on the territory of another State, but this fact cannot lead to the development of secessionist State policies[20].

The relations between the kin-State, the home-State and the individual belonging to the national minorities are elaborated, being grafted, in two directions of action: (1) the relations between the kin-State and the national minority located on the territory of the home-State; (2) the relations between the home-State and the national minority located on its territory. Ensuring the highest level of protection of fundamental rights and freedoms depends on how the kin-State-home-State bilateral relationship is produced on the subject of the protection of persons belonging to national minorities. The main objective of the kin-State is to achieve the highest possible level of protection of the rights of persons belonging to the related minority located on the territory of the home-State. On the other hand, the goal pursued by the home-State is to ensure equal treatment in favor of all persons belonging to national minorities located on its territory in order to guarantee territorial unity and prevent any conflicts based on ethnic criteria[21].

The kin-State-home-State dialogue as a cardinal formula of the steps necessary to protect the rights of persons belonging to national minorities has been evaluated including at the level of the European Union. At the European regional level, the European Union supported the initiative to manage the issue of effectively guaranteeing the rights of persons belonging to the national minority by means of strengthening bilateral relations between the States in dialogue.

The strengthening of inter-State cooperation and friendly relations were materialized through the advancement of the Pact on Stability in Europe initiative whose stated objective was to ensure *stability through the pro-*

[20] OSCE High Commissioner on National Minorities (HCNM), *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note*, Netherlands, 2008, pp. 5-9.

[21] Report on the Preferential Treatment of National Minorities by their Kin-State adopted by the Venice Commission at its 48th Plenary Meeting, (Venice, 19-20 October 2001), pp. 6 and the following.

motion of good neighborly relations, including questions related to borders and minorities, as well as regional co-operation and the strengthening of democratic institutions through co-operation arrangements to be established in the different fields that can contribute to the objective[22].

The previously mentioned quote imposes a perspective that descends from inter-State cooperation to the State perspective. Cooperation also means learning good practices in the field of minority protection through the development and consolidation of relevant policies. On the other hand, through inter-State cooperation, we must find and establish relevant pattern at the level of each State in order to counteract ethnic prejudices and stereotypes that prevent free forms of cultural expression. Legislation and policies developed at the international, regional or national level are silent in the face of destructive mentalities that deny the rights of persons belonging to national minorities out of sheer aversion to diversity. So, advocacy in favor of minority rights begins from changing the mindsets of individuals by cultivating a conception of positive multiculturalism supported including through intercultural education, dialogue and exchanges[23].

The problem of recognizing national minorities and outlining the corresponding framework of the rights of persons belonging to national minorities

The responsibility of the States towards the sensitive subject of the protection of the rights of persons belonging to national minorities also implies that they recognize the minorities that exist on their territory. At this point, at a theoretical level, there remains the dilemma regarding the possibility of granting appropriate protection to persons belonging to national minorities in the absence of formal recognition by the State. Regarding this point, specialized literature has spoken in favor of an

[22] According to *Concluding document of the inaugural conference for a Pact on Stability in Europe* in 94/367/CFSP: Council Decision of 14 June 1994 on the continuation of the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union on the inaugural conference on the Stability Pact.

[23] Ion Diaconu, *Minoritățile în mileniul al treilea. Între globalism și spirit național (Minorities in the third millennium. Between globalism and national spirit),* Publishing House Asociației Române pentru Educație Democratică, Bucharest, 1999, p. 118 and following.

autonomous existence of national minorities and the rights of their members regardless of the granting, in their favor, of an express recognition by the State[24]. So, the State's margin of appreciation relative to persons belonging to national minorities does not reside in the possibility of recognizing or not their existence, but it resides in choosing the most appropriate means to ensure an appropriate level of protection in their favor. The mere existence of a human group that is distinguished from the majority group by specific cultural traits brings into question in the most serious way the commitment of the State in the sense of granting protection. Thus, from a substantial point of view, the minority group gains recognition through its daily existence which differs, by means of specific features, from that of the majority group. However, from a formal point of view, the State must proceed with an official recognition of the minority group (stemming from its mere existence and not from the discretionary power of the State). In the absence of any recognition, the implementation of the set of specific rights and guarantees for persons belonging to national minorities will be compromised.

The primary consequence of the recognition of national minorities is the granting of a legal status in their favor. The legal status of persons belonging to national minorities will be shaped according to two criteria that either combine or apply independently: race and ethnicity. The difference between the two is, first of all, one of content: race refers to physical features (we include : physical constitution, skin color, ancestry or descent) while ethnicity refers to the inner forum of the individual and the means of externalizing it (religion, language, traditions, customs). If we were to appreciate national minorities through restrictive lenses we would have to remove the element of race from the analysis. However, we consider it prudent to maintain race in the context of describing the status of national minorities given the fact that, in a broad sense, refugees, stateless persons, internally displaced persons or those who are members of Indigenous Peoples can benefit, *lato sensu*, from the protection granted to national minorities. Comparing the two determining elements of the legal status of persons belonging to national minorities, race is characterized as more static than ethnicity; the latter, in turn, is fluid and flexible and can successfully accommodate the differences according to which is legitimized the right to identity of persons belonging to national minorities.

[24] Ion Diaconu, *op, cit.,* pp. 73 and following.

Inevitably, from the interaction of race-ethnicity emerges *culture* – as an identifying element of national minorities. Culture is defined by the daily activities of the members of the minority community that have distinctive features in relation to those undertaken by the members of the majority group. So, culture is not only attached to intellectual activities, but it exists wherever the spirit of the community is manifested: in games, traditions or customs transmitted through socialization or even in the specifics of some professional activities.

Cultural identity is the seal of the individuality of any minority community, but in relation to it we must remember at least two truths: (1) it is not monolithic – therefore, it has the ability to develop, evolve and change in natural dynamics imposed by society; hence the challenge of preserving the spirit of the community in the context of adapting cultural practices and meanings to social changes; (2) culture is multidimensional, including several facets of which linguistic and religious identity are essential. Cultural identity is the binder that brings together, from a legal point of view, the guarantees of the right to education, the right to participate in the cultural life of the community and scientific progress, freedom of thought, conscience, expression, freedom of association and assembly, thus reflecting a significant part of the status of persons belonging to national minorities. Equally, meditating on these aspects, in specialized literature, cultural identity has been extended to ensuring the right to human dignity and psychic integrity given the fact that man owes his human quality to his culture – creator of civilization and meaning for his community of membership[25].

Linguistic and religious identity are enshrined within cultural identity. Language is a means of appropriating the members of a community and distinguishing them in relations with other communities. As in the case of cultural identity, linguistic identity does not denote a closed circuit but it is permeable, as by interacting with other cultures and civilizations it borrows terms and concepts and offers, in exchange, expressions and words. The doctrine highlighted the way in which linguistic identity reflects the particularities of a community: *each language, with its choice of words, with its phrase syntax, with each idiom and its specificity, is a*

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[25] Marianne Wilhelm, *L'étude des droits à l'identité à la lumière des droits autochtones,* en *Les droits culturels, une catégorie sous-developpée des droits de l'homme*, Collection interdisciplinaire, Volume 22, 1991, pp. 221-222.

kind of philosophy that gives expression to past history, character and psychological identity of those used to using it[26].

Among the forms of exercising linguistic identity, expression in the mother tongue and education in the mother tongue are paramount. It cannot be denied that expression in the mother tongue – although it is necessary to be guaranteed, cannot be appreciated as absolute, in relation to national minorities. It must be subject to the same restrictions and limitations that are recognized in the exercise of freedom of expression.

At the European regional level, the protection of minority or regional languages has been codified by a binding instrument (the *European Charter of Regional or Minority Languages*[27]) which fulfills two essential functions aimed at clarifying the application of the linguistic identity of national minorities: (1) it defines the notion of regional languages or minority and (2) indicate their protection regime. Article 1 of the Charter indicates that regional or minority languages are those traditionally used in an area of a State by the citizens of that State who constitute a numerically inferior group to the rest of the State's population and which are different from the official languages or dialects. Along the same line of ideas, non-territorial languages are used by the citizens of a State on the territory of the State without being associated with a certain geographical area of the State. Although it constitutes an important step in the direction of ensuring linguistic identity, the European Charter of Regional or Minority Languages establishes a relatively limited system of protection. Article 4 of the Charter shows that the level of protection proposed by the Charter cannot prejudice the more favorable provisions established in favor of national minorities or regional or minority languages. On the other hand, in relation to the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms[28], the Charter cannot establish limitations or derogations.

The protection of linguistic identity is limited, symmetrically with the protection of persons belonging to national minorities, by means of objective factors. In other words, the artificially created language/dialect

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[26] V.C.A. Macartney, *National States and National Minorities,* 1968, pp. 7-8.

[27] *The European Charter of Regional and Minority Languages* is a Council of Europe Convention signed on November 5, 1992, in Strasbourg and entered into force on March 1, 1998.

[28] Convention of the Council of Europe signed in Rome on November 4, 1950, and entered into force on September 3, 1953.

cannot benefit from the level of protection established by the Charter, in the absence of objective historical or civilizational indicators. Artificial languages do not contribute to the preservation of the common heritage of humanity, but cause the unwanted fragmentation of the linguistic identity of a certain minority community. Subjective adherence to certain artificial languages cannot place that language under the protection of international instruments to the extent that there are challenges from other communities to the very autonomous existence of that artificial language.

Religious identity is structured around the individual's free adherence to a particular deity or, on the contrary, around the freedom not to recognize any form of religious manifestation. Unlike linguistic freedom which was susceptible to certain restrictions (consistently with the restrictions applied to freedom of expression), religious freedom is full and absolute as long as it is manifested in the *forum internum*. This is also the starting point of religious freedom: in the internal forum of the individual are crystallized both the idea of a deity and the compatibility between the conceptions of the individual and that respective deity.

In its externalized form, manifested in the *forum externum*, religious freedom is susceptible to legitimate limitations that are justified by appeals to public order, national security, or even the protection of the rights and liberties of others. In the same vein, the lack of a unanimously accepted definition within international forums on the notion of religion led to the acceptance of any form of spiritual manifestation related to a deity within the scope of religious freedom. However, due to this premise, religious freedom cannot be confronted, in its exercise, with the protection of artificial religious forms. In the opposite sense, the protection of linguistic identity can lead to the negative situations of requesting the protection of artificial languages/dialects, constructed despite historical and scientific arguments[29].

Conclusions

Cultural differences are the hallmark of national minorities. According to international standards, cultural differences cannot be seen as antagonistic in interactions with the culture of majority groups. Minorities

[29] See, also, Nicolae Voiculescu, Maria-Beatrice Berna, *Treatise on Human Rights*, Universul Juridic Publishing House, Bucharest, 2013, pp. 936-941.

cannot be defined otherwise than by their specific cultural traits; as a consequence, attaching a name or a fixed legal status to persons belonging to national minorities brings with it the danger of excluding underrepresented groups from the sphere of protection of national minorities. Our work focuses mostly on highlighting the advantages of international cooperation in the matter and less on the role of the State in the protection of national minorities. This solution is easy to justify: although the Nation States have, in principle, acceded to the two relevant international standards (the Framework Convention on the Protection of National Minorities and the European Charter of Regional and Minority Languages, the mere accession does not implicitly resolve the issues concerning the protection of persons belonging to national minorities. The problems arising from the artificial appearance of minority languages or groups remain pending. This fact attracts inconsistencies in the protection of individuals who, based only on the subjective criterion, invoke belonging to a historically or scientifically unfounded minority. Obviously, these are challenges that remain in the attention of international experts and researchers.

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THE IMPORTANCE OF REPORTED CRIMES IN CRIMINOLOGICAL RESEARCH

Bogdan VÎRJAN*

ABSTRACT

In this article, we have proposed an analysis of that category of offense that includes all the facts that have a criminal appearance and that are brought to the attention of the criminal justice bodies through different reporting methods provided by law. This category of offense is important in criminological research, because such acts appear in the statistics of criminal justice enforcement bodies at various stages of criminal trials, before a final judgment or other solution of criminal investigation bodies is issued, by which the criminal nature is confirmed or disproved. However, as is known, for a good part of these facts, the bodies of criminal justice pronounce solutions of acquittal, termination of the criminal process or closure. However, the acts pending before the criminal justice enforcement bodies for which the criminal character is not confirmed should not be included in the criminal statistics regarding the totality of the crimes that are committed. In the specialized literature, all the acts that have a criminal appearance, brought to the attention of the criminal justice bodies, form the category of reported crime, unlike the acts for which the criminal character is confirmed, which fall into the category of convictions, also called judged crime. Considering the particular importance of criminological research in understanding the distinction between the facts that have a criminal appearance and the facts for which the courts establish by final judgments that they meet the conditions of an offense, in this article a more detailed analysis of the facts that fall under the category of reported crime is made.

KEYWORDS: *reported crime; offense; criminal acts; disclosed crime; notification;*

1. Brief considerations on the notion of crime

The notion of crime began to be used towards the end of the 18th century and the beginning of the 19th century, with the first criminal statistics. In the doctrine[1] it was stated that, from a legal point of view,

* *Lecturer Ph.D., Law Faculty, "Titu Maiorescu" University, Bucharest, Romania.*

[1] Valerian Cioclei, *Manual de criminologie,* ed. 6, C.H. Beck Publishing House, Bucharest, 2016, p. 19.

crime refers to the set of human behaviors that are considered crimes by a certain criminal law system. The notion of crime is considered to include all criminal acts committed in a given space and period of time[2], by criminal act meaning the externalization of a human behavior that is considered a crime by the criminal law.

Starting from this definition of the notion of crime, we note that the scope of crime includes, first of all, all crimes that are committed in a certain period of time, in a certain territory. Crime is a concept specific to criminal law. Thus, according to Article 15 (1) Criminal Code, the crime is the deed provided by the criminal law, committed under guilt, unjustified and for the commission of which a person can be charged. Therefore, for an act to be considered a crime, it must meet the four essential features provided by the criminal law: typicality, guilt, the act being unjustified and for the commission of which a person can be charged. The criminal legislation also explains to us what is meant from the point of view of criminal law by the expression committing a crime. In this sense, Article 174 Criminal Code provides that "*the commission or perpetration of an offense means the performance of any of the acts punished by law as completed offense or attempted offense, as well as the participation in the commission of the same, as co-author, instigator or accomplice.*". It follows from the text of the law that the commission of a crime involves the commission of an act that the criminal law punishes as a consummated crime or as an attempt.

From a legal point of view, we can say that a crime or attempted crime has been committed only when this is established by a final court decision. In the content of the concept of crime we will include not only the offense, as it is defined in the criminal law and criminal procedure, but also all other human behaviors that are prohibited and sanctioned by the criminal law. It is about those facts committed in the objective reality which, although they are provided for by the criminal law, considering the circumstances and the concrete way in which they are committed, do not meet all the requirements of the criminal law to be considered crimes, which is why they are not ascertained by a final court decision. All these facts that fall within the content of the concept of crime will be referred to as criminal acts. At the same time, we will also include offenses in the

[2] Valerian Cioclei, *Manual de criminologie,* ed. 6, C.H. Beck Publishing House, Bucharest, 2016, p. 19.

notion of criminal acts, which is why we can say that all criminal acts or acts that have a criminal appearance fall within the scope of the concept of crime.

2. Objective classification of crime

In the specialized literature, it has been stated that in a very broad sense, which takes into account the whole social and human phenomenon, by crime in the criminological sense we understand a mass social phenomenon that includes all crimes or criminal acts committed, either over the course of all human evolution or only in relation to a particular era, civilization, time interval or geographical space[3]. Such a scope of the notion of crime is of interest when we consider criminological research as a whole, as a fundamental science. However, apart from this very broad understanding of the notion, much narrower understandings of the notion are often used in criminological research, which are determined by certain requirements specific to the interest pursued in the research activity. In this sense, criminological research can be interested, for example, in an analysis of crime limited to a certain geographical space, to a time interval or to a certain type of crime[4]. We conclude that a distinction can be made between crime, as a phenomenon seen in a general sense, on the one hand, and different types of crime, as a concrete phenomenon of manifestation, on the other.

The grouping of criminal acts according to certain evaluation criteria results in the establishment of different crime categories. The way in which the criteria for evaluating crime are established allows the identification of two types of its classification. Thus, if we establish a fixed, invariable criterion for evaluating crime, we will obtain an objective classification of crime. Instead, if we propose diverse, variable criteria for evaluating crime, depending on the interest of criminological research, we will obtain a subjective classification of crime.

Regarding the objective classification of crime, over time, criminological research has identified as a reference criterion the objective existence of different degrees of knowledge of criminal acts by criminal justice

[3] Narcis Giurgiu, *Elemente de criminologie*, The Publishing House of the Chemarea Foundation, Iași, 1993, p. 97.

[4] Narcis Giurgiu, *op. cit.*, p. 97.

bodies. In the specialized literature, it has been shown that this criterion for classifying crime takes into account the degree of knowledge, discovery, registration, verification and judicial resolution of criminal acts, and depending on this criterion, the extent or depth of crime can be established[5]. According to this criterion, it has been shown in the specialized literature that crime is divided into the following categories[6]:

1) total crime, which is the most widespread but not entirely visible form of crime;

2) the black figure of crime, which includes that form of crime that never ends up being known by the competent authorities in the criminal investigation activity, being entirely invisible;

3) reported crime, which is a visible and mixed form of crime, but broader than convictions, and

4) convictions, which is the narrowest form of crime, but known and better defined.

Next, we will analyze reported crimes, in order to highlight the reasons why this category of crime is of particular importance in criminological research.

3. Reported Crime

Reported crime includes all the criminal acts that are committed in the objective reality on a certain territory and in a certain period of time, acts that have a criminal appearance and come to the knowledge of the bodies involved in the execution of the act of criminal justice. We say that these are acts that have a criminal appearance because only the court will determine if an act actually committed meets all the legal conditions to be considered a crime. Therefore, only a part of the facts that are brought to the attention of the judicial bodies will finally be confirmed as crimes, which is the reason why this category of crime is called reported.

The legal method by which the commission of certain acts provided for by the criminal law is brought to the attention of the criminal investigation bodies is the reporting act. For this reason, in specialized literature, this

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[5] Ion Oancea, *Probleme de criminologie*, All Educațional Publishing House, Bucharest, 1998, p. 42.

[6] Valerian Cioclei, *op. cit.*, p. 20.

category of crime is also known as crimes by referral[7]. The main effect of the report is to invest the criminal prosecution body for carrying out specific activities, the notification being a necessary condition for the initiation of criminal prosecution[8].

The ways of notifying the criminal investigation bodies are provided in the Code of Criminal Procedure. Thus, according to Article 288 (1) and (2) of the Code of Criminal Procedure, criminal investigation bodies are notified by: i) complaint, when the referral is made by the person injured by the criminal act, ii) by report, when the referral is made by a person other than the one who is injured by the criminal act, iii) by prior complaint, when the law requires the prior complaint, iv) following acts performed by other law enforcement bodies or v) *ex officio*, when it finds out in any way that a crime has been committed.

The complaint is an acknowledgment made by a natural or legal person, regarding an injury caused to him by a crime[9], while the report represents the knowledge made by a person other than the injured person, about the commission of a crime[10].

Regarding the prior complaint, this is a special way of reporting that we encounter in the Romanian judicial system. Thus, the right to file a preliminary complaint belongs only to the injured person, in the sense of a natural or legal person who suffered a physical, material or moral injury by committing the crime[11]. According to Article 288 (1) of the Code of Criminal Procedure, if the law stipulates that the initiation of the criminal action is made only upon the prior complaint of the injured person, the criminal action cannot be initiated without it. A similar provision is also valid in the case of the crimes provided for in Article 413-417 of the Criminal Code committed by the military, for which the criminal action is initiated only when the commander is notified, but also in other cases provided by law, such as for example the crimes provided for in Law no. 191/2003 regarding offenses in the naval transport regime, when it is necessary to notify the captain, the owner, the operator of the ship or the competent bodies of the naval authority, as the case may be.

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[7] Ion Oancea, *op. cit.,* p. 43.

[8] Andrei Zarafiu, *Procedură penală. Partea generală,* ed. 2, C.H. Beck Publishing House, Bucharest, 2015. p. 335.

[9] See Article 289 of the Code of Criminal Procedure.

[10] See Article 290 of the Code of Criminal Procedure.

[11] Andrei Zarafiu, *op. cit*., p. 341.

With regard to the notification through documents concluded by other ascertaining bodies, this is a general way of notifying the criminal prosecution bodies, the notification being carried out by drawing up minutes or by means of a minutes of the proceedings, in the case of the audience offense provided for by Article 360 of the Code of Criminal Procedure.

Ex officio reporting is a method by which criminal investigation bodies self-report when they find out about the commission of an act provided for by the criminal law, through any other means than the other reporting methods provided by Article 288-291 of the Code of Criminal Procedure.

The facts that fall into the category of reported crimes are registered at the police bodies or prosecutor's offices. If the complaint or report is wrongly directed, it is sent, administratively, to the competent body. Therefore, for a correct evaluation of reported crime, the statistical data provided by both categories of bodies mentioned above must be taken into account.

Reported crime includes all criminal acts that, at least in an initial phase, present a criminal appearance. The confirmation or not of the criminal character of the act is made following the solutions given by the prosecutor or the court and which result in the extinguishment of the criminal action[12]. As it was shown in the doctrine, the extinguishment of the criminal action basically marks the moment when the criminal action is exhausted through one of the methods provided by law[13].

The situations in which the extinguishment of the criminal action may take place are the following:

a) When the criminal action has as its purpose the criminal liability of one or more persons. According to Article 396 (2)-(4) Code of Criminal Procedure, the termination of the criminal action by achieving its object can take place by a definitive ruling to convict, to waive enforcement of penalty, to postpone the service of sentence. Any of these solutions can only be pronounced by the court.

b) When one of the cases intervenes that prevents the realization of the object of the criminal action. In this sense, in many situations the judicial bodies can reach conclusions contrary to the initial appearance. In Article 16 of the Code of Criminal Procedure provides the cases in which the criminal action cannot be initiated, and when it has been initiated, it can

[12] Valerian Cioclei, *op. cit*., p. 26.
[13] Andrei Zarafiu, *op. cit*., p. 85.

no longer be exercised. Depending on the time at which they intervene, these cases have the effect of either preventing the initiation of the criminal action, if it has not yet been initiated, or the extinguishment of the criminal action, if it had already been initiated, regardless of the procedural phase, the stage or the stage in which the criminal action has reached[14].

c) Separate from the cases that prevent the exercise of the criminal action, the criminal action can also be extinguished by giving up the criminal investigation, which can be ordered by the prosecutor during the criminal investigation phase, when he considers, in compliance with the provisions of Article 318 of the Criminal Procedure Code, that there is no longer a public interest in pursuing the act. The prosecutor's order for the abandonment of the criminal investigation is subject to confirmation by the judge of the preliminary chamber.

In conclusion, taking into account the provisions of Article 17 of the Code of Criminal Procedure, we identify the following ways of extinguishment of criminal action:

During the course of the criminal investigation criminal action is extinguished through:

– closure, when one of the cases of preventing the criminal action provided for by Article 16 Criminal Procedure Code is found to have occurred, or

– dropping charges, under the terms set by the law.

During the trial, the criminal action is extinguished by:

– the *res judicata* of the court decision of conviction, waiver of the application of the penalty, postponement of the application of the penalty;

– acquittal, when the court finds the existence of one of the following cases provided for by Article 16 a)-d) of the Code of Criminal Procedure; or

– termination of the criminal process, when the court finds the existence of one of the following cases provided by Article 16 e)-j) of the Code of Criminal Procedure.

It follows that a first reason why some facts remain in the area of reported crime is the finding of one of the cases in which the initiation or exercise of the criminal action is prevented or when it is ordered to abandon the criminal investigation.

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[14] *Ibidem.*

The second reason why some acts remain in the area of reported crimes is the failure to identify the authors of some criminal acts, when the well-known files with an unknown author are established. The files with unknown perpetrators exist due to the skill of the criminal, the ineffectiveness of the criminal investigation bodies or often a combination of the two elements.

4. Conclusion

We thus observe that in terms of volume, the category of reported crimes is much wider than that of convictions or judged crimes, which includes all the facts for which a final judgment of conviction, waiver of the application of the penalty or postponement of the application of the penalty is pronounced. This is because for many acts, which have a criminal appearance and fall into the category of reported crimes, their criminal nature is not confirmed and in these conditions the respective acts will not fall into the category of convictions.

Thus, the criminal investigation bodies and the courts are the ones who practically carry out a necessary triage on all the acts that have a criminal appearance in the category of reported crimes, in order to avoid the criminal liability of some people who are not guilty of committing a crime[15]. However, from the exposition made above regarding the reasons why some facts remain only in the category of reported crimes, we have seen that many times these facts exist and produce dangerous consequences in social life. This occurs because we can find ourselves in a situation where the statute of limitations for criminal liability has intervened for an act provided for by the criminal law, or perhaps the injured person's prior complaint has been withdrawn in the case of crimes where the criminal action is set in motion upon the injured person's prior complaint. As we can have situations in which the conclusion is reached that there is no evidence from which it can be concluded that a certain person committed the crime or there is a justifying cause or non-impunity.

In all these situations, even if, from a legal point of view, criminal sanctions cannot be applied against the people who committed these acts, however, the negative social consequences of these acts, both for the victim and for society, cannot be denied. For this reason, criminological

[15] Ion Oancea, *op. cit.*, p. 43.

research is also interested in such facts, which remain only in the category of reported crimes. We can thus affirm that reported crimes are of particular importance in criminological investigations.

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THE CONTRIBUTION OF CESARE BECCARIA TO THE DEVELOPMENT OF CRIMINOLOGICAL THOUGHT

Bogdan VÎRJAN*

ABSTRACT

In this article we proposed a presentation of the importance that the work On Crimes and Punishments, written by Cesare Bonesana, Marquis of Beccaria, had on the development of criminological thought. As is known, the first scientific explanations regarding the criminal phenomenon focused on the identification of causes that favor or generate crime. However, these explanations were preceded by the classic conception of crime, which was based on the ideas presented by Cesare Beccaria in his work On Crimes and Punishments. In fact, the ideas contained in this work were the basis of the classical school of criminal law, which dominated legal-criminal thinking for more than a century. According to the representatives of the classical school of thought, any criminal act is the result of the person's free will. Therefore, every person assumes the consequences of his actions. In other words, when he commits a crime, the person becomes a criminal because he so desired, according to his free will. Considering the special importance that Beccaria had in the formation of the classical school of criminal law, and implicitly, in the development of criminological thinking, in this article a presentation of his reference work in the field, On Crimes and Punishments, is made.

KEYWORDS: *crimes; punishments; legal-criminal thinking; Beccarian thought; criminal law;*

1. The role of Cesare Beccaria in the formation of the classical school of criminal law

Cesare Bonesana, Marquis of Beccaria, was born on March 15, 1738, in Milan, Lombardy, where he lived until the end of his life on November 28, 1794. He belonged to an old noble family, his father being the Marquis Giovanni Saverio Beccaria. He was educated at the Jesuit College at Parma, which was very famous at that time. Later Beccaria enrolled at the

* *Lecturer Ph. D., "Titu Maiorescu" University, Bucharest, Romania.*

University of Pavia, which he graduated in 1758, obtaining the title of doctor in canon law and Roman law. However, Baccaria did not pursue a legal career. In fact, it has been said that Beccaria was not a particularly outstanding student during his university studies, being inclined more towards mathematics[1]. After completing his studies, he began to meet frequently with a group of young people that included Allessandro Verri, an employee of the penitentiary in Milan, and his brother, the economist Pietro Veri, discussing various philosophical and literary topics.

After publishing *On Crimes and Punishments*, Beccaria abandoned both legal and philosophical studies. He was appointed professor of political economy at the University of Milan.

Although he also published several works in the field of economics as well as a series of articles and studies on the problems of literary art, on meditation or on the pleasures of the imagination, Beccaria's only truly valuable work remained the treatise *On Crimes and Punishments*.

In his work *On Crimes and Punishments,* Beccaria criticized the system of law that was taught at the university, while showing that the professors were totally out of touch with the realities of contemporary society as they promoted a science that he saw as a sad legacy of a distant past that was dark and barbaric[2]. He believed that the laws of his time had the role of masking the arbitrariness of the rulers, which is why he considered the university professors who promoted and defended these laws to be servants of despotism. Beccaria was influenced by the works of Montesquieu, Voltaire and Jean-Jacques Rousseau, he was impressed by the works of Georges-Louis Leclerc de Buffon and Denis Diderot, and expressed his admiration for the philosopher Jean le Rond D'Alembert, for he was also no stranger to the works of the English philosophers David Hume and Francis Bacon. However, it is considered that the most important influence on Beccaria was exerted by the Milanese illuminist Pietro Verri, who led him to publish his works[3]. Incidentally, regarding the role that Pietro Verri played in the publication of Beccaria's work, it is best

[1] Ellio D. Monachesi, *Pioneers in Criminology*, published in the Journal of Criminal law, Criminology and Police Science 46(4): 439-49, nov.-dec. 1985, apud Tudor Amza, *Criminologie*, Lumina Lex Publishing House, Bucharest, 1998, p. 69.

[2] Alexandru Balaci, preface to the work *Cesare Beccaria. Despre infracțiuni și pedepse*, translation and notes: Armand Roșu, preface: Alexandru Balaci, Introductory study: Vasile Papadopol, Științifică Publishing House, Bucharest, 1965, p. X.

[3] Alexandru Balaci, *op. cit*., p. XII.

characterized by Beccaria himself, who says the following: "*he encouraged me and I owe it to him that I did not throw the manuscript into the flames, which, out of love for me, he transcribed personally*"[4].

Cesare Bonesana is rightfully considered the founder of *modern criminal law* in specialized literature[5], given that his work, entitled "*On Crimes and Punishments*", triggered profound changes in the criminal justice system of the time. In fact, the ideas contained in this work were the basis of the classical school of criminal law, which dominated legal-criminal thought for more than a century. According to the representatives of the classical school of thought, any criminal act is the result of the person's free will. Therefore, every person assumes the consequences of his actions. In other words, when he commits a crime, the person becomes a criminal because he so desired, according to his free will. Thus, the classical school studies the crime in an abstract way, separated from the person of the criminal, from his living conditions and his psychological peculiarities, which remain within the scope of the concerns of the representatives of this school[6].

Moreover, Beccaria's work is still of real interest today, which is not only of a historical nature. After more than two and a half centuries, by their value, the ideas expounded by Cesare Beccaria in his work are still relevant[7].

2. The context in which Cesare Beccaria published the work *On Crimes and Punishments*

The work *On Crimes and Punishments* appeared in Milan in 1764. The author, Cesare Beccaria, was at that time an unknown who had not yet turned 27 years old[8]. Before the publication of the work, Beccaria, along with several Enlightenment intellectuals, expressed his dissatisfaction with the rulers of the period, considering them to refuse to reform society and adapt legislation to new social realities. This was probably one of the main reasons why he proposed a substantial reform of criminal justice, so that it

[4] Alexandru Balaci, *op. cit*., p. XIII.
[5] Valerian Cioclei, *op. cit*., p. 61.
[6] Dumitru Culcea, *Curs de criminologie*, Național Publishing House, Bucharest, 2021, p. 40.
[7] Valerian Cioclei, *op. cit*., p. 62.
[8] *Ibidem.*

was closer to the citizen, protesting against judicial practices that protected certain interests from the top of power and criticizing inhumane, barbaric punishments[9].

Aware that his ideas will not be to the liking of many people in the state apparatus, the author took some precautions to avoid a direct clash with the authorities. In this sense, Beccaria slipped into his work some flattering assessments of the authorities. Also, before the publication of the work, Beccaria secured the protection of influential people on whom he could rely in the event of a scandal[10].

Contrary to the author's fears, the book was an immediate and spectacular success. The ideas contained in this work triggered rapid and radical transformations in the criminal systems of some European states[11]. Thus, torture is abolished in 1772 in Sweden and in 1776 and in some provinces of the Habsburg Empire, in 1786 the death penalty and torture are abolished in Tuscany, and in France in 1780 the application of torture is limited, so that in 1788 torture was completely abolished, several abuses being repealed at the same time. The humanistic principles formulated in the content of the treaty were the basis for the drafting of articles 7 and 8 of the "Declaration of the Rights of Man and Citizen" from 1789. Thus, we can say that Beccaria's work represented the turning point in terms of reforming the criminal jurisdictional system, laying the foundations of modern principles of criminal justice, insisting on the importance of preventing crimes and respecting the rights of those accused of committing crimes.

As it was rightly said, the work *On Crimes and Punishments* represents for the history of humanity a veritable act of indictment of the past, a vast indictment against arbitrary justice, a vivid documentary of the era in which it appeared and above all a monument of human culture[12].

In his work, Beccaria demolishes an entire legal-criminal system, with deep roots in the era of the time, and fixes only a few general principles on the empty place, leaving the role of specialists to fill the remaining gap, by applying these general principles enunciated by him. He was aware that if he had offered full versions, they would have been imperfect in turn, and

[9] Tudor Amza, *Criminologie*, Lumina Lex Publishing House, Bucharest, 1998, p. 70.
[10] Valerian Cioclei, *op. cit.*, p. 62.
[11] *Ibidem.*
[12] Alexandru Balaci, *op. cit.*, p. XVIII.

the confrontation would have been diverted to criticizing them. However, Beccaria's main objective was to abolish an outdated system, he being aware that building a new system requires time[13].

3. The main ideas that emerge from Beccaria's work

Professor Valerian Cioclei shows that the structure of Beccaria's work *On Crimes and Punishments* is based on two main coordinates, on the one hand, the demolition of the rules on which legal-criminal thinking was based at that time, which were totally outdated, and on the other hand, the establishment of some reformatory principles of criminal law, which constitute the basic pillars of the future legislation in the criminal field.

These two coordinates are the basis of the main ideas that Beccaria presents throughout his treatise. We will now briefly present the most important ideas expressed by Cesare Beccaria in his work *On Crimes and Punishments*.

The inclusion of all crimes and punishments in a body of written, clear and accessible laws

Regarding the principle of the legality of crimes and punishments, it has been emphasized in the specialized literature that the importance of this principle in Beccaria's work results not specifically from its mention, but more so from the way in which Beccaria understood to justify the special importance that the principle presents for respecting the fundamental rights and interests of the citizen. In this sense, Professor Valerian Cioclei showed that in this work Beccaria emphasizes the three major guarantees that respect for the principle of the legality of crimes and punishments brings, namely:

1. Only the legislator, as the representative of the people, can impose limitations on the exercise of the rights and freedoms of citizens. Thus, Beccaria shows that "*Laws are the terms by which independent and isolated men united to form a society, once they tired of living in a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of its preservation. They sacrificed a portion of this liberty so that they could enjoy the remainder in security and peace. The*

[13] Valerian Cioclei, *op. cit.*, p. 64.

sum of all these portions of liberty sacrificed for each individual's benefit constitutes the sovereignty of a nation, and the sovereign is the legitimate keeper and administrator of those portions. But it was not enough to create this depository; it had to be defended from the private usurpations of each particular individual, since everyone always tries to withdraw not only his own share but also to usurp that belonging to others. Tangible measures were needed, therefore, to prevent the despotic spirit of every individual from plunging the laws of society back into primeval chaos. These tangible measures are the punishments established against lawbreakers"[14].

2. Instruments must be found in order to protect the citizen against any form of abuse by the power. Beccaria shows that "*laws alone can decree punishments for crimes, and that this authority can rest only with the legislator, who represents all of society united by a social contract; ... a magistrate cannot, therefore, on any pretext, whether out of zeal or concern for the public good, increase the punishment established for a delinquent citizen.*"[15].

3. In order to be able to impose compliance with the criminal law and to be forced to bear the consequences of violating the criminal law, conditions must be created for the citizen to know what is permitted and what is prohibited. According to Beccaria, it is necessary for criminal laws to be published so that they can be known by citizens. Only laws can determine what constitutes a crime and the applicable punishments. These laws can only be adopted by the legislator, they must be clear, so as not to leave room for interpretations and implicitly for arbitrariness on the part of those called to apply them; and at the same time the laws must be known to the citizens, in order to be able to demand their observance. Only if these conditions are met can the citizen be said to have freely decided to violate a criminal law and to bear the consequences of this violation.

The need for the punishment to be proportionate to the crime, dissuasive and therefore useful for maintaining order in society

Cesare Beccaria also emphasizes that any punishment must be proportionate to the crime committed. The negative consequences that the

[14] Cesare Beccaria, *On crime and Punishments, Indianapolis*, 1963, pp. 11-12, *apud* Tudor Amza, *op. cit.,* p. 71.

[15] *Ibidem.*

punishment produces on the person who violates the criminal law must be more important than the benefits that the crime brought to him. However, Beccaria also says that the purpose of punishment should not be to torture the one who violated the criminal law but to educate him, in order to prevent the commission of new crimes[16]. Thus, according to Beccaria, "*For a punishment to achieve its objective, it is only necessary that the harm that it inflicts outweighs the benefit that derives from the crime, and into this calculation ought to be factored the certainty of punishment and the loss of the good that the commission of the crime would produce... The atrocity of a punishment itself, and the greater evil the criminal faces, makes him even bolder in trying to avoid punishment and leads him to commit even more crimes in order to escape punishment for any single one of them... the obstacles that deter men from committing crimes must be more formidable the more those crimes are contrary to the public good and the greater are the incentives to commit them. Thus, there must be proportion between crimes and punishments.*"[17].

Punishments should not be harsh, instead it should be moderate, but also inevitable and prompt

Beccaria disagrees with the violence of punishment, believing that it results in an increase in violent behavior on the part of the recipients of the criminal law. At the same time, the application of very harsh punishments is not even useful to society, as the certainty of the punishments has a greater preventive role than their severity. Therefore, Beccaria correctly believes that in order to achieve its deterrent purpose, the sentence must be applied shortly after the crime has been committed.

Referring to the promptness of punishment, Beccaria shows that "*The swifter the punishment is and the sooner it follows the crime, the more just and useful it will be. I say more just, because it spares the criminal the useless and violent torments of uncertainty... because the loss of liberty is itself a punishment and cannot precede the sentence, except when required by necessity... I have said that the promptness of punishment is more useful, for the less time that passes between misdeed and punishment, the*

[16] Valerian Cioclei, *op. cit.*, p. 66.
[17] Cesare Beccaria, *op. cit.*, p. 73.

stronger and more lasting in the human mind is the association of the two ideas crime and punishment"[18].

As for the certainty of punishment, Beccaria points out that "... *The certainty of a punishment, even if it is moderate, will always make a stronger impression than the fear of another, more terrible punishment, but that carries with it the hope of impunity; for, even the least of evils, when they are certain, always frightens men's minds"*[19]. In Beccaria's view, the moderation of the punishment takes into account both the aspect of the quality and the aspect of the quantity of the punishment.

The abolition of the death penalty

Cesare Beccaria is the one who questions for the first time, in a published work, the right of the state to provide for and apply the death penalty, bringing arguments for its abolition[20]. Until then, no one had expressly challenged the legitimacy of the death penalty, even if some thinkers, such as Plato or Thomas Morus, had supported, even if in isolation, either its abolition or the restriction of its application, but without causing social movements in this sense[21].

In Beccaria's conception, the death penalty cannot be considered legitimate, because man does not have the right to dispose of his own life, therefore he does not have the possibility to cede this right to society or to consent to the destruction of the right to life through the social contract. However, this conception was challenged by philosophers, showing that freedom is just as inalienable as life and Beccaria supports the deprivation of freedom. Thus, the German philosopher Immanuel Kant, although he agreed with the theory of the social contract, claims that no person suffers a punishment because he consented to it in advance, but because he wanted such a punishment to be applied to the general way in society, considering that it is not possible to imagine that anyone wishes to be punished. Kant

[18] Cesare Beccaria, *op. cit.,* p. 74.
[19] *Ibidem.*
[20] Valerian Cioclei, *op. cit.,* p. 66.
[21] Vasile Papadopol, *Studiu introductiv* la lucrarea: *Cesare Beccaria, Despre infracțiuni și pedepsei*, Științifică Publishing House, Bucharest, 1965, p. LX.

shows that in reality, through the social contract, each citizen has agreed to obey whatever laws are deemed necessary to maintain social order[22].

Next, Beccaria believes that the death penalty is neither necessary nor useful. He argues that a very severe punishment produces less effect on the human spirit compared to the duration of the punishment, because any human sensibility is more strongly and constantly touched by a lighter but frequent and/or long-lasting impression, than by means of a jolting, violent, but fleeting impression.

Reforming the criminal procedure by introducing the accusatory system and the principle of publicizing the judgment and the evidence

Beccaria does not agree with the excesses of the inquisitorial process, proposing several principles that ensure the respect of the rights of the accused in the criminal process and that allow a fair judgment to be delivered. He believes that a public trial allows public control over the legality of the justice process and thus avoids arbitrariness on the part of the people involved in this process, thus being a guarantee of compliance with the principles of legality and the soundness of the judgment of the court[23]. Likewise, Beccaria believes that the publicity of the criminal trial has an important role in preventing the commission of new crimes, due to the example that a public trial gives to other recipients of the criminal law, who will begin to understand that he who violates the criminal law will bear the consequences of this violation.

At the same time, the system of evidence existing at that time is contested, which did not allow the judge to freely assess the evidence. The author considers the practice of requiring the defendant to take an oath to be useless and inhumane, because it implies a contradiction between man's most sacred duties: the one towards the instinct of preservation, which prompts man to lie, and the one towards divinity, which requires the recognition of the truth[24].

[22] Immanuel Kant, Metaphysische Anfangsgrunde der Rechtslehre, 1979, p. 252 et seq., *apud* Vasile Papadopol, *Studiu introductiv* la lucrarea: *Cesare Beccaria, Despre infracțiuni și pedepsei*, Științifică Publishing House, Bucharest, 1965, p. LXI.

[23] Vasile Papadopol, *op. cit*., p. LXX.

[24] Valerian Cioclei, *op. cit*., p. 67.

Abolition of torture as a method of investigation, as a means of obtaining evidence

In the era in which *On Crimes and Punishments* was published, torture was a very old practice, being deeply integrated into society's value system. Therefore, the request to prohibit investigative torture as a means of obtaining evidence was very bold for that time. However, Beccaria has the courage to virulently criticize the inhuman nature of torture, while demonstrating its uselessness and legal inefficiency. Thus, Beccaria considers that torture is most often a means to condemn the weak innocent and to acquit the resistant criminal. He believes that torture is not a criterion for finding out the truth, because its result "*is a matter of temperament and calculation, which varies with each man according to his sturdiness and sensibility* "[25].

The need to prevent crimes.

The author believes that in order to achieve the desired goal of crime prevention, laws must be simple, clear and not favor certain social categories. At the same time, all criminal laws must be public, so that citizens know them and understand the consequences of their violation, prisons should be much more humane, legislation should not distinguish between rich and poor, between nobles and commoners, and people should be tried by judges from the same social class[26].

The idea of crime prevention appears as a natural completion of all the views expressed by Beccaria in relation to the criminal law, the crimes and the punishments to be applied to those who break the criminal law[27]. Thus, the ideas expressed in the content of the paper can be found compressed in the following conclusion: "*In order that punishment should not be an act of violence committed by one or many against a private citizen, it is essential that it be public, prompt, necessary, the minimum possible in the given circumstances, proportionate to the crimes, and established by the law.*"[28].

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[25] Vasile Papadopol, *op. cit.,* p. LXXVI.

[26] Tudor Amza, *Criminologie*, Lumina Lex Publishing House, Bucharest, 1998, p. 74-75.

[27] Valerian Cioclei, *op. cit.,* p. 68.

[28] Cesare Beccaria, *op. cit*., p. 75.

4. Conclusion

The work *On Crimes and Punishments* contains ideas that had a great impact in the era in which it was published, and the principles expounded by Beccaria in this work are still relevant today.

It is true that not all the ideas expressed in Beccaria's work were original, many of the principles expounded by him being previously expressed by philosophers and jurists from antiquity until the time of the appearance of this work. Beccaria's merit, however, lies in the fact that he managed to take over, synthesize and argue in a structured way all these ideas, using them for a noble purpose: criticizing an outdated legal-criminal system, which had feudal bases, and the proposal of a new modern, simple system that corresponds to the realities of its era, a system that was considered progressive[29].

Within the treatise we find concepts that were later developed by the positivists Ferri, Garofalo, Sutherland. Many of the opinions expressed by Beccaria in this work bear the influence of the French enlighteners Montesquieu, Rousseau, Buffon or Voltaire, as well as the ideas of the Englishmen Locke or Hobbes, which he happily managed to transpose in a unitary way in a unique work, which bears the imprint of his personality[30].

Beccaria's work had an important role in the development of criminological research, in which sense we recall Beccaria's emphasis on the preventive side of criminal policy, at the expense of the repressive one[31]. The conceptions of free will, the claim that criminal policy must have as its main purpose the prevention of crime, as well as numerous other principles expressed regarding the criminal phenomenon. And last but not least, the concern for the analysis of the notions of crime, criminal and punishment highlight Beccaria's special leaning towards the field of criminology.

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[29] Vasile Papadopol, *op. cit.,* p. LXXVI.
[30] *Ibidem*, p. LXXVII.
[31] Valerian Cioclei, *op. cit.,* p. 71.

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THE PARTICULARS OF THE JUDGMENT PRONOUNCED IN THE SPECIAL PROCEDURE OF THE SUCCESSIONAL PARTITION. RECONSIDERATION OF THE EDITING TERM OF JUDICIAL DECISION

Liliana Cătălina ALEXE[*]

ABSTRACT

The court decision – obviously, one favorable to the one who appeals to the court competition – is the eternal stake of any process before the courts. The court decision rendered in the special judicial division procedure appears to be ab initio one favorable to all parties to the trial. Since at the center of this article is the judgment pronounced in the succession division process, it is hard to believe that any of the parties involved would be in the position of the party that lost the process, given the particularities of the division, which has as its purpose the exit from the division according to the share – parts that it belongs to everyone. The points of tangency of the judicial division with the notarial division, as well as the points of interest of the first – if we choose the division involving the court – we capture them in the following sections of the article.

KEYWORDS: *share; division; judgment; court; term; motivation; drafting;*

I. The concept of good will in the matter of sharing

The first aspect is the one according to which the concept of goodwill is subsumed, even integrated with the concept of good faith.

We could say – without making too much of a mistake – that between good faith and goodwill is a relationship of the part-whole type, if we assume, reasonably, that exercising our rights in the process of sharing in good faith (in the sense of intention fair, honest, not to seek to damage or

[*] *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania. Judge, Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation, assistant in civil procedural law – Faculty of Law, "Titu Maiorescu" University.*

injure in any way the rights of the heirs involved) we have a (theoretically higher) chance of a share made by good will.

We cannot fail to notice the presence in both legal concepts ("good faith" and "good faith") of the adjective "good" that characterizes them, this time with the meaning of legal value corresponding to honesty, correctness, incorporating all those qualities required by law (both civil procedure law and civil law) for a well-done legal act.

Good will is an important element, of particular importance, in the construction of a partition at court.

This is because the presence of a partition on the court's roll does not de facto exclude the good will only because the right of the heir – a disputed right – is established in the process regarding its existence and extent.

Good faith is manifested on the legal level of the division and by good will, an immediate and preferable effect because the successional partition by good will is the practical and most convenient way out of the division, which can be used at any time by the co-sharers.

And the will is the sovereign form of the inheriting parties to dispose of the inheritance rights in the best way for them, private application of the principle of availability of the parties enshrined in procedural terms by the provision of art. 9 of the Code of Civil Procedure and in terms of civil law, the provision listed in art. 1144 of the code ("If all the heirs are present and have full exercise capacity, the division can be carried out voluntarily, in the form and by the act that the parties agree on").

The notarial succession procedure defined as a complex set of rules fulfilled by the notary public.

The judge, the public notary, the lawyer, the bailiff and recommend to the parties, respectively the party they represent, the amicable resolution of the dispute, respectively the conflict, through the mediation procedure, according to the special law (recommendation contained in art. 2 paragraph 6 of Law no. 192 /2006, which is, in fact, nothing more than a private application of Article 7 paragraph 2, Article 21 paragraph 1 and 2 CPC, even more so when in question are rights over which the parties can dispose art. 9 paragraph 3 final part CPC).

The guarantees of the two procedures are different, in the end the beneficiaries of the two procedures are those who have their say taking into account, of course, the advantages in question.

II. Good agreement – element of the notarial succession procedure and partition in court

Naturally, the first question that emerges from the title of the section is that of the reason why – although we are in the presence of a good will, this time in the sense of the willingness of all the heirs to share voluntarily – one of the procedures is chosen in favor of the other.

The first aspect is the consumption of time, significantly less during the notarial procedure.

The judicial division – even by good will – is subject to the rules of court procedure which presuppose deadlines – fixed by law or established by the judge – a procedural order that can extend over a considerable period of time.

The deed of notarial partition can be concluded in a few days, unlike the partition in court which can take several years.

And the costs of the two procedures are different. The financial resources employed in the two procedures are relevant elements in the option for one of them, but this aspect, not negligible, is not particularly the focus of the article.

However, what does a court decision of partition have in particular, significantly?

III. Court *versus* notary public. Sphere of public services

The public notary is appointed to perform a service of public interest and has the status of an autonomous function, being defined in this way by art. 3 paragraph 1 of Law no. 136/1995, Law on public notaries and notarial activity, republished, with subsequent amendments and additions.

On the other hand, according to art. 1 paragraph 2 of the Civil Procedure Code, "in administering justice, the courts perform a service of public interest, ensuring respect for the rule of law, fundamental freedoms, the rights and legitimate interests of individuals and legal entities, the application of the law and guaranteeing its supremacy."

Consequently, the role of both in the sharing process is one of the sphere of public services that would determine the necessity of correlating the activity with the public imperative, mutual conditioning, of essence, permanent, between the substantive law rules that govern the legal regime

of the sharing and the imperative to ensure the capitalization corresponding to them, on the procedural path chosen, in accordance with the law.

The notarial activity is carried out by public notaries through notarial documents and notarial legal consultations, under the conditions of Law no. 136/1995 that governs their activity.

This element of the notarial activity – legal consultations – is one with weight and an important factor in the performance of the notarial division.

The role of the judge in the partition procedure at court is a limited one, restricted, marked by rules which, although they have a high degree of generosity (in expression and terms), are not in a position to decisively help the party – heir in decisions regarding the process.

IV. The notion of *diligence* of the court in the successional division. The need for reform in content of the notion

The sharing procedure greatly diminishes the essence of the notion of diligence, otherwise quite present in the area of law.

There should be a different level of protection for the successor in the process, and the procedural law or even the civil law should offer the court more consistent procedural levers than the current ones at the level of guidance or conciliation.

Under this aspect, the obligations of the judge in the architecture of the sharing process should be imperatively increased, taking into account that a fair process can only be determined by the circumstances of the particular case under discussion, by the obligation to know them (through the mechanism of questioning or the explanations given by the parties in any judicial procedure allowed by Article 22 paragraph 2 of the Code of Civil Procedure).

It is not superfluous to remember that the Convention (EDO) does not guarantee theoretical and illusory rights, but concrete and effective rights; and if the right to inheritance is treated in a superficial manner it tends to become an illusory right.

The law, moreover, reserves the judge's discretion.

Whenever the law reserves the judge's discretion or requires him to take into account all the circumstances of the case, the judge will take into account, among others, the general principles of law, the requirements of equity and good faith (art. 22 para. 7 Civil Procedure Code).

V. *Ferendum* law proposal. Transfer of similar duties to the notary

By presiding over judicial proceedings, the power and position could allow the judge to "get closer", in terms of the process, more to the duties of the public notary, at least for the relevant argument that in these distribution procedures the risk of losing the process is not at all equal to that of the unsuccessful party in claims from the other litigations, but civil in nature.

And in this regard, an element of conviction that such a transfer of functions and attributions can be possible is that through similarity.

Pursuant to Law no. 36/1995 regarding public notaries and notarial activity, it is the competence of public notaries to carry out the documents regarding the divorce procedure.

In the case of divorce through the notarial procedure (divorce at the notary), the public notary will note the dissolution of the marriage by the consent of the spouses, issuing them the divorce certificate.

However, in such a situation, the notary has assumed jurisdictional powers, although, entrusted to perform a service of public interest, it has the status of an autonomous function.

The functional autonomy of the public notary is somewhat similar to that of the judge, being differentiated from it by the lack of jurisdictional character and that of a public official.

And if the notary institution has also taken over jurisdictional attributions in its activity, why cannot such a transfer also operate in the opposite direction, allowing the judge to take over the position of legal consultant of the notary, with other procedural valences that protect, in an increased degree, the realization of the legitimate rights and interests of the parties in the judicial division.

VI. Judge's "guides" in opposition to notarial legal advice

Governed by the rules of procedure with principle value from art. 22 of the Civil Procedure Code (which under the marginal name of "Attempt to reconcile the parties" enables the judge to, throughout the process, insist on the reconciliation of the parties, giving them the necessary instructions, according to the law") and art. 983 of the same code (according to which "throughout the process, the court will insist that the parties divide the property by good will"), this role is a limited one.

The "necessary guidelines" are, however, subordinate to the law (the rule in art. 22 has the role of warning the judge that, in compliance with this obligation to play an active role, he should not replace the defense attorney as long as these duties of the court are not clearly identified, being left to the discretion of the judge.

Beyond any doubt, these guidelines cannot be equated with a legal consultation that can be granted, according to the law, only by lawyers registered in the Bar Association, members of the National Union of Bar Associations in Romania.

The "guidelines" of the judge are limited by the active role, and this method is not the safest and most effective solution for a partition achieved, in the end, by good will.

However, notarial legal consultation is a completely different act, an aspect that can confer a substantial benefit to the heirs from the notarial procedure.

In other words, the legal instruments at hand are not of the same rank.

And the professional contact between the public notary and his client cannot be prohibited or restricted (according to art. 163 paragraph 3 of Law no. 136/1995).

The notary public has the obligation to clarify the legal relations between the parties regarding the act they want to conclude, to check if the goal they are pursuing is in accordance with the law and to give them the necessary guidance on its legal effects.

The public notary ensures that the lack of legal training or the difficulty of understanding one of the parties will not place it in a position of imbalance with respect to another party, while the diligence of the court in this regard is almost minimal, if it chooses to exercise its personal procedural rights and does not benefit from legal aid under the terms of the special law on public legal aid through defense and free assistance through a lawyer appointed by the bar.

VII. Heir certificate or court judgment

According to art. 1132 Civil Code, "The heir's certificate is issued by the public notary and includes findings related to the successional patrimony, the number and quality of the heirs and their shares from this patrimony, as well as other mentions provided by law."

At the same time, according to the related Law no. 36/1995, republished, "(1) Based on the final conclusion, within 20 days, the certificate of heir or legatee is drawn up, which will include the findings from this conclusion regarding the estate, the number and quality of the heirs and the quotas return to them from the patrimony of the deceased".

In the succession procedure, the public notary establishes the quality of the heirs and legatees, the extent of their rights, as well as the composition of the estate.

During the succession debates, at each term the public notary draws up a reasoned conclusion, which will include the mentions regarding the completion of the procedure, the statements of the parties, the presence of witnesses and the measures ordered in order to resolve the case.

In the succession in which there are assets, the agreement between the heirs has been reached and sufficient evidence has been administered, the public notary prepares the final conclusion of the succession procedure.

On the basis of the final conclusion, the certificate of heir or legatee is drawn up, which will have the same date as the final conclusion and number from the register of succession terms and will include the findings of the conclusion regarding the inheritance mass, the number and quality of the heirs and their shares from the patrimony the deceased.

The heir's certificate may contain mentions regarding the way in which the extent of the rights of the successors was established, as well as any mention that justifies its release.

The heir's certificate proves the quality of the heir, legal or testamentary, as well as the proof of the ownership right of the accepting heirs over the assets of the estate, in the share that belongs to each.

In court,

According to art. 984 Civil Procedure Code, "(1) If the parties do not reach an agreement or do not conclude a transaction according to what is shown in art. 983, the court will establish the assets subject to division, the status of co-owner, the share due to each and the claims arising from the state of common ownership that the co-owners have against each other. If an inheritance is divided, the court will also establish the debts transmitted by inheritance, the debts and claims of the co-heirs towards the deceased, as well as the duties of the inheritance.

(2) The court will make the division in kind. On the basis of those established according to para. (1), it proceeds with the formation of lots and their assignment. If the lots are not equal in value, they are completed by a sum of money."

The norm in art. 985 of the Code of Civil Procedure also obliges the court to issue a conclusion of admission in principle: "(1) If for the formation of the lots operations of measurement, evaluation and the like are necessary, for which the court does not have sufficient data, it will give a conclusion which will establish the elements provided for in art. 983, duly drawing up the minutes.

(2) If, in accordance with the law, other requests have been made in connection with the sharing and whose resolution depends on its implementation, such as the request for the reduction of excessive liberalities, the request for a report of donations and others, by the conclusion shown at para. (1) the court will rule on these requests as well.

(3) By the same decision, the court will order the performance of an expertise for the formation of batches. The expert report will show the value of the goods and the criteria taken into account when establishing this value, it will indicate whether the goods are conveniently divisible in kind and in what way, proposing, at the request of the court, the lots to be assigned."

The above legislative framework is summarized, being known, easily recognizing common elements in both procedures.

Then, the question arises what would be the particularity of the court decision?

The heir's certificate proves the quality of heir, legal or testamentary, as well as the proof of the ownership right of the accepting heirs over the goods in the estate, in the share due to each, effect established by art. 1133 Civil Code, putting an end to old controversies regarding its nature.

VIII. Admissibility of appeal. Exclusion of the right to appeal (art. 483 par. 2 Civil Procedure Code, art. XVIII par. 2 of Law no. 2/2013 in conjunction with those of art. 94 point 1 letter j) and art. 995 para. 3 thesis I Civil Procedure Code). Judgment pronounced on a request for judicial division is only subject to appeal

According to the provisions of art. XVIII paragraph (2) from Law no. 2/2013 regarding some measures to relieve the courts, as well as to

prepare for the implementation of Law no. 134/2010 regarding the Code of Civil Procedure, in the processes started from the date of entry into force of this law and until December 31, 2018 (term thus extended by O.U.G. no. 95/2016) the decisions pronounced in the requests provided for are not subject to appeal to art. 94 point 1 letter a) – i) from Law no. 134/2010 on the Code of Civil Procedure, republished [...].

In this sense, in art. 995 para. 3 sentence I of the Code of Civil Procedure provides that "the partition decision is subject only to appeal".

There are many recent decisions of the appeals courts that ruled the appeal inadmissible.

In our opinion, the solution of the legislator of the Code after 15.02.2013, in accordance with the provisions of art. 3 of Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Civil Procedure Code, for requests for judicial division, regardless of value, under art. 94 lit. j) CPC, it seems, deeply unfai.

The circumstance that the parties had at their disposal a judgment on the merits before the first instance and a retrial on the merits, both in fact and in law, in the appeal, does not support the legislator's decision at least at the level of respecting the degrees of jurisdiction.

It is true that the double degree of jurisdiction, a basic principle of the judicial and jurisdictional organization, which ensures the trial of the case, successively, by two courts (the first court and the judicial review exercised through the appeal or, where the appeal is suppressed, the appeal) is respected.

But the judicial division procedure had a long history regarding the application of three degrees of jurisdiction, not necessarily as a guarantee of the quality of the judicial act (4), but of the control (one exclusively of legality) of the court of appeal.

Similarly, mutatis mutandis, the reasoning of the Constitutional Court in Court Decision no. 369 of May 30, 2017 regarding the effects of court decisions pronounced after their publication in the Official Gazette of Romania, in disputes valued in money up to and including 1,000,000 lei, started after the publication of the decision (July 20, 2017) in relation with which the system of appeals was established (5), precisely because of the reevaluation of the standard of protection provided by art. 16 para. (1) and art. 21 para. (3) of the Constitution, in the sense of reducing the legislator's margin of appreciation in the field of extraordinary appeals and increasing

the guarantees that accompany free access to justice, given that extraordinary appeals also represent an aspect of free access to justice – Decision no. 462 of September 17, 2014, paragraph 27- (6).

IX. Characteristics of the sharing decision

Compared to the Old Civil Code, which regulated the declarative nature of the division, the Code of Civil Procedure provides in art. 995 paragraph 1 "The partition decision has constitutive effect".

The new Code expressly states that the partition has a constitutive effect and each co-owner becomes the exclusive owner of the goods or sums assigned only starting from the date established in the deed of partition, but not earlier than the date of the conclusion of the deed, in the case of voluntary partition, or, as the case may be, from the date the court decision became final

In the case of judicial partition, it produces effects from the date of finality of the judicial partition decision.

According to art. 995 Civil Procedure Code, "(1) The partition decision has constitutive effect.

(2) Once it remains final, the partition decision constitutes an executory title and can be enforced even if the actual handover of the asset was not requested or the court did not expressly order this handover.

(3) The partition decision is only subject to appeal. However, if the division was requested incidentally, the decision is subject to the same appeals as the decision given on the main request. The deadline for exercising the right of appeal is the same, even if only the solution given on the division is challenged. The application of the criteria provided for in art. 988 cannot be censured through appeal.

(4) Execution regarding the divided assets can be requested within the 10-year limitation period provided for in art. 706."

According to article 1133 para. 1 of the Civil Code, the heir's certificate proves the quality of the heir, legal or testamentary, as well as the proof of the ownership right of the accepting heirs over the goods in the estate, in the share that belongs to each one.

Those who consider themselves injured in their rights by the issuance of the heir certificate can ask the court to establish or, as the case may be, declare it null and establish their rights, according to the law.

The heir's certificate can be canceled at any time, without having the force of res judicata, in the situation where defects of consent or other reason for cancellation have been found.

Or, the court decision enjoys the authority of a res judicata (according to art. 430 of the Code of Civil Procedure), has executive power, under the conditions provided by law (according to art. 433 and art. 995 paragraph 4 of the Code of Civil Procedure), it is mandatory and opposable (according to art. 435 of the same Code), features that position it in a superiority over the notarial deed subject to annulment under the law.

It is true that the nullity of the court decision can only be requested through the appeals provided according to the procedural rule in art. 405 of the code.

But under the conditions in which the remedies for reformation have been exhausted (being a final decision in question), and the remedies for withdrawal can be exercised in cases and conditions expressly and limitedly provided by law, we can conclude without too much ado that, by comparison, ***the partition judgment is a property deed for the heir much better characterized in terms of the safety requirements it emanates.***

X. "Waiting" for the partition decision. The deadline for drafting the decision

The term of 30 days fixed in article 426 par. 5 of the legislator of the Code of Civil Procedure for the drafting (and signing) of the court decision can be considered, without making too much of a mistake, the best-known rule of civil procedure by the litigant, but also the most frequently evoked by him through requests to expedite the drafting, when this time interval is exceeded.

This is – most of the times – the moment when the term in art. 426 para. 5 of the Code enters the (accusatory) rhetoric of the party in the process, with the feeling of injustice, of deep damage to his right to receive his decision (even) within this term.

The duration of drafting the decision (from a civil process) is a matter of public notoriety, because the legal act must also be carried out with speed.

How realistic is this term?

Can it still be imposed by the force of the reality faced by the courts, including from a statistical point of view?

Does it still represent a reasonable time interval, suitable to contribute to the realization of the judicial act exercised in the component of drafting the considerations that support the pronounced legal solution?

All these are questions that motivated the author of this article to bring to the fore – the research plan and the 30-day procedural deadline for drafting the final act of the judgment – the decision – both from a procedural and a human perspective, much neglected.

XI. Obligation to respect the motivation term. The nature of the obligation

1. Obviously, the first norm that regulates the term for drafting the civil judgment is the Code of Civil Procedure[1] and is circumscribed to the measures aimed at speeding up judicial procedures, addressing provisions mainly focused on increasing the speed of resolving cases, with a direct impact on decisions.

Art. 426 paragraph 5 (previous form brought by Law no. 310/2018) provided: *"(5) The decision will be drawn up and signed within 30 days at the latest from the pronouncement. The separate opinion of the judge remaining in the minority, as well as, when applicable, the concurrent opinion are drawn up and signed within the same term."*

Law no. 310/2018 made changes, among others, to the procedural text that is the subject of this article, introducing the possibility of extending the deadline for drafting and signing the decision by 30 days, at most twice, but only in thoroughly justified cases.

In our opinion, the amendment norm gave the text in paragraph 5 of article 426 a dilatory character, presuming (legally) its impossibility

[1] The Civil Procedure Code of 1865 was decreed on September 9, 1865, promulgated on September 11, 1865 and implemented on December 1, 1865. The Civil Procedure Code of September 9, 1865 was republished by Law no. 18 of February 12, 1948 published in the Official Gazette no. 35 of February 12, 1948.

According to article 264, "When the reasoning of the decision cannot be done until the date of the pronouncement, it will be done within no more than 15 days from the pronouncement. If the court was made up of several magistrates, the president will be able to assign one of them to draft the decision. The opinion of the judges remaining in the minority will have to be drafted at the same time as the decision.".

The new Civil Procedure Code entered into force on February 15, 2013, through Law 76/2012 – for the implementation of Law no. 134/2010 regarding the Code of Civil Procedure – Official Gazette no. 365/2012.

(obviously, one of objective fact) to have always respected the *ab initio* duration of 30 days, one with recommendation character.

First of all, the drafting term is subject, as professionals agree, to the formalism of civil procedural law when it is centered on the act of civil procedure, in turn, subject to formal conditions and deadlines.

The civil process is a procedure, a set of rules and deadlines to be followed and respected. And I emphasize through the provision in art. 7 first paragraph which enshrines the fundamental principle of legality: "the civil process is carried out in accordance with the provisions of the law", therefore, the legal solution must be motivated and made available to the party no later than 30 days after it is given.

Seeing the construction of the text, we cannot see that art. 426 para. 5 is only a special application of the second paragraph of art. 7: "The judge has the duty to ensure compliance with the provisions of the law regarding the realization of the rights (...) of the parties in the process.

The consistency of the article in question (the one in art. 426 par. 5) has its origin in the right to a fair trial, in an optimal and predictable term, defined by the provisions of art. 6 Civil Procedure Code[2] and art. 6 paragraph 1 of the European Convention on Human Rights[3].

2. The need to comply with the drafting deadline was also extended within the legal framework established by rules contained in special laws.

Law no. 303 of November 15, 2022 regarding the status of judges and prosecutors, published in the Official Gazette no. 1102 of November 16, 2022 disposes, with an imperative tone in art. 224:

"(1) Judges and prosecutors are obliged to solve the work within the established terms and resolve the cases within a reasonable time, depending on their complexity, and to respect professional secrecy."

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[2] Paragraph (1) Every person has the right to judge his case in a fair manner, in an optimal and predictable time, by an independent, impartial court established by law. For this purpose, the court is obliged to order all the measures allowed by law and to ensure the speedy conduct of the trial.

[3] Art. 6 paragraph 1 of the European Convention on Human Rights provides: "Every person has the right to a fair trial, in public and within a reasonable time, by an independent and impartial court, established by law, which will decide either on the violation of his civil rights and obligations, or on the merits of any accusation in criminal matters directed against him. (...)." The provisions relating to the trial of the case within a reasonable term contained in art. 6 par. 1 of the ECHR were taken over in art. 6 of Law no. 134/2010 on the Civil Procedure Code, republished.

The regulation of December 22, 2022 on the internal order of the courts issued by the Superior Council of the Magistrates – Section for Judges, approved by Decision no. 3243/22.12.2022, published in the Official Gazette of Romania, Part I, no. 1,254 bis of December 27, 2022 no longer deals with the deadline for drafting court decisions, although art. 128 of the regulation is concerned with the "court decision", resuming part of the procedural requirements alongside provisions, administrative instructions that establish the smooth running of the internal functioning of the court.

XII. Reconsideration of article 426 para. 5 of the Civil Procedure Code

The judicial duties of a judge take precedence over any other activities[4].

This is part of value 6 defined in the Bangalore Principles of Judicial Conduct 2002 (Draft Bangalore Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening the Integrity of the Judiciary as reviewed at the Round Table of Chief Justices held at the Palace Peace, The Hague, 25-26 November 2002):

> "*Value 6 COMPETENCE AND EFFORT*
> *The principle: Competence and effort (diligence) are prerequisites for the correct exercise of judicial powers.*
> *Application: 6.1*
> *6.2 The judge will dedicate his professional activity to the fulfillment of judicial duties, which include not only the exercise of the judicial function, the responsibilities towards the court and taking decisions, but also the performance of other tasks relevant to the judicial activity and the operation of the court.*"

The professional "order" (given at the level of the above-mentioned legal framework) to motivate the decision within the 30-day period is determined by the necessity and practical usefulness of the judicial act – receiving the decision within the period set by the legislator of the Code,

[4] In an article from the "Dreptul" Magazine – 1926, Professor Andrei Rădulescu, the president of the Romanian Academy and, at the same time, the president of the High Court of Cassation and Justice shows that: "The preparation of decisions is not only one of the main duties of the magistrate, but also a significant attribution for the advancement of legal science".

which, in the new reality from the courts, it requires increased organizational efforts, it is increasingly difficult to achieve, maintained only with the contribution of the use of the judge's rest time.

But this is a subject that has its own controversy.

And the decision-makers in the jurisdictional system, the entities with prerogatives and powers including legislative initiator, should reconsider this deadline for drafting the decision, which has lost more and more of its valence as an optimal, reasonable or foreseeable deadline.

Final word

Istrate Micescu affirmed that "inheritance is a right with deep roots in human psychology. Social life would be seriously damaged if the right to inheritance were not recognized and protected because true civilization consists in keeping from each generation what it has gathered, and in passing it on to future generations, so that nothing of what is useful is lost. The rhythm of succession interrupted, would be the very rhythm of life suppressed."

The decision must not only take into account the relevant legal instruments, but also the notions and non-legal realities specific to the context of the controversy, such as, for example, social or economic considerations.

The national legislation does not recognize the judicial precedent as a source of law, the legal doctrine affirms its important role for the pronouncement of unitary solutions.

Jurisprudence has often ruled on the fundamental notions of the succession procedure, but the definition or redefinition of some notions – such as those that were the subject of this material – continues to be the subject of doctrinal and jurisprudential disputes.

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SUBSTANTIVE CONDITIONS OF THE MORTGAGE CONTRACT ON COPYRIGHT

Christine Giulia ABAZA[*]

ABSTRACT

In the context of the evolution of intellectual creations categories and of the current legislative regulation, the connection between author's rights over his own creations and instruments for guaranteeing obligations becomes a particularly relevant topic. The exploration of this broad interaction and the impact of the mortgage institution on copyright assets, which constitute complex intangible values, require analysis of the benefits, risks and conditions of validity of such a contract. In analyzing the connection between the two institutions and ensuring an understanding of the concepts, we will approach the incident legal framework in the field and the impact on the parties to the contract, in order to provide practical information, useful for both professionals and content creators and those interested in the relationship between copyright and guarantees of performance of obligations.

KEYWORDS: *mortgage; copyright; civil law; intellectual property law;*

The mortgage on copyright can find its usefulness in various situations, some of the most common being obtaining a bank loan or concluding a commercial agreement. This seemingly paradoxical legal institution finds its source in the provisions of Article 2.389 of the Civil Code and is based on the attempt to reconcile creative freedom with the need to capitalize on intellectual creations, creations that can have a significant economic value, in relation to a person's patrimony. In general, where a mortgage is constituted on intellectual creations regardless of their nature, it may be constituted only to the economic rights of the holder of the work. According to Law 8/1996 on copyright and related rights, moral copyright rights are inalienable, therefore, these rights cannot be subject to disposi-tional acts such as the constitution of a mortgage, under penalty of absolute

[*] *PhD student "Titu Maiorescu" University Bucharest, Romania.*

nullity for lack of object, these rights being removed from civil circuit by legal inalienability.

Intellectual creations, materialized in artistic, literary or scientific works, represent significant intangible values in contemporary society, influencing innovation, culture, commerce and society as a whole. Given the complexity of intellectual property rights and the mortgage institution, in this article, research and analysis will focus on the essential conditions of validity of the mortgage contract on copyright patrimonial rights, these conditions raising complex issues regarding the legal regime of the constitution of the mortgage and its effectiveness.

1. Concept. Legal characters

The right of mortgage, in the sense of the provisions of art. 2.343 Civil Code represents a *"right in rem over movable or immovable property affected to the performance of an obligation"*. This right may originate from the law or agreement of the parties[1], therefore, we can define a mortgage contract as the agreement by which one party, called the settlor, constitutes in the patrimony of the other party, which has the status of creditor of the principal obligation report, a right in rem of guarantee, without dispossession and which gives the holder the right to pursue and to be preferred upon the property assigned to the performance of the obligation[2].

The mortgage is an *in rem*[3], accessory and indivisible right. Based on its accessory nature[4], the legal regime of the mortgage right is conditioned by the validity and legal regime of the main act, namely the guaranteed obligation. The accessory relationship finds justification only in regard to

[1] Art. 2.349 para. (2) Civil Code states: *"The mortgage may be conventional or legal."*

[2] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Civil Law Course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015, p. 603.

[3] On the basis of its *in rem* nature, the mortgage confers on the holder a right of preference and a right of prosecution. The right of preference represents the prerogative that the holder has to fulfill his claim with priority, satisfying the economic value of the asset with priority over other creditors, even mortgagees (of lower rank). The right of prosecution is that prerogative under which the right holder can pursue and enforce the asset against any holder, even when the settlor has disposed to a third party the property assigned to guarantee the claim.

[4] The accessory character is of nature, not of the essence of the mortgage.

the validity, transmission and extinction of the right, since the mortgage right has its own legal regime regarding its effects and capitalization.

The indivisibility of the mortgage right implies that the mortgage *"bears in its entirety on all encumbered property, on each of them and on every part thereof, even in cases where ownership is divisible or obligations are divisible."* [Article 2.344 of the Civil Code]

Thus, the indivisible nature of the mortgage right entails the following consequences: (i) the partial extinguishment of the principal obligation will have no effect on the existence of the mortgage, as it follows its original regime, the entire asset being assigned to guarantee the part of the debt that subsists; (ii) the division of the claim or debt will have no effect on the extent of the mortgage but shall continue to be constituted upon the whole property[5].

However, in relation to the subject matter of this article, the question arises regarding the indivisibility of the object of the mortgage, in relation to an intellectual creation, especially common or collective[6]. Will the holder of a share in the copyright in the work be able to mortgage only that share, or can only the entire creation be mortgaged? We are of the opinion that the legal regime of that work will be governed by the legal regime of communal property and the establishment of a mortgage right over a communal property, in the sense that, if the holders have determined an ideal and abstract share of the communal or collective work belonging to each, any holder will be able to mortgage his own share of the economic copyright in the creation, with all the ensuing consequences[7], however, the mortgage will encumber the entire intellectual creation, unless the joint work is a set of distinct works that can have an independent existence, in

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[5] *Ibidem.,* p. 604.

[6] Art. 5 para. (1) and (4) of Law 8/1996 on copyright and related rights, provide: *"The work created by several co-authors, in collaboration, is a joint work. Where the contribution of each author is distinct, it may be used separately, provided that the use of the joint work or the rights of the other co-authors are not prejudiced.'* Art. 6 of Law 8/1996 provides: *"A collective work is a work in which the personal contributions of the co-authors form a whole, without it being possible, given the nature of the work, to assign a distinct right to any of the co-authors over the whole of the created work."*

[7] Art. 682 of the Civil Code provides: *"The guarantees provided by a co-owner over his share shall be transferred de jure to the property assigned to him or, as the case may be, to the sums of money assigned to him at the partition."*.

which case the owner of each work will be able to mortgage his patrimonial rights in the work independently.

On the other hand, if the holders have not established an ideal and abstract share of the ownership right over the work, the mortgage constituted for a co-author may arise only with the consent of all the holders, the unanimity rule applicable to a disposition act being incidental, under penalty of unenforceability of the act vis-à-vis the other co-owners[8].

As regards the establishment of the mortgage right, these situations do not highlight difficult issues, the general legal regime of constituting a mortgage right on communal property being applicable, but the forced execution of such a mortgage could raise delicate issues.

2. Object and extent of the mortgage

As regulated by Article 2.350 of the Civil Code, *'A mortgage may relate to movable or immovable property, tangible or intangible. It may encumber definite or determinable goods or universalities of goods.'* Likewise, Art. 2.389 lit. e) Civil Code determines, as the object of the movable mortgage, *Intellectual Property Rights*[9] *and any other intangible property*. On the basis of those articles, it may be stated that economic copyrights may be the subject of a mortgage contract, but the conditions of validity of the contract and its effects have a number of specific features.

First of all, we are of the opinion that the subject matter of the mortgage agreement on intellectual property rights has a double derivative object: *intellectual creation* and *patrimonial copyright rights*. An essential condition of the derivative object of the mortgage contract on copyright

[8] In arguing this opinion, we invoke the corroboration of the provisions of art. 641 para. (4), Article 642 para. (1) and Art. 645 Civil Code. Similarly, for the development of the concept, see Ioan Adam, *Civil Law. The General Theory of Real Rights,* Edition 3, C.H. Beck Publishing House, Bucharest, 2013, pp. 356-363.

[9] In art. 2 point viii) of the Convention establishing the World Intellectual Property Organization, signed in Stockholm in 1967, convention to which Romania acceded by Decree no. 1175/1968, published in B. Of. No. Article 1 of 6 January 1969 provides*: 'For the purposes of this Convention, intellectual property shall mean rights relating to: literary, artistic and scientific works; performers' performances, phonograms and broadcasts; inventions in all fields of human activity; scientific discoveries; industrial designs; trademarks, service marks, trade names; protection against unfair competition, and all other rights pertaining to intellectual activity in industrial, scientific, literary and artistic fields.'*

patrimonial rights is represented by the clear identification of the intellectual creation on which the mortgage was created, in application of the provisions of art. 2.372 para. (2) Civil Code and 2.391 Civil Code[10], but, at the same time, specific to this contract is the determination of the content of the mortgaged copyright, as an object of the mortgage right. In this respect, we consider it necessary to analyze Articles 12 and 13 of Law 8/1996 on copyright and related rights, which provide an exclusive patrimonial right of the author to decide on the use of his work, and the right of use entails a series of prerogatives[11]. The legislator itself determines as distinct rights those prerogatives of copyright, which leads to the conclusion that those rights are capable of forming the subject of a guarantee and that the mortgage may be lodged either on all the economic copyright rights related to the use of the work or only on specific rights. At the same time, we consider it necessary to mention the resale right[12], considered a patrimonial right distinct from the rights identified in the

[10] The articles relied on gave rise to a principle of specialization of the mortgage, providing that both the guaranteed obligation and the property on which the mortgage bears must have a *sufficiently precise description for the* very validity of the contract, providing a series of criteria for individualizing the mortgaged assets and leaving the parties flexibility in determining the category of works, by distinguishing them in an inventory or other such operations. Moreover, the determination of the object of the mortgage is nothing more than an application of the provisions of Art. 1.226 para. (2) Civil Code.

[11] Art. 12 of Law 8/1996 provides: *"The author of a work has the exclusive patrimonial right to decide whether, how and when his work will be used, including to consent to the use of the work by others.".*

Art. 13 of Law 8/1996 provides: *"The use of a work gives rise to* ***distinct and exclusive*** *patrimonial rights of the author to authorize or prohibit: a) reproduction of the work; b) distribution of the work; c) importation for sale on the domestic market of copies made, with the consent of the author of the work; d) rental of the work; e) lending the work; f) communication to the public, directly or indirectly, of the work, by any means, including making the work available to the public, in such a way that it can be accessed at any place and at a time individually chosen by the public; g) broadcasting of the work; h) cable retransmission of the work; i) retransmission of the work.*

[12] According to the definition dictated by art. 24 of Law 8/1996 on copyright and related rights, the resale right represents a distinct patrimonial right of the author of an original work of graphic or plastic art or of a photographic work, consisting in *"the right to receive a share of the net sale price obtained at any resale of the work, after the first transfer from the author, as well as the right to be informed of the whereabouts of his work.".*

aforementioned articles, but, based on its inalienable character[13], it cannot be the subject of a mortgage contract.

Secondly, even if all economic copyright relating to the use of a work or even several works may be the object of the mortgage agreement, we consider that the legal regime of mortgage on a universality of assets is not applicable in all cases, since a mortgage on a universality may be established only in upon assets assigned to the activity of an enterprise. Therefore, a mortgage on all patrimonial copyright held by the holder in a universality of works is allowed only in the case of holders who are also professionals, within the meaning of Art. 3 para. (2) Civil Code and, in our opinion, we add the condition of acquiring the rights through an exclusive assignment contract of patrimonial copyright from the author(s)[14]. A mortgage contract concluded with the author himself may not cover all or part of his patrimonial rights over all or part of his works, being a universality of intangible property, not allowed by reference to the provisions of art. 2.368 Civil Code. On the other hand, a mortgage on all patrimonial copyright in a work cannot be considered a mortgage on a universality of assets, the "asset" being the intellectual creation, and the patrimonial rights related to it do not constitute a universality within the meaning dictated by art. 2.368 Civil Code.

The complex legal nature of copyright has raised at least interesting debates at the level of doctrine, with opinions both in the sense of classifying the right as a right in rem and a right of claim or even of clientele or[15] an intermediate category of rights[16]. We agree with the view

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[13] Art. 24 para. (4) of Law 8/1996 on copyright and related rights provides: *"The resale right may not be waived or alienated."*.

[14] In order to dispose of acquired rights without the author's consent, the assignee must legitimize himself as the holder of the rights, based on a contract of exclusive assignment of economic copyright. If the assignment is non-exclusive, the assignee cannot dispose of the acquired rights without the author's consent and does not have the absolute right to decide. Only following an exclusive assignment, the assignee is considered the sole holder of the acquired patrimonial copyright rights and the only person who can dispose of the acquired rights, the author himself being forbidden to use the work in the ways, for the term and for the territory agreed with the assignee, as well as to *transmit* those rights to third parties [Art. 40 para. (4) of Law 8/1996].

[15] For details, see Violeta Slavu, *Intellectual Property Law*, Hamangiu Publishing House, Bucharest, 2017, pp. 176-180. and bibliography there cited.

[16] Valeriu Stoica, *Civil Law. Main rights in rem*, Edition 3, C.H. Beck Publishing House, Bucharest, 2017, pp. 37-48.

that copyright has a complex, dualistic character, in which moral rights cannot be ignored, but the patrimonial content of copyright has the features of a property right. Although not expressly provided, they may be inferred, on an interpretation *a fortiori ratione*, from the author's right to dispose of his work, in any way he wishes[17], within the limits laid down by law or by conventions to which the author is a party, in a manner similar to the property disposition attribute and from the privilege granted to the author to use and reap the fruits of his work, prerogatives that are, moreover, only the expression of the attributes of the property right (*usus, fructus, abusus*) with the specific regime of intangible goods and the content of copyright.

Regardless of the legal nature of copyright, we consider that both the ownership right over the creation, materialized in its material support[18], when possible, as in the case of a work of art, and the patrimonial copyright related to the use of the work can be mortgaged.

We specify that, in the absence of any contrary provisions, the object of a mortgage contract may also be a usufruct right over the creation, the author retaining the attribute of disposition over his work, and the *assignee*[19], having the capacity of usufructuary, acquires the right to exploit the work and to collect the fruits, pursuant to art. 703 Civil Code. In relation to the special law, the source of a right of usufruct over a work may be a non-exclusive assignment of copyright agreement, which, on the basis of the principle of autonomy of will, may also include clauses relating to the establishment of that right.

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[17] Art. 46 para. (2) of Law 8/1996 on copyright and related rights provides: *'In the absence of an agreement to the contrary, the copyright holder may freely dispose of the work, if it has not been published within one month from the date of acceptance, in the case of a daily newspaper, or within 6 months, in the case of other publications.'.*

[18] Law 8/1996 on copyright and related rights recognizes a distinct property right over the material support of the work, which cannot be confused with the copyright on the work. In this respect, Articles 25 and 26 of the Law expressly provide for *ownership of the work.*

[19] According to Law 8/1996, in cases where a person becomes the holder of a patrimonial copyright as a result of concluding a contract, the source of acquiring the right is the legal operation of the assignment (exclusive or non-exclusive). To this end, Article 3 para. (4) of Law 8/1996 on copyright and related rights provides: *"Natural or legal persons who have acquired this status by inheritance or **assignment**, under the law, as well as publishers of musical works and written works, for the rights **transferred** to them, shall be recognized and protected as copyright holders under individual agreements and entitled to at least part of the rights revenue.'*

In general, the mortgage encumbers the assets on which it was established, but with regard to the movable mortgage, its extension is expressly regulated to *"the fruits and products of the mortgaged movable property, as well as to all assets received by the settlor following an act of administration or disposition concluded with respect to the mortgaged movable property."* [Art. 2.392 para. (1) Civil Code]

With regard to the extension of the mortgage to the fruits of the mortgaged work, we consider it necessary to make a few mentions. Given the nature of the asset, we believe that a work can only generate civil fruit. In order to generate fruits, by its essence, a work must be exploited with human intervention, not susceptible to natural fruits, and through exploitation, a work can only generate income, not industrial fruit. In this respect, the extension of the mortgage to the fruits of the encumbered property may be applicable only to civil fruits generated as a result of the exploitation of the work, and the general legal regime governing the extension of the mortgage is applicable.

As regards the extension of the mortgage by accession, in the case of a work, this institution may be applicable to the realization of derivative works[20], and the holders of the patrimonial copyright of the newly created work shall be held by the mortgage, under the conditions of art. 2.355 para. (2) final sentence. However, for practical reasons, we are in favor of the solution according to which the extension of the mortgage will require the consent of the new author, who contributed to the transformation of the work, and a mortgage, an act of disposition by its essence, cannot be constituted on an asset of a person, namely the patrimonial copyright rights, without his consent. For the same reasons, the holder of copyright in the original work will have an obligation to inform the author of the derivative work, at the time of authorizing the production of the derivative work, of the legal situation of the work. Only through this mechanism does the author of the derivative work consents, expressly or tacitly, to the acceptance of the extension of the mortgage to his own intellectual creation.

[20] Art. 23 of Law 8/1996 on copyright and related rights provides: *"The production of derivative works, within the meaning of this Law, means translation, publication in collections, adaptation, as well as* ***any other transformation*** *of a pre-existing work, if it constitutes intellectual creation."*

Also regarding the object of the mortgage, we consider it necessary to deepen the issue of operations assimilated to mortgage. Article 2.348 of the Civil Code expressly states that the provisions of the chapter on mortgage do not apply to the assignment of intellectual property rights. The doctrinal view[21], to which we comply with interest, concerns possible abusive conduct on the part of the creditor-assignee, who, although he has received payment, would collect the revenues obtained as a result of the exploitation of the work, as assignee, causing damage to the assignor, with the result that the exception referred to in that article concerns *'the assignment of such rights alone and, like any exception, being strictly applied and interpreted, may not extend to the subject matter of mortgages'*[22]. Therefore, an *assignment* of the economic rights of copyright for the purpose of guaranteeing an obligation is not possible, but the operation of assignment and of the establishment of a mortgage right on the economic rights of copyright must be treated independently[23].

3. Mortgage formation and effectiveness

According to Article 2.387 of the Civil Code*, "The movable mortgage is established by concluding the mortgage contract, but it takes effect on the date on which the secured obligation arises and the settlor acquires rights over the mortgaged movable property."* In relation to this article, it is necessary to analyze the status of settlor of the mortgage right, a possible proof of that status vis-à-vis the mortgage lender and, last but not least, the moment at which the mortgage contract can take effect, all the conditions laid down therein being met.

[21] Gabriel Boroi, Alexandra Carla Anghelescu, Ioana Nicolae, *Civil law sheets. General part. People. Family. Main rights in rem*, 6th edition, Hamangiu Publishing House, Bucharest, 2021, p. 202.

[22] *Ibidem*, p. 203.

[23] Unlike Romanian and continental law in general, U.S. law permits assignment of copyright for warranty purposes. Title 17 of the U.S. Code deals with copyright law. In Chapter 1, *Subject Matter and Scope of Copyright",* in the definitions section, the explanation of the notion of *"transfer of copyright*" is provided, which also includes copyright mortgaging: *"A transfer of copyright ownership is an assignment,* ***mortgage****, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."* Therefore, under U.S. law, assignment for warranty purposes forms the basis for mortgage on copyright.

The notion of *copyright owner/subject* includes both the author and any other holder, natural or legal person who has acquired the patrimonial copyright under the conditions of art. 3 of Law 8/1996. Therefore, both the author, his heirs[24] and the assignee of the patrimonial copyright can have the status of settlor. Last but not least, the owner of the material support of the work may also have the status of settlor, when the derivative object of the mortgage is the support itself. We would also point out that a conventional mortgage may be provided both by the debtor of the guaranteed obligation and by a third party, since the copyright holder does not necessarily have to be the debtor of the secured obligation or vice versa.

Proof of ownership of economic rights can raise complex issues, given that publicity formalities concerning works are not easily accessible to authors and the procedure for their registration is not enshrined at legislative level. For information, the Romanian Copyright Office will be able to register, upon request and with payment of the related fees, in the National Register of Works, the intellectual creation of the author, but given that this registration is optional, it does not provide the creditor with a guarantee regarding the status of holder of the settlor[25]. However, we mention that in the field of copyright are established, by free association, under the law and with the approval of the Romanian Copyright Office, *collective management organizations* whose object of activity is the management of copyright or rights related to copyright on behalf of the holders. In that sense, although those organizations are non-economic legal persons acting on the basis of a mandate given by the copyright holder[26], registration in the repertoire of those organizations has become, customarily, a substitute for disclosure formalities.

The authorship of a work is therefore difficult to prove, but, at least until the publication registers and the formalities to be completed by the holders are rigorously regulated, that status can only be 'guaranteed' by the author by the guarantee against eviction regulated by the common law.

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[24] Based on the provisions of Art. 28 para. (1) of Law 8/1996 on copyright and related rights, heirs acquire, under civil law, for a period of 70 years, the patrimonial copyright of their author.

[25] We note that this aspect is not applicable when the mortgage settlor is the assignee of copyright patrimonial rights, the mortgage lender having the right to claim proof of title to the settlor.

[26] For details on the organization and functioning of collective management organizations, see Violeta Slavu, *op. cit.,* pp. 241-259.

With regard to the capacity of the settlor, it is unanimously admitted[27] and regulated *expressis verbis*[28] that a movable mortgage right is a disposition act, which can be constituted exclusively by contractual means, according to art. 2.388 Civil Code, therefore, the settlor must have full legal capacity at the time of conclusion of the contract. Also, regarding the consent of the settlor and the cause of the act, there are no specific problems regarding this type of contract, the general rules on the conclusion of civil disposition acts being applicable.

In analyzing the condition of acquisition of rights to movable property mortgaged by the settlor, we consider it necessary to specify when copyright arises. Under the law, an intellectual creation, when it meets the qualification criteria in the category of works, is recognized and protected by copyright, from the moment of creation, not being conditioned by a concrete way of expression, its completion or public disclosure[29]. In this case, the question arises of the possibility of mortgage on a future work. We are in favor of such a solution, the mortgage on future assets being allowed by the legislature, as long as the conditions of its validity are respected, but a mortgage right constituted on all future works of the settlor, nominated or not nominated, is not valid, for the reason dictated in art. 42 para. (2) of Law 8/1996 on copyright and related rights.

In relation to the principle of law according to which *"no one may transmit or constitute more rights than he has"* dictated in art. 17 para. (1) Civil Code, the duration of the mortgage right over the patrimonial copyright shall be conditioned by the duration of the assignment (in the case of mortgages constituted by holders who acquired the rights by assignment) and, in the case of the author, by the duration of the protection of rights according to Articles 27-34 of Law 8/1996 on copyright and related rights. Patrimonial copyrights, by their essence, are temporary rights, whose term is variable, a feature which supports the contrary opinion regarding the possibility of classifying copyright as a property right, but, in our opinion, this character should not be absolutized.

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[27] Gabriel Boroi, Alexandra Carla Anghelescu, Ioana Nicolae, *op. cit.*, p. 60; Ioan Adam, *Civil Law. General theory of obligations*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014, p. 783.

[28] Art. 2.365 of the Civil Code provides: *"A conventional mortgage may be established only by the holder of the right to be mortgaged and who has the* ***capacity to dispose*** *of it."*

[29] Article 1 para. (2) of Law 8/1996 corroborated with the provisions of art. 27 para. (1) of the Law.

Similarly, a mortgage on a right of usufruct of economic copyright is subject to the duration of usufruct, in accordance with the provisions of Article 708 of the Civil Code.

In the light of the reasoning set out above, we can say that the mortgage on copyright patrimonial rights represents an operation that reflects a complex legal reality, being an instrument in the current exploitation of intellectual creations. The essence of the mortgage right on copyright assets, as exposed, reveals legislative problems, at least interesting, providing specific conditions for authors to exploit their own works.

On the other hand, this institution requires special attention from the legislator, in the context of the evolution of the creative process of the human being, of local facilities in the realization of works, regardless of their nature, of technological innovations that support authors in the production and distribution of creative content, especially in the digital environment. All these tools for capitalizing on intellectual works remain open topics for researchers and professionals in the field. We believe that it is in the common interest to promote a clear legislative framework, both from a material and procedural point of view, which satisfies both the personal needs of creators and the civil circuit, thus developing a sustainable balance between creativity and the sphere of economic value of intellectual creations.

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RATIFICATION VERSUS ACCESSION IN THE CONTEXT OF TRANSPOSING INTERNATIONAL LABOUR ORGANISATION CONVENTION NO. 190/2019

Tudor-Gabriel APETRI[*]

ABSTRACT

Ratification and accession procedures represent two distinct ways through which states become parties to international agreements or international organizations. The ratification process is primarily associated with treaties and international agreements, involving the formal approval of a treaty by the competent national authorities of a state, such as the parliament or head of state. This procedure confirms the state's commitment to respect and implement the provisions of the treaty. On the other hand, the accession procedure is specific to international organizations and involves the process by which a state becomes a member of such an organization. Accession usually entails the submission of an official application by the interested state, followed by its evaluation and approval by the existing members of the organization. This process may include compliance with specific criteria and may involve negotiations between the applicant state and the organization regarding membership conditions. Both procedures represent crucial stages in international relations, influencing the dynamics of collaboration and the involvement of states at the global or regional level.

KEYWORDS: *International Labour Organization; Conventions; labour law; treaties; international; ratification; accession;*

In contemporary society, addressing labour-related issues can no longer be exclusively within the national sphere of each state[1]. International norms are becoming increasingly relevant, and no civilized country can afford to disregard them. The importance of international labour law takes on new dimensions as competent organizations make efforts to bridge gaps

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[*] *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania; specializing in Labour Law, Parliamentary Consultant at the Romanian Chamber of Deputies.*

[1] Alexandru Țiclea, *Tratat teoretic și practic de dreptul muncii*, Universul Juridic Publishing House, Bucharest, 2023, p. 82.

in national legislations and reduce differences among them, aiming to ensure a minimum set of rights and freedoms for all citizens worldwide.

The exercise of democracy, in principle, involves engaging in an extensive and representative consultation process with citizens and members of various social groups in decision-making, with the goal of harmonizing opinions and interests[2]. The assumption is that negotiations and communication aim not only to achieve consensus but also to gain acceptance and commitment to decisions, including the responsibility for their implementation.

Norms in the field of international labour law include rules established by the International Labour Organization, and concerning the member states of the European Union, norms elaborated by the Council of Europe and the European Union. International labour law also addresses the relationships between states concerning the harmonization of labour legislation and social security systems, aiming for the uniform application of a set of international standards. However, it is crucial to emphasize that the implementation of these norms is contingent on the sovereign will of states[3].

Recently, workplace harassment has been one of the most analyzed subjects due to its social significance and the proposal to draft a Council Decision on the ratification by member states of Convention No. 190 adopted by the International Labour Organization on violence and harassment in the world of work.

The scope of Convention 190/2019 is to protect both workers and other individuals involved in the field of labour according to definitions established by national legislation and practices. This includes employees, regardless of their contractual status, self-employed individuals, individuals undergoing training, including interns and apprentices, workers whose employment contracts have been terminated, volunteers, those seeking employment, job applicants, as well as individuals with authority, duties, or responsibilities similar to those of an employer[4].

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[2] Valer Dorneanu, *Dialogul social*, Luminex Publishing House, Bucharest, 2006, p. 7.

[3] Andrei Popescu, *Dreptul internațional și european al muncii*, ed. a II-a, C.H. Beck Publishing House, Bucharest, 2008, p. 103.

[4] COM(2020)24 – Propunere de DECIZIE A CONSILIULUI de autorizare a ratificării de către statele membre, în interesul Uniunii Europene, a Convenției Organizației Internaționale a Muncii (nr. 190) privind violența și hărțuirea, disponibil la: https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX%3A52020PC0024

The ILO Convention is the first international instrument that establishes specific, globally applicable standards for combating work-related harassment and violence. It specifies the necessary measures to be taken by states and other relevant actors. The Convention and related recommendations aim to establish an inclusive, integrated approach that takes into account the gender dimension for preventing and eliminating violence and harassment in the workplace.

The European Union (EU) has committed, through Article 2 of the Treaty on European Union (TEU), to promote human rights and decent work, including safe and healthy working conditions, gender equality, and the elimination of discrimination, both internally and in its external relations. Article 3 of the TEU succinctly presents the EU's objectives. In its relations with the international community, the Union contributes to poverty eradication and the protection of human rights, especially those of children, as well as strict adherence to and development of international law, including respect for the principles of the United Nations Charter.

Despite the regulation of workplace harassment by numerous legislative acts (e.g., Law 202/2022; Government Ordinance 137/2000, the Penal Code, and, not least, the Labor Code), the convention adopted by the International Labour Organization (ILO) at the Geneva Conference on June 21, 2019, centralizes all forms of harassment[5], unifying measures for prevention and combatting the phenomenon.

It should be noted that while the European Union shares the same principles with the International Labour Organization, the EU cannot adopt the ILO convention to make it binding on each EU member state through the effect of their accession to the European Union.

However, it is in the EU's interest to promote the implementation of an international instrument to combat violence and harassment in the world of work in line with its internal framework because the ILO Convention addresses certain areas of law that the EU is unable to adopt. The content of the convention is not in any way in opposition to the EU acquis. Therefore, it is in the EU's interest for this convention to be ratified by EU member states. To achieve this goal and considering the EU's competence in the areas covered by the convention, all legal obstacles at the EU level

[5] Cristian-Răzvan Cercel, *Prevenirea și combaterea hărțuirii la locul de muncă. Noi obligații pentru angajatori?,* articol disponibil pe: https://republica.ro/prevenirea-si-combaterea-hartuirii-la-locul-de-munca-noi-obligatii-pentru-angajatori.

regarding the ratification of the convention by EU member states need to be eliminated[6].

In accordance with rules on external competences elaborated by the Court of Justice of the European Union[7], particularly concerning the conclusion and ratification of ILO conventions[8], member states cannot individually ratify the convention as certain parts of it fall under the Union's competences according to Article 3(2) of the Treaty on European Union. This has led to a delayed implementation of the ILO convention due to certain parts of it falling under the Union's competences according to Article 3(2) of the Treaty on European Union.

However, the European Union cannot ratify an ILO convention, as the ILO constitution stipulates in Article 1(2) that only states can be member states and thus parties to conventions and recommendations. Furthermore, international organizations have the status of subjects of international law, but only in a derivative, secondary sense, not as principal entities like member states.

Thus, to ratify the convention and implement the commitments arising from it, EU institutions and member states must take necessary measures of cooperation, laying the foundation for the Council Decision. Since 2005, the Council has granted member states permission to ratify five ILO conventions for the benefit of the EU[9].

At the national level, according to the Labor Code, Romania is obligated to harmonize labor legislation with European Union standards, International Labour Organization (ILO) conventions and recommendations, and other international norms regarding labor law in accordance

[6] DECISION OF THE COUNCIL authorizing the ratification by Member States, in the interest of the European Union, of the International Labour Organization Convention (No. 190) concerning violence and harassment, 2019, available at: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX%3A52020PC0024.

[7] The decision of the Court of Justice of the European Union (CJEU) dated March 31, 1971, in Case 22/70 concerning the European Agreement on Road Transport, Rec. 1971, p. 263.

[8] Advisory Opinion 2/91 of the Court of Justice of the European Union (CJEU) dated March 19, 1993, Rec. 1993-I, page 1061, on International Labour Organization (ILO) Convention No. 170 concerning the Chemicals.

[9] Ion M. Anghel, *Personalitatea juridică a Comunității Europene/Uniunii Europene*, in Revista română de drept comunitar nr. 4/2005, pp. 45-46.

with the commitments made[10]. This obligation to harmonize legislation also requires continuous observation of decisions pronounced by the European Court of Human Rights, as well as compliance with solutions issued by the Court of Justice of the European Union.

In Romania, on November 16, 2023, the executive branch approved and submitted[11] to Parliament a draft law for the accession to Convention No. 190/2019 concerning the elimination of violence and harassment in the world of work[12], adopted at the 108th session of the International Labour Conference of the International Labour Organization in Geneva on June 21, 2019.

From the text and title of the future law, it can be observed that the term chosen for Romania's involvement in Convention 190/2019 is "accession" and not "ratification" of the international legal instrument, as was the case with the Convention on the Duration of Work (Industry) from 1919, the Maternity Protection Convention from 2003, and others that have already been transposed into national law.

Furthermore, in the opinion of the Legislative Council[13], reference is made to the fact that the ratification procedure establishes the means by which a state expresses its consent to become a party to an international legal instrument that has been previously signed by that state, in our case, by Romania. Conversely, in the absence of a prior signature by the Romanian state, the expression of the state's consent is done through the accession procedure, as provided by Article 1, letter h) of Law 590/2003.

The Legislative Council, in the same opinion, mentions that, regarding international instruments developed by the International Labour Organization, the term "ratification" is used to denote the state's consent to become a party to these conventions[14].

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[10] The Labour Code, republished, is available at: *https://legislatie.just.ro/Public/DetaliiDocument/128647.*

[11] Press release from the Ministry of Labor and Social Protection, available at: *https://mmuncii.ro/j33/index.php/ro/comunicare/comunicate-de-presa/7099*-20231116_cp-conventia_oim.

[12] See: *https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=21355.*

[13] The link provided leads to the legislative opinion of the Legislative Council on the legislative proposal (PLx) 735/2023, no. 1066/14.11.2023. For the detailed content, analysis, and conclusions of the legislative opinion, you can refer to the document available at: *https://www.cdep.ro/proiecte/2023/700/30/5/cl866.pdf.*

[14] *Ibidem.*

It was concluded that the expression of Romania's consent to become a party to Convention No. 190/2019, which is the subject of the law, will be done through accession and not through ratification.

To fully understand the arguments of the Legislative Council, let's analyze the provisions of the aforementioned law, which, at letter f), defines ratification as the method of expressing consent to become a party to a treaty that has been signed by the Romanian party, through the adoption of a ratification law by Parliament or, under the conditions of the law, by emergency ordinance of the Government. At letter h), it is provided that by accession, it is meant the method by which consent is expressed to become a party to a multilateral treaty that has not been signed by the Romanian party.

Although the Legislative Council limited its interpretation of the legislation to definitions, after a comprehensive review of the legal provision, we observe that Article 18 of the aforementioned law stipulates that the expression of the state's consent to become a party to a treaty is done, as the case may be, through ratification, approval, accession, or acceptance.

Article 18 is explained by the subsequent provisions; thus, Article 19 enumerates the documents subject to ratification by Parliament, and at letter f) of paragraph 1), we find the obligation of ratification by Parliament of treaties at the governmental level that refer to participation as a member in intergovernmental international organizations, a provision applicable to the convention referred to in the opinion of the Legislative Council.

However, according to Article 2, paragraph (1), letter (b), and Article 15 of the Vienna Convention on the Law of Treaties of 1969, accession is defined as the action by which a state accepts the offer or opportunity to become a party to a treaty already negotiated and signed by other states. This action has the same legal value as ratification[15]. The conditions and procedure for accession depend on the specific provisions of the treaty. A treaty may provide for the accession of all other states or a limited and defined number of states. In the absence of such provisions, accession can only take place if the negotiating states have agreed or subsequently agree in the case of the state in question, aspects not found in the situation of transposing Convention 190 into Romanian law.

[15] Vienna Convention on the Law of Treaties, 1969, available at: *https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.*

Additionally, Article 2, paragraph (1), letter (b), and Articles 14, paragraph (1), and 16 of the same 1969 conventions stipulate that ratification is the international action through which a state expresses its consent to be bound by a treaty when the parties intended to express their consent through such an act[16]. In the case of bilateral treaties, ratification is usually accomplished through the exchange of necessary instruments, while for multilateral treaties, the usual procedure is for the depositary to collect the ratifications of all states and keep all parties informed of the situation. The ratification process allows states the time needed to obtain the necessary approval for the treaty at the national level and to enact the legislation necessary to give internal effect to that treaty.

Concerning national legal norms, we consider that the ratification procedure is applicable in the context of transposing Convention 190 because Romania integrates international provisions into its national legislation. As a member state of the International Labour Organization (ILO), our country expressed its will through a preliminary procedure involving government representatives, employers, and trade unions, through the vote at the 108th Conference where Convention 190/2019 was adopted.

We believe that the definition of accession provided by Law 590/2003 does not apply to the transposition of ILO conventions because the criterion of the absence of a prior signing procedure, as in the case of ratification, is not met.

Furthermore, the constitution of the International Labour Organization provides in Article 19, paragraph 5, the obligations of member states regarding the ILO, and the first obligation is that "the Convention shall be communicated to all Members for ratification."[17] It can be observed that, in addition to the main obligation to communicate all conventions, the purpose of ratification of these international instruments is specified, leaving no room for free interpretation of the transposition procedure. The ratification procedure is identified throughout the fundamental law of the ILO without mentioning the accession procedure concerning the transposition of conventions into the national law of member states.

[16] *Ibidem.*

[17] The Constitution of the International Labour Organization, available at: *https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm*

Romania, due to its accession to the International Labour Organization in 1919 through the signing of the Treaty of Versailles, which was updated by the Declaration of Philadelphia, became a founding member state, a status to which the provisions of the treaties that formed and consolidated the status of the ILO are applicable.

Although there is an international obligation to transpose international norms, the national obligation provided by Article 276 of the Labour Code must be correlated with the provisions of Article 20 of the Constitution, due to the assimilation of the employment relationships of employees as fundamental human rights[18].

From the perspective of the Romanian Constitution, Article 20 of the Constitution states that constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts, and with other treaties to which Romania is a party[19]. The ILO, through the nature of its conventions, played a significant role in the development and promotion of the Universal Declaration of Human Rights adopted in 1948. Article 23 of the Universal Declaration of Human Rights refers to employment relationships, including the right to work, fair working conditions, and unionization.

Based on the arguments presented above, it is concluded that in the case of a conflict between national legislation and fundamental treaties and consolidating treaties of the ILO, the latter prevail over national law, except where national provisions are not more favorable.

Given that Law no. 590/2003 provides procedural norms that are in conflict according to the interpretation provided by the Legislative Council and cannot be considered more favorable in relation to international provisions, it is concluded that the interpretation of the Legislative Council, according to which Romania will accede to ILO conventions, is erroneous. In fact, the correct and applicable procedure in this case is the ratification of the conventions.

[18] Ion Traian Ștefănescu, Aurelian Gabriel Uluitu, *Codul muncii și Legea dialogului social,* Universul Juridic Publishing House, Bucharest, 2017, p. 515.

[19] *The Constitution of Romania*, available at: *https://www.constitutia.ro/art-20-tratatele-internationale-privind-drepturile-omului.htm*

Conclusions

In conclusion, the Law no. 590/2003 represents a starting point for understanding the procedures for transposing international law into national law, which complements international provisions, and where these norms are contradictory, international ones will override national ones, except when lower-ranking norms are more beneficial and contain more favorable provisions.

The accession procedure refers to the process by which a state becomes a member of an international or regional organization. Accession is a voluntary act of a state that wishes to join an organizational framework and participate in the activities and objectives established by that organization.

This process usually begins with the submission of an official application by the requesting state to the organization. The application may be followed by an evaluation process, in which the organization examines the requesting state's fulfillment of specific accession criteria. These criteria may include aspects related to democracy, respect for human rights, economic stability, or others, depending on the nature of the organization.

If the application is accepted, the requesting state may be invited to sign an accession agreement or treaty, which sets out the conditions and obligations of the organization's members. In some cases, this process may involve negotiations between the requesting state and the existing members of the organization to reach a consensus on the details of the accession.

Accession to international organizations can offer advantages and responsibilities, including access to common resources, collaboration in specific areas, but also compliance with the rules and standards established by the organization.

On the other hand, the ratification procedure refers to the formal process by which a state confirms and accepts an international treaty, agreement, or convention, thereby committing to respect and implement its provisions. This process is essential for transforming an international agreement into a valid legal commitment at the national level.

Ratification gives legal force and obligation to the agreement within that respective state.

In summary, accession refers to becoming a part of an organization or treaty, while ratification is the process by which a state formally confirms

and adopts the respective agreement. Accession often precedes ratification, as a state must first become a member to be able to ratify a treaty or agreement.

Furthermore, to avoid confusion in terminology, in the case of the International Labour Organization, which adopts international legal instruments during the ILO Conference, transposing conventions into national law through the adoption procedure would create confusion at the procedural stage at which member states are. From the moment when government representatives vote for the adoption of conventions by the ILO, the authenticity of using the ratification procedure for international instruments issued by the ILO is unquestionable. The identification of the ratification procedure of international instruments issued by the ILO is easily recognizable as the final step in the transposition into national law of conventions.

There is no universal assessment that establishes whether accession or ratification is more efficient, as these terms refer to different stages of the process in specific contexts, such as international treaties. Their importance depends on the objectives and circumstances involved.

In conclusion, ratification and accession are two distinct processes in international relations, but both are essential for the commitment and participation of states in treaties, agreements, or international organizations. Both processes have significant implications for the commitment and international collaboration of states, playing a crucial role in the global legal and political architecture.

It is evident that the accession procedure to ILO Conventions of a member state can never be applied; the applicable procedure is the ratification of international instruments.

It should be noted that ILO international instruments can also be applied by other states that are not members of the organization, but even in this case, those states will be able to ratify the conventions without becoming ILO member states through the effect of the ratification procedure.

Thus, the different and separate nature of ratification compared to accession is revealed, and the fact that these procedures, although often succeeding each other, is not the case for the ILO. A member state can ratify a convention without joining the ILO, and vice versa, a state can join the ILO but may not ratify all ILO conventions, although this perspective is to be avoided.

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THE AUTHORSHIP REGIME IN CRIMINAL LAW – EXPLORING DOCTRINAL VALUES AND ASPECTS

Andreea AROȘOAIE (ACSINTE)*

ABSTRACT

The article proposes an analysis of the regulation of the concept of authorship and the institution of participation in criminal law, by considering the implications presented by the improper participation and the theory of the mediated author in the various legislations of states/eras. The delimitation criteria of these two institutions, as well as the disagreements that arise from this, necessitate research into how these theories are applied in both foreign and national legal norms. The study of the regime of authorship brings into discussion subtleties of criminal responsibility/liability, the influences on the degree of culpability and on the sanctions imposed on individuals involved in committing of crimes, revealing the complexity of the relationship between the author, instigator, and accomplice within the legal system.

KEYWORDS: *mediated author; improper participation; crime, participant; guilt;*

The development of criminal law over time has been based on the evolution of criminal policy systems and legal thinking in successive historical periods, the incidence of criminal law, and, in particular, criminal liability, cannot occur in the absence of criminal phenomenon and of the participants in the commission of acts provided by the incrimination norm.

Closely related to the theory of the crime, the legal construction of the authorship regime has experienced relatively diversified judicial elements or methods through which the demands of the criminal law have been tried to be satisfied, both at the national and international level.

The criminal regulations regarding the author and the participants have known, throughout history, various classifications within the Criminal Code. The previous Penal Code provided the participants in the

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

commission of an act provided for by the criminal law – the author, the instigator or the accomplice – in a chapter entitled *Participation*, whereas the current code has dedicated a separate chapter under the name of *The Author and the participants*.

The current Romanian Penal Code also brings some substantial changes in that, unlike the Penal Code of 1969 which established that *"Participants are individuals who contribute to the commission of an act provided by the criminal law as authors, instigators or accomplices."*, it integrates the co-author into the sphere of participants and excludes the author.

Thus, a new concept is established in the matter, with differences among actors extending from the form of guilt to the way they commit the act provided by the criminal law: the author – directly, while the instigator or the accomplice is conditioned by the commission of the act by another person.

In order to understand the doctrinal concepts, we will analyze the actors who contribute to the commission of a criminal act as authors, co-authors, instigators or accomplices.

Thereby, regulated by article 46 of the Penal Code, the author is defined as the person who directly commits an act prescribed by the criminal law, thus becoming the indispensable person for the commission of a crime.

On the other hand, a co-author is a person who directly commits the same act provided by the criminal law. Presuming the existence of two or more individuals, co-authorship is conditioned by the existence of criminal participation, without significantly considering the level of contribution of each participant, it holds legal relevance that the same criminal act is committed, directly, by several people.

"If the contributions were fractionally analyzed, nothing conclusive would be achieved regarding the legal meaning of co-authorship." In this regard, the High Court of Cassation and Justice, Criminal Section, ruled in Decision no. 300 of February 1, 2012, regarding the situation where there is a tacit or express agreement between the authors in order to attack the victim by applying multiple deadly blows. In this case, the intensity of the blows is no longer relevant, in the conditions in which the intention of co-authorship to commit the crime of murder results from the materiality of the acts committed. What is noteworthy is the fact that the contribution of each co-author is not important as long as the simultaneous actions of the people involved determined the final result, appreciating that those

who applied less intense blows limited the victim's possibility to defend himself.

"It is essential that the material activities carried out by each participant complement each other, through simultaneous or successive actions and all together to constitute a unique, indivisible activity, considered, on the whole, the activity of committing the act, regardless of the separate contributory value of each individual action.", as the High Court of Cassation and Justice, the Criminal Section justifies in Decision no. 2925 of November 4, 2014.

The new text provided by article 52 of the Criminal Code has undergone some additions compared to article 31 of the previous code, in the sense in which it refers to co-authorship as a participant in the commission of an act provided by the criminal law. The doctrine appreciates the new regulation as justified since co-authorship involves the participation of several individuals, but a criticism in relation to the definition provided by article 46 para. (2) which define co-authors as persons who directly commit the same act[1].

Along with the author and co-author, another important actor is the instigator, article 25 of the Criminal Code defining instigation as the act of a person who, with intention, determines another person to commit an act provided by the criminal law, hence resulting his role and position in the commission of a crime.

The last actor in this presentation is the accomplice and the Criminal Code reproduces, without modifications, the definition of the accomplice from the previous regulation, as the person who "*intentionally facilitates or helps in any way the commission of an act provided by the criminal law*", or "*promises, before or during the commission of the act, that he will hide the assets derived from it or that he will favor the author, even if, after the commission of the deed, the promise is not fulfilled.*"

Legal-criminal institutions corresponding to the crime, authorship and criminal participation have as a premise the direct commission of the typical action by the author/co-authors, in which the instigators or the accomplices can participate, through actions or inactions. Compared to foreign regulations, the Romanian legislation provides a restricted

[1] George Antoniu, Tudorel Toader, *Explanations of the New Penal Code, vol. I*, Universul Juridic Publishing House, Bucharest, 2015, p. 575.

conception of the author as the consecration of the theory of the mediated author is not accepted.

The criminal law, incriminating facts and actions, specifies, through the legal provisions, what these consist of, thus fixing the content of the incrimination which includes the typical action together with a certain mental attitude, which together are carried out by an indispensable author in order to fulfill the action.

The regime of authorship has a defining role in Romanian criminal law concerning the commission of an act provided by the criminal law, by reference to the conditions that must be fulfilled in order to constitute a crime.

Why is it important to determine and analyze the institution of authorship and that of criminal participation? The entire process is essential for the correct application of legal rules, for finding out the truth regarding the crime and for holding criminals accountable. At the same time, the existence of the subjective connection between the authors represents an important condition to be analyzed and interpreted, a condition that leads to the application of co-authorship and in the absence of which each participant in the crime would be held accountable for different crimes, co-authorship not finding its applicability. In the same sense, the absence of the will to cooperate in the commission of the act, a subjective condition expressed through the guilt form of intention, would no longer make instigation and complicity applicable.

The theory of authorship and participation, by establishing those who play a central role in the commission of the criminal act and those who have a purely accessory role in achieving the result of the actions, defines the *dose of punishment* that corresponds to each participant in the act provided by the incrimination norm, serving as a dogmatic instrument and it is based on the achieving the principle of proportionality and, together with it, the principle of human dignity, which responds to a need of criminal law to protect the fundamental rights.

The Penal Code regulates improper participation as an institution in criminal law that occurs when an act provided by the criminal law is committed by two or more persons acting with distinct forms of guilt. This concept, which has become a tradition in criminal law, has been retained by the new regulation to the detriment of the theory of the mediated author, a well-known concept in foreign legislation.

The regulation of improper participation has been the solution to the various cases arising in practice, managing to prevail over a theory of the mediated author increasingly mentioned in the doctrine and aiming to sanction the instigator who intentionally caused the instigated to commit an act provided by the criminal law, whether with guilt or without guilt.

The theory of the mediated author presupposes that the person who actually commits the act acts without guilt, and the person who instigated the author to commit the act has caused it with intention. Thus, the one who instigates is considered the mediated author, while the person who actually carries out the acts of execution is merely an instrument that helped the instigator to obtain the final result, as a rule, the executor acting unknowingly.

The theory of the mediated author or, as it is also known in the doctrine, the theory of the remote author or of the long-hand author (*longa manus*)[2] presumes that the mediated author is the instigator who determines another person to commit a crime, the latter commits it without guilt because he is irresponsible, a minor under the age of fourteen, is in error of fact or could not realize or comprehend his actions or inactions or could not control them, due to involuntary intoxication with alcohol or other psychoactive substances.

The Romanian doctrine presents different opinions regarding this theory, the opinions being divided between the necessity of concrete regulation in situations in which one person uses another to commit a crime, specifically the person instigated to actually commit the act being either an incapable person or a person in whose favor a cause operates that removes the criminal nature of the deed, acting without guilt and preserving the traditional concept of improper participation.

Therefore, professor Dongoroz considered the theory of the mediated author as *"artificial and must be removed, as one that leads to absurd solutions"*, appreciating that the instigator is responsible as an instigator for the act committed as a result of his instigation, regardless of whether the author (the one instigated) is a responsible person or not[3]. In the justification presented, the falsity of the theory of the mediated author is

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[2] Constantin Mitrache, *Romanian Criminal Law – General Part,* Publishing House and Press "Șansa" – S.R.L., Bucharest, 1995, p. 245.

[3] Vintilă Dongoroz, *Criminal Law – Republishing of the edition from 1939,* The Romanian Association of Criminal Sciences, Bucharest, 2000, p. 413.

emphasized in the case of crimes for which the criminal law provides a special quality for the active subject, i.e. the author, considering the fact that certain crimes require this characteristic in order to consider the deed a crime, its absence leading either to considering the person who committed the act as the author of another crime in the content of which this quality is not provided[4] or he will be an accomplice of the direct execution activity carried out by the person who has the special quality required by the incrimination norm.

Thus, consider the example where X (who is not and has not been married) encourages Y (who is married) to contract a new marriage. As a result of the incitement, Y marries and commits the crime of bigamy; during the trial, Y is found to be irresponsible; if the theory of the mediated author were applied, then Y would be a mere instrument and the author of the bigamy would be X, who is not even married.

In another opinion, it is argued that the institution of improper participation does not present solutions regarding the situations of self-injury caused by a third party or in the hypothesis where the material author acts in a state of legitimate defense preconceived by a third party[5]. At the same time, regarding the case where X picks up Y and throws him into a shop window, breaking exposed objects, according to national legislation, Y is considered the author and X the instigator because he induced Y to commit the act. In doctrine it is expressed the idea that the normal solution in this situation is to consider X as the direct author of the act of destruction, a theory that is not applicable in Romanian criminal law[6].

The idea was also expressed that the theory of the mediated author *"is neither outside the realities nor does it lead to the absurd solutions attributed to it"* because it becomes applicable in the situation where the guilt of the mediated author *omnino* substitutes the will of the person who directly committed the deed, the execution acts remaining meaningless as they become *"an operation with a more formal character, a way of realizing the will of the person in the shadows who exercises complete*

[4] For instance, in the absence of the quality of a public servant (manager/administrator), the person who commits acts of appropriation/use/trafficking in his own interest will not be considered the author of the crime of embezzlement, but of the crime of theft.

[5] Florin Streteanu, Daniel Nițu, *Criminal Law. General Part. Vol. II,* Universul Juridic Publishing House, Bucharest, 2018, pp. 253-254.

[6] *Ibidem*, p. 259.

dominance over the entire causal process". In the other situations where the person who directly performs the acts of execution manifests even a partial will, the theory of the mediated author does not find its applicability[7].

The foreign doctrinal opinions which militate in favor of this theory base their arguments on the objective rationale that in the case where a person serves as an instrument of the commission of an act by another person who generally performs the acts of execution without knowing, must be punished the real author of the deed, the one who expressed the desire and interest in committing the deed, and not the "instrument-person" he has used. In this sense, it is exemplified the situation in which the mediated author pushes another person (the instrument) to fall on top of a third person in order to injure or to harm him[8].

Furthermore, the foreign doctrine emphasizes the importance of the principle of proportionality in the criminal law system, especially with regard to the concept of the mediated author, considering the contributions of the participants in the commission of a crime and by referring to the sanctions applied to them[9].

In another point of view, the theory of the mediated author is described as the conception that opposes the concept of direct authorship and that occurs when a person uses another one who acts, but does not commit unjustly or illegally the act, either because he acts without objective typicality, unintentionally or in a justified manner. An illustrative example is that in which one person uses another one to commit a murder by replacing blank bullets with real ones, who is indisputably responsible for the commission of the act because the person using the weapon acts unknowingly, believing that it has no real ammunition[10].

Regarding the theoretical part of the presented concept, under article 28 of the Spanish Penal Code, the author is defined as the person who commits an act personally, *together or through another person who is used*

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[7] George Antoniu, *Mediated author or improper participation?,* in Criminal Law Journal nr. 2/1995, Bucharest, p. 43.

[8] Monica Eugenia Ungureanu, *Instigation as a form of criminal participation,* in Criminal Law Journal nr. 2/2013, Bucharest, p. 63-79.

[9] L.R. Alfaro, *Derecho Penal – Parte General, Temas claves,* Gaceta Jurídica S.A., 2016, pp. 98-99.

[10] E.R. Zaffaroni, *Manual de Derecho Penal – Parte general, Segunda Edicion,* Publishing House Ediar, Argentina, 2007, p. 612.

as an instrument (*"como instrumento*"). Additionally, this category also includes individuals who directly induce another person to commit the act, as well as those who cooperate in committing the deed through an act without which the crime could not have been committed[11]. Accomplices are defined as persons who, not fulfilling the conditions to be authors, participate in the commission of the act through previous or concurrent actions.

Compared to the Romanian legislation, the Spanish law categorizes both authors and accomplices as persons criminally responsible for crimes and misdemeanours, choosing not to include the instigators in this category, who are defined as persons who directly incite through materials, broadcasting or any other means that facilitate publicity in front of a crowd in order to commit the crime.

From the above presented information, the theory of the mediated author seems to find its applicability in Spanish legislation, the one who determines another person to commit a crime is considered the author according to the very definition provided by the code.

Regarding German legislation, the Penal Code defines the author as the person who commits the criminal act personally or through another person, while co-authors are individuals who commit the same act together.

The notion of instigator is also regulated, as the person who intentionally causes another person to commit the illegal act, being punished as an instigator but similarly to the author, from which we deduce the applicability of the theory of the mediated author in German criminal law.

The Italian legislation includes explicit regulations concerning individuals who instigate others to commit a crime. If the instigator can not be held responsible or punished due to a condition or professional status that prohibits committing a crime, the instigator will bear responsibility for the crime committed and their punishment will be increased. Furthermore, according to Article 46 of the Italian Penal Code, if physical coercion is exerted on a person to commit a crime, the person who inflicts the violence is held responsible for the act committed by the coerced person. The same solution is also applied in the situation in which the state of necessity is involved, in the sense that the deed committed by the person threatened and constrained by the need to save himself or to save others from a real danger is responsible the one who forced him to perform it.

[11] https://codexpenal.just.ro/laws/Cod-Penal-Spania-RO.html.

Also, the Italian Penal Code incriminates the commission of a different crime from the one intended by one of the participants, as stipulated in article 116. Regarding the responsibility of the participant for a crime, other than the intended one, it may happen that, in carrying out the criminal plan, one of the participants independently commits another crime *"instead"* of the desired one or another crime *"beyond"* the one intended by the other cooperators. Therefore, in the absence of an individual's intention to participate in various crimes, the question arises as to whether the resulting crime can be criminally attributed to him and under what title. The Italian Criminal Code, in article 116, has adopted a more stringent solution, sanctioning *"when the crime committed is different from the one intended by one of the participants and he is responsible if the event is a consequence of his action or omission."* This rigidity is partly mitigated in paragraph 2, where it is stated that *"if the different offense is more serious than the intended one, the punishment may be reduced for those who intended the less serious offence"*[12].

Consequently, from the perspective of Italian legal doctrine, the mediated author replaces the direct author in these situations, both in terms of the characteristics required to be considered the author of the deed and regarding the punitive treatment, in the sense that the one who compels a person to commit a crime is the author of the deed and not the instigator, acts of coercion being assimilated to acts of execution, implemented through the instigated person.

Regarding the legal system in Hexagon, the French Penal Code defines the author of the crime as the person who commits the incriminated acts, the attempted murder or, in cases provided by law, the attempted delict. Embracing the objective theory of criminal participation, French criminal law regulates in article 121-7 the institution of complicity, defining the accomplice as a person who knowingly, through help or assistance, facilitates the preparation or commission of a crime. However, the jurisprudence has allowed some exceptions regarding the assimilation of the moral author with the material author, a situation that becomes questionable and debatable when it lacks a textual basis. Thus, the French Court of Cassation has admitted, in some cases, that the moral author is considered the material author of the crime when the author, unaware of

[12] G. Fiore, *Diritto Penale – Parte-Generale,* p. 70, accessed on 10 of November 2023 on https://www.scribd.com/document/324203614/Fiore-Diritto-Penale-Parte-Generale.

his actions and of what is happening, he was only an instrument in the hands of the moral author[13]. As an example, the court's decisions have emphasized the situations in which a person delivers a deadly substance to a third party responsible for administering it to the victim, presenting it as a medicine, in such cases, the individual become culpable of attempted murder or, similarly, when the goods belonging to a person are knowingly handed over to another one by a third party. Likewise, the person who makes a public announcement by usurping another person's identity is the author of the violence suffered by the latter due to the outrageous messages received from third parties who are unaware of the situation.

In certain cases, the law establishes as the author, although, according to the general principles, he might be considered an accomplice, not only the person who wrote the defamatory article and who is, in fact, the material author of the crime, but also the person who did not undertake acts of execution, but allowed its printing, publishing or distribution, such as the director of publication or the editor[14].

The French doctrine points out the rejection of the objective nature of participation, the arguments referring to the system of punishments, in the sense in which, according to article 121-6 of the French code, the accomplice will be punished as the author, the court deeming that he acted as a co-author[15]. However, the court, by taking into account the circumstances of the commission of the crimes or the person of the author/accomplice, can apply aggravating or mitigating circumstances and thus the resulting punishment is different[16].

This way of interpreting has not been uniformly shared by French thinking, with some authors considering that the moral author is not the one who commits the crime, but rather the one who causes it to be committed, thus manifesting a strong intellectual guilt. It is asserted, therefore, that French criminal law, essentially objective, refuses the

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[13] Olivier Décima, Stéphane Detraz, Edouard Verny, *Droit pénal general* – 27e édition, Publishing House LGDJ, Paris, 2022, p. 233.

[14] Bernard Bouloc, *Droit pénal general*, 27e éd., Publishing House Dalloz, Paris, 2021, p. 303.

[15] *Ibidem*, p. 324.

[16] Certain provisions expressly regulate the issue of applicable penalties, article L. 654-4 of the French Commercial Code states that when the author or accomplice of the a bankruptcy is the administrator of a company that provides investment services, the penalties are increased to 7 years imprisonment and a fine of 100,000 euros.

identity between the mediated author and the material author because being the author implies the personal commission of the incriminated acts. In principle, the moral author is qualified as an accomplice to the crime within the meaning of article 121-7 of the Penal Code because his behavior is punished only in consideration of the acts committed by the material perpetrator[17].

Concluding remarks

In summary, we appreciate that the theory of the mediating author has generated doctrinal disputes in judicial practice, through the lens of the need to find solutions to the issues that have arisen over time and to align Romanian legislation with European laws. We believe that a separate regulation of the situations in which the instigation of an irresponsible, coerced or delusional person is to commit an act provided by the criminal law would resolve the practice. Currently, these cases do not find their applicability in the national legislation because they do not fulfill the conditions outlined for either holding instigation or improper participation.

There is a requirement to align the Romanian criminal legislation with the European one for the continuous evolution of doctrinal concepts in the field, as well as a necessity to bring the new regulatory solutions closer to the standards of a unified European criminal legislation, imposed by the development of the criminal phenomenon.

The current Penal Code manages to combine tradition with new trends in the field of criminal law, striving to position itself on an upward trajectory both in terms of legislative technique and in terms of finding solutions for judicial practice, which is constantly between preserving the traditional values and the need to rally to international trends.

The regulation of the authorship regime has, undoubtedly, incomparable valences in the Romanian criminal law system, in virtue of respecting the principle of finding the truth and achieving justice. What this institution offers to criminal justice interferes with the interpretation of Montesquieu's statement: *"What makes the power of the law is the justice of the punishment, rather than its harshness"*. (*The spirit of the laws*)

[17] O. Décima, *op. cit.,* p. 232.

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REMARKS ON THE EMERGENCE AND EVOLUTION OF THE CONCEPT OF THE RESPONSIBILITY TO PROTECT

Gabriel MICU[*]

ABSTRACT

The developments taking place in the plan of international relations in the age of globalization have shown that there are countries where the authorities resort to violent forms of government, with dire implications on the very application in good faith of the principle of respect for human rights and fundamental freedoms. This conduct represents not only a violation of the mentioned imperative norm, but also a threat to international peace and security, especially since acts of systematic and substantial violation of fundamental human rights and freedoms have been included in the category of international crimes. In this study we aim to identify the way in which the international community intends to act to resolve some normative deficiencies, which may appear in the application of imperative norms, which have the same binding legal force for all states and which cannot be ranked, but applied in correlation and legal harmony.

KEYWORDS: *sovereignty; human dignity; non-interference in internal affairs; non-use of force; humanitarian intervention;*

1. Context

In our era, fundamental human rights and freedoms have become one of the fundamental principles of international law, along with other imperative norms such as state sovereignty, non-interference in internal affairs, non-recourse to force and the threat of force, etc. Cultural differences between nations, but also the autocratic form of government in certain states are two of the reasons why the concept of human dignity is perceived differently in different geographical regions of the world.

[*] *Associate Professor, The National University of Political Studies and Public Administration, Bucharest, Romania. Minister-plenipotentiary, Romanian Ministry of Foreign Affairs.*

In the era of globalization, the international community is facing more and more diverse obstacles in effectively preventing mass crimes and atrocities, such as genocide, ethnic cleansing and other major crimes against humanity, that occur on the territory of a sovereign state. In order to adequately respond to these challenges, the international community launched the theme of the need to protect civilians who become victims of such violent behavior by the authorities of a state within multilateral diplomacy.

Due to the complexity of the topic that we propose to address in this study, we opted for the examination of concrete situations of violation of fundamental human rights and freedoms that occur on a sovereign territory, correlative with the reactions of the international community to stop these acts, in some cases with the help of military force, and in others by using the specific instruments of multilateral diplomacy.

We chose to focus on those events that allow us to have some authorized remarks, precisely because of the passage of time, a context that gives us space for reflection and decanting of what happened.

Within multilateral diplomacy, we consider that the most relevant form of cooperation between states on the subject of our study is the International Commission on Intervention and State Sovereignty, which de facto launched the concept of the responsibility to protect, starting from the theory that sovereign states they have a responsibility to protect their own citizens from avoidable catastrophes – crime, rape, famine – but that when they cannot or will not do so, this responsibility must fall to the international community.

In the doctrine of international relations, some authors consider the responsibility to protect to be "the most dramatic normative development of our time"[1]. It is obvious that the application of such a principle aims to protect human communities that face abuses by national authorities, regarding the observance of the imperative rule that regulates the observance of fundamental human rights and freedoms, through acts that would often involve the violation of the principle of sovereignty and that concerning the prohibition of the use of force in international relations.

[1] Ramesh Thakur & Thomas G. Weiss, "R2P: From Idea to Norm–and Action?", *Global Responsibility to Protect* 1:1, 2009, p. 22.

International Commission on Intervention and State Sovereignty (ICISS)[2] consecrated in the text of its 2001 Report the very name of the responsibility to protect, referring to the conceptual framework for stopping mass atrocities, through an international responsibility in three directions: to prevent, to react, to rebuild.

Regarding this Report, we must mention that we will not focus on the normative efforts of the Commission, but rather on its efforts at the time, submitted together with other international actors, individual states or non-governmental organizations, as a relevant example of diplomacy of contemporary network, which differs significantly from classical, state-centered approaches to diplomacy and which is practiced by diplomats in an exclusive environment. We share the opinion of an American official, who even stated that "international crisis management (...) requires the mobilization of international networks of public and private actors"[3].

The evolutionary path of a concept such as the responsibility to protect, which could lead to the crystallization of an international norm with the same name, results from the contributions of a diversity of actors, who did not have access in the past to formulating and policy-making circles, which makes this process a dynamic one, which was neither hierarchical nor dominated by the secret diplomacy of powerful states.

The use of the designation responsibility to protect by the United Nations (UN) Security Council, General Assembly and Human Rights Council in 2011 illustrated the operational power of a nascent custom under appropriate political circumstances[4].

Like other imperative norms, the crystallization and codification of such a new norm needs time, clarifications and international debates. Like the principle to which it is closely related, respect for fundamental rights and freedoms, a possible norm regarding the responsibility to protect coagulates in the context of international cooperation, of multilateral diplomacy.

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[2] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

[3] Anne-Marie Slaughter (Former Director of the Office of Policy Planning at the US State Department), "America's Edge", *Foreign Affairs* 88:1, January/February 2009, p. 94.

[4] Thomas G. Weiss, "R2P Is Alive and Well after Libya", *Ethics & International Affairs*, 2011, pp. 1-6.

Humanitarian crises that led to the use of military force to come to the rescue of civilians in northern Iraq and Somalia, but even less consistently in the Balkans, led some authors to consider that after the end of the Cold War "sovereignty was no longer sacrosanct"[5].

The cumulative effect of international action in the mentioned situations has led some experts in the field of international relations to label it as "rescuing foreigners"[6]. It launched significant conceptual, political and operational challenges to the notion of state sovereignty and international society. ICISS responded to humanitarian challenges through actions that became known as "new wars"[7] and "military-civilian interactions"[8].

The main challenge faced by the Commission was generated by the divergent reactions or non-reactions of the Security Council.

Rwanda and Kosovo were decisive for the subject we are addressing. Looking through the prism of the passage of time, which gives us a better space for reflection and analysis, in 1994, international intervention was anemic and late to be able to slow down the pace of crimes committed in the Great Lakes region of Africa, estimated to about 800,000 people.

Later, in 1999, the North Atlantic Treaty Organization (NATO) bypassed the paralyzed Security Council and waged war in Kosovo. In connection with the American intervention, however, there are many observers who later considered that the air military intervention, which lasted seventy-eight days, was carried out too soon, that the exclusion of the use of ground troops diminished the effect of the American military effort, and the suffering generated among internally displaced populations, but also internationally displaced populations (international displaced peoples – IDPs) and refugees made the US intervention considered counterproductive.

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[5] Jarat Chopra & Thomas G. Weiss, "Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention", *Ethics & International Affairs* 6, 1992, pp. 95-117.

[6] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford: Oxford University Press, 2000.

[7] Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Stanford, CA: Stanford University Press, 1999. On humanitarian action and the use of military force, see Peter J. Hoffman & Thomas G. Weiss, *Sword & Salve, Confronting New Wars and Humanitarian Crises*, Lanham, MD: Rowman & Littlefield, 2006.

[8] Thomas G. Weiss, *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*, 2nd ed., Lanham, MD: Rowman & Littlefield, 2004, pp. 191-214.

The Security Council has failed, in neither Rwanda nor Kosovo, to act quickly and authorize the use of lethal force to protect vulnerable populations. A significant number of human rights advocates and international humanitarian institutions supported the need for military protection of civilians whose lives were threatened. The significant gap between the normative framework for legitimizing a collective action and the concrete international steps that took place was highlighted among public opinion and experts, precisely so that what happened could be analyzed more correctly.

The lack of reaction in Rwanda represented a far more serious threat to international order and justice than the paralysis of the Security Council in Kosovo, where NATO fulfilled its international responsibility to protect.

The most thorough survey to date of casualties in war zones suggests insufficient application of humanitarian law. Two-thirds of the besieged civilians who were interviewed, in twelve war-torn societies, by the International Committee of the Red Cross (ICRC) indicated that more efficient and effective intervention was needed, and only 10% wanted none kind of intervention[9].

Not surprisingly, looking at the spectrum of operational contexts available to humanitarian institutions since 2005, it has been found that beneficiaries "are more concerned with what is provided to them than who provides it to them"[10]. Also, an examination of cultural perspectives in the Global South suggests the need for wider support for helping war-torn societies in Third World traditional religions, philosophies and art[11].

The United Nations had to find a way to justify its involvement in civil wars, which produced shocking pangs of conscience. The debate on the qualification of humanitarian disasters as "threats to international peace and security"[12] it resolved itself, because there were many crises in the 1990s that had been the object of the Security Council's action, precisely for humanitarian reasons. The UN's responses in Rwanda and Kosovo

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[9] Greenberg Research, *The People on War Report*, Geneva: ICRC, 1999, xvi.

[10] Antonio Donini, Larry Minear, Ian Smillie, Ted van Baarda & Anthony C. Welch, *Mapping the Security Environment: Understanding the Perceptions of Local Communities, Peace Support Operations, and Assistance Agencies*, Medford, MA: Feinstein International Famine Center, June 2005, p. 53.

[11] Rama Mani & Thomas G. Weiss (eds), *The Responsibility to Protect: Cultural Perspectives in the Global South*, London, Routledge, 2011.

[12] The legal basis of the coercion specified in Chapter VII of the UN Charter.

highlighted a lack of political will, but at the same time reflected the obstacle generated by traditional state sovereignty.

The creation of a new debate framework between state sovereignty and human rights was particularly facilitated by the existence of two previous conceptual approaches, which paved the way for the launch of a real polemic in multilateral diplomacy on the concept of the responsibility to protect. First was the normative theory on the problem of internally displaced persons[13].

The second was the activism of UN Secretary-General Kofi Annan in promoting individual sovereignty as a concept to run alongside that of state sovereignty.

Concerned with finding a way to protect the ever-increasing number of victims of atrocities, the authors of the first mentioned approach have argued since the late 1980s that when states are unable to provide protection and vital assistance to their citizens, they are expected to request and accept external offers of help. If they deliberately deny or prevent access to their displaced populations and put large numbers of them at risk, there is an international responsibility to respond.

This doctrinal vision is based on one of the sovereign attributes of the state, that of being responsible for the fate of the people under their jurisdiction, implicitly respecting human rights, as an imperative norm assumed by them at the international level.

According to the vision presented, sovereignty implies responsibility towards two separate legal systems, domestically towards one's own population and internationally towards the community of responsible states, in the form of respect for human rights and humanitarian standards. It follows from this opinion that sovereignty is not absolute, but contingent. A corollary to this theory would be that when a government massively abuses the fundamental rights of its citizens, its sovereignty is temporarily suspended.

The second key conceptual contribution belonged to the UN Secretary-General, Kofi Annan, who looked at the observance of human rights much more deeply than any of his predecessors and pleaded for

[13] Roberta Cohen & Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Washington, DC: Brookings Institution, 1998; Roberta Cohen & Francis M. Deng (eds), *The Forsaken People: Case Studies of the Internally Displaced*, Washington, DC: Brookings Institution, 1998.

humanitarian justifications that, in extreme cases, can legitimize the form of military intervention as well. On the occasion of several speeches by the UN Secretary General, from 1998-1999, with reference to this theme, it would be introduced on the intergovernmental agenda[14].

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Kofi Annan's challenge to the black-white binary reflected the shifting balance between states and the people under their jurisdiction as a source of legitimacy and authority. He sought to expand the concept of sovereignty to include both the rights and responsibilities of states.

The Secretary General's call was hard to ignore, especially after The Economist published its two concepts of sovereignty on September 18, 1999, which stated that: "State sovereignty, in its most basic sense, is being redefined. (...) States are now widely understood to be instruments at the service of their peoples, and not the other way around. (...) When we read the Charter today, we are more aware than ever that its purpose is to protect individual human beings, not to protect those who abuse them."

Shortly after this, at the opening of the General Assembly, the moral request of the future Nobel laureate was transmitted to the member states,

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[14] James Traub, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power*, New York, Farrar, Straus & Giroux, 2006.

being translated into six official languages of the UN[15]. A year later, Annan would set out his views, in diplomatic terms, at the Millennium Summit[16].

Within the General Assembly, there were, predictably, consistent reactions from China, Russia and several states in the global south, arguing that behind military interventions with a humanitarian purpose, interests of a different nature than stopping repeated and systematic violations can be hidden of human rights by the state authorities, the latter being only pretexts, which are often subjective.

As a result, the issue of any unilateral intervention without Security Council authorization, however many countries are involved in a coalition and for whatever reasons, including genuine humanitarian ones, remained in abeyance. According to an enthusiastic campaigner for the concept of responsibility to protect "the hard-won and proudly enjoyed sovereignty of a people is a sovereignty that is not easily relinquished or compromised"[17].

Annan's reframing of the responsibility to protect theme has helped shift the focus from the absolute rights of state leaders to compliance with international standards, at least in the face of mass atrocities.

The conclusion that emerges unequivocally from the position consistently expressed by Kofi Annan is that the sovereignty of a state is not above the human rights and fundamental freedoms of the people under its jurisdiction. The political level from which this vision was enunciated, from the highest international civil servant in the world, resonated strongly. Thus, the situation was created for the Canadian government to take the initiative to convene the International Commission on Intervention and State Sovereignty.

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[15] Kofi A. Annan, The Question of Intervention—Statements by the Secretary-General, New York: UN, 1999. For an analysis of the implications of his September 1999 speech to the General Assembly, see Thomas G. Weiss, "The Politics of Humanitarian Ideas", Security Dialogue 31:1, 2000, pp. 11-23.

[16] Kofi A. Annan, *We the Peoples!: The United Nations in the 21st Century*, New York: ONU, 2000.

[17] Gareth Evans, "Foreword", in Thakur, *The United Nations, Peace and Security*, xiv.

2. The role of multilateral diplomacy in launching the concept of the responsibility to protect

The most vocal state in promoting the concept of the responsibility to protect is Canada, which has emerged as a country strongly engaged in multilateral diplomacy centered on the UN, with substantial involvement in the world organization, political credibility in both the North and the South, and having a tradition of successful global initiatives.

After the vehement criticism of Annan in the fall of 1999, Foreign Minister Lloyd Axworthy proposed the establishment of the ICISS, presiding in Ottawa in November 2000 over the first of five sessions of this Commission[18]. After his retirement from politics, the work of the Commission was continued by his successors.

The Canadian initiative was joined by other like-minded countries, including Norway and Switzerland, as well as major foundations such as MacArthur and other non-governmental actors such as the ICRC, which worked closely with ICISS. Notably, Canada has been a pioneer in mobilizing resources and providing logistics on this issue.

The first and most important challenge faced by the Commission, which acted as a "norm entrepreneur", was to find a way to overcome the inherent obstacle between compliance with two imperative norms, state sovereignty and non-interference in internal affairs, on the one hand on the one hand, and military intervention to support humanitarian objectives on the other. In this context, humanitarian imperatives and principles of sovereignty were reconciled by launching the idea of the responsibility to protect, with substantial conceptual and political consequences.

The shift of the center of interest towards the concept of the responsibility to protect, from a marginal subject in international relations to the center of them and, in particular, multilateral diplomacy within the UN, was a natural consequence of the interest shown by a wide range of actors involved in the debates within the Commission.

Kofi Annan himself launched the question to which the international community was invited to find solutions: "If humanitarian intervention is indeed an unacceptable attack on sovereignty, how should we respond to

[18] Commission meetings were held in Wakefield, Canada (August 2000), Ottawa (November 2000), Maputo (March 2001), New Delhi (June 2001), and Brussels (September 2001).

a Rwanda, a Srebreniča – to the blatant and systematic violations of human rights that offends our every precept? common humanity?"[19]

As many international issues that are analyzed within the UN, the responsibility to protect should answer the question of whether responsible sovereignty is really a North-South issue[20]. The expansion of the ICISS and the consultations that took place within it proved that differences between and within developing regions (Africa, Asia and Latin America), as well as between governments and civil society within countries, were more nuanced than tones black and white stereotypes attributed to North and South.

In the ten consultations that took place with the aim of arguing the need to assume the norm of the responsibility to protect, organized both in the northern and southern hemispheres, the opinions of governments, scholars, intergovernmental and non-governmental humanitarian actors, as well as journalists were requested[21].

Even if the expected result was not achieved through these efforts, a notable result was that the participants recognized the existence of circumstances in which intervention is justified to support humanitarian objectives. After the Rwandan genocide, very few policymakers, experts or practitioners, were willing to rule out intervention to protect against mass murder.

The international context, however, was one that favored the interest of public opinion on the subject analyzed through the publication of the ICISS report in December 2001, which was de facto completed in August 2001, shortly after the September 11 terrorist attacks on the United States, when attention the world focused on the consequences and reactions to that condemnable event worldwide.

Shortly thereafter, the invasion of Iraq and the ousting of Saddam Hussein by a US-led coalition, which acted without UN authorization, was even more damaging to the intentions of promoting a new international norm to legitimize the responsibility to protect.

[19] Report of the Secretary-General on the Organization's activity, UN document A/54/1, 1999, p. 48.

[20] Thomas G. Weiss, "Moving Beyond North-South Theatre", *Third World Quarterly* 30:2, 2009, pp. 271-84.

[21] Round tables and consultative meetings were held, in chronological order, in Ottawa, Geneva, London, Maputo, Washington DC, Santiago, Cairo, Paris, New Delhi, Beijing and St. Petersburg.

First, as tensions rose in 2002 and early 2003, few had time to focus on the issue of the responsibility to protect.

Second, as the justification for the American intervention turned out to be baseless, both the one accusing Iraq of possessing weapons of mass destruction and the one claiming that Saddam's regime had close ties with Al- Qaeda, which proved false, the coalition led by Washington and London as the main belligerents, began to apply ex post facto humanitarian language and even the responsibility to protect as the main justification for their actions in Iraq.

In the context of the fight against terrorism, Richard Haass, former director of the US State Department's policy planning unit and chairman of the Council on Foreign Relations, spoke of sovereignty as a responsibility and argued that when states fail to fulfill their responsibility to the fight against terrorism, "America will act, ideally with partners, but alone, if necessary, to hold them accountable."[22]

As a result of these events the promising diplomatic process started by ICISS has significantly diminished its activity. The war in Iraq brought the discussion on the responsibility to protect to a temporary halt.

3. Conceptual developments regarding the responsibility to protect in multilateral diplomacy

It can be said that the results of multilateral diplomacy since the publication of the ICISS report in December 2001 suggest that the responsibility to protect had moved from the stage of a simple report of the International Commission to one where it aspired to become a pillar of international public policy. In this context, some authors consider the Commission's report to be "a blink of an eye in the history of ideas"[23].

The theme of the protection of the human being against abuses by national authorities has substantial potential to further evolve in customary international law and to contribute to the dialogue launched in multilateral diplomacy regarding the responsibilities of states as legitimate, rather than wrongful, sovereigns.

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[22] Richard Haass, "When Nations Forfeit their Sovereign Privileges", *International Herald Tribune*, February 7, 2003.

[23] Evans, *The Responsibility to Protect*, p. 28.

Prior to the World Summit agreement on the Responsibility to Protect, in 2004 the UN HLP published the paper A Safer World: Our Shared Responsibility which supported the "emerging norm that there is a collective international responsibility to protect"[24].

Annan advocated this approach in his 2005 report, In Larger Freedom[25]. In addition to the formal adoption in the General Assembly in October 2005, the Security Council made specific references to the responsibility to protect. We mention in this regard Resolution 1674 of April 2006 on the protection of civilians in armed conflict, which "expressly reaffirms the provisions of paragraphs 138 and 139" and Resolution 1706 of August 2006 on Darfur, which was the first to link the responsibility to protect from a certain conflict.

Beyond simply listing the documents, we find it useful to analyze some content aspects. The HLP reaffirmed the importance of the terminological shift from the deeply divisive humanitarian intervention to the responsibility to protect. Their report explicitly supported the ICISS argument that "the issue is not any state's right to intervene, but each state's responsibility to protect"[26]. He proposed five criteria of legitimacy: seriousness of threat, appropriate purpose, last resort, proportionate means and balance of consequences[27].

An important moment that suggested a wider profile of the norm is China's June 2005 official document on UN reforms, which noted that "Each state bears the primary responsibility to protect its own population... When it has a massive humanitarian crisis, the legitimate concern of the international community is to ease and defuse the crisis"[28].

Meanwhile, in the United States, the Gingrich-Mitchell task force has supported the responsibility to protect, including calls for the norm to be confirmed by the Security Council and the General Assembly[29]. We note

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[24] High-level Panel (HLP) on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, New York: United Nations, 2004, para. 203.

[25] Kofi A. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, New York: United Nations, 2005.

[26] HLP, *A More Secure World*, para. 201.

[27] HLP, *A More Secure World*, para. 207.

[28] *Position Paper of the People's Republic of China on the United Nations Reforms*, Beijing, June 7, 2005, Part III.1, "Responsibility to Protect".

[29] "American Interests and UN Reform", Report of the Task Force on the United Nations, Washington DC, US Institute of Peace, 2005, p. 15.

some ICISS experts who argued that Iraq would not have met the conditions/criteria for legitimizing an intervention in the name of the responsibility to protect[30].

In this context, the Commission addressed several audiences that could have helped promote dialogue on the responsibility to protect: politicians (intergovernmental and governmental officials), academics and civil society[31].

The Canadian government held consultations with governments, regional organizations and civil society forums to help promote the Report. As the message gained resonance, many civil society organizations began advocacy and dissemination activities on their own. All the while, Kofi Annan remained fully involved in the matter.

In his own report before the World Summit, Annan made explicit reference to the ICISS and the responsibility to protect as well as the HLP, endorsed the legitimacy criteria and urged the Security Council to adopt a resolution setting out these principles and expresses its intention to comply with them when authorizing the use of force. The report also states that this approach "would add transparency to its deliberations and make its decisions more likely to be respected, both by governments and by global public opinion."[32].

The responsibility to protect was one of the few substantive elements that survived the negotiations at the World Summit in New York in September 2005[33]. Some proponents criticized the summit's emphasis on the state and the requirement that coercive measures be authorized by the

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[30] Gareth Evans, "Humanity Did Not Justify this War", *Financial Times*, May 15, 2003; Ramesh Thakur, "Chrétien questioned need to redefine 'just war'", *Globe and Mail*, July 22, 2003 and *Iraq and the Responsibility to Protect*, 62:1, Toronto, Canadian Institute of International Affairs, October, 2004.

[31] Evans' views on the responsibility to protect are summarized in his work, *The Responsibility to Protect*, and on the International Crisis Group website, and Thakur's writings span a wide range of formats, from his work, *United Nations, peace and security*, to the scholarly articles collected in *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics*, London, Routledge, 2011, and newspaper opinion pieces collected in *The People vs. the State: Reflections on UN Authority*, *US Power and the Responsibility to Protect*, Tokyo, United Nations University Press, 2011.

[32] Annan, *In Larger Freedom*, pp. 122-35.

[33] Thomas G. Weiss & Barbara Crossette, "The United Nations: The Post-Summit Outlook", in *Great Decisions 2006*, New York: Foreign Policy Association, 2006, pp. 9-20.

Security Council, and others felt that the language in paragraphs 138-139 of the World Summit Outcome Document was more comprehensive than the original ICISS version[34].

Despite criticism, the document represented a step forward in a long journey. The concept has been given its own sub-section and title, making clear the need for international intervention when countries fail to protect their citizens from mass atrocities or, more likely, actively perpetrate mass atrocity crimes. The language reflects an unequivocal and unanimous acceptance of individual state responsibility, particularly to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Member States further asserted their readiness to take collective action, in a timely and decisive manner, through the Security Council, and in cooperation with relevant regional organizations, as appropriate, where peaceful means are inadequate and national authorities do not they clearly succeed in protecting their populations. At the same time, the heads of state and government gathered in New York emphasized the need for the General Assembly to continue to analyze the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

However, the criteria of legitimacy that, at the same time, would make the Security Council more receptive than before to the triggering of humanitarian atrocities and would make it more difficult for individual states or ad hoc coalitions willing to appropriate the language of humanitarianism for geopolitical interventions and unilateral[35].

The idea has since been incorporated into the UN agenda. Secretary-General Ban Ki-moon appointed a full-time Special Adviser on the Prevention of Genocide (Francis M. Deng) and a Special Adviser on Promoting the Responsibility to Protect (Edward C. Luck). He referred to the implementation of the responsibility to protect as one of his priorities.

[34] Alex J. Bellamy, "Whither the Responsibility to Protect?", *Ethics and International Affairs* 20:2, 2006, pp. 143-69.

[35] *2005 World Summit Outcome*, adopted by the UN General Assembly by Resolution A/RES/60/1, October 24, 2005, para. 138-40.

It launched Implementing the Responsibility to Protect in January 2009[36], outlining a three-pronged approach:

- the protection responsibilities of individual states;
- international assistance and capacity building for states in need;
- timely and decisive international responses to mass atrocities.

The Secretary-General and the Secretariat emphasized the first two pillars, thereby trying to resolve the remaining controversy primarily on the subject that had sparked the debate, namely the use of military force, when necessary, to stop mass atrocities.

Although the norm of the responsibility to protect has experienced a rapid emergence, it is still at the beginning of its crystallization. Secretary General Ban Ki-moon stated in debates under the UN dome that: "the responsibility to protect speaks to the things that are noblest and most enduring in the human condition. We will not always succeed in this cardinal undertaking, and we are only taking the first steps in a long journey. But our first responsibility is to try."[37].

The diplomatic efforts initiated by ICISS continued to be a very important impetus for civil society and governments supporting the legitimization of the concept of the responsibility to protect, to make skeptical countries and the UN bureaucracy take seriously the words of the UN Secretary-General.

In mid-2009, 2010, 2011 and 2012, the General Assembly engaged in informal interactive dialogues, further steps in the normative journey of the responsibility to protect. The member states of the "Group of Friends" responsible for protecting in New York, the UN Special Adviser and civil society took over the theme from the previous "norm entrepreneurs"[38]. They drew on the example of successful campaigns to form wider groups to debate outstanding issues, such as the ban on landmines and the establishment of the International Criminal Court, and mobilized around the Secretary-General's report.

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[36] Ban Ki-moon, *Implementing the Responsibility to Protect*, Report of the Secretary-General, UN document A/63/677, 12 January 2009.

[37] Ban Ki-moon, "Address of the Secretary-General, Berlin, 15 July 2008", document ONU SG/SM/11701.

[38] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change", *International Organization 52:4*, 1998, pp. 887-917; Thomas Risse, Stephen Ropp, & Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999.

Initially, many observers feared that the debate would lead to a dilution of the September 2005 commitment. Fears of resuming efforts in a normative direction seemed quite concrete. For example, on the eve of the 2009 debate, The Economist described how opponents of the rule "sharpened their knives"[39]. The Nicaraguan President of the General Assembly, Father Miguel d'Escoto Brockmann, expressed his Marxist opinion and suggested that "a more accurate name for responsibility would be the right to intervene" or "redecorated colonialism"[40].

However, opponents of the emerging norm had to acknowledge the visible shift from antipathy to wider public acceptance of the draft norm[41]. A close reading of the statements made by diplomats from ninety-two countries and two observers who addressed the first interactive dialogue does not indicate a firm and unequivocal position against the crystallization of a customary norm on the responsibility to protect.

The 2005 World Summit agreement was viewed with reservations only by Venezuela, and only four of the usual skeptics tried to overturn the previous consensus (Venezuela, Cuba, Sudan and Nicaragua). Countries such as Rwanda, Bosnia, Guatemala, Sierra Leone and East Timor, which had suffered terrible atrocities, continued to make encouraging calls to strengthen and implement the responsibility to protect.

Other states such as Chile, South Korea and Western states continued to express their support in favor of this project. More surprising was the growing consensus and support from previously reluctant or even hostile regional Powers, including Brazil, Nigeria, India, South Africa and Japan. Of course, concerns about implementation, thresholds and inconsistency remained.

General Assembly Resolution 63/208 of 2009 enjoyed a wide audience among representatives from all regions for the responsibility to protect, and in August 2010, debates continued around the Secretary-General's report on early warning and resulted in December, the creation of a new joint office.

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[39] "An Idea whose Time Has Come – And Gone?", *The Economist*, 23 July 2009.

[40] Statement by the President of the General Assembly, Miguel d'Escoto Brockmann, at the opening of the 97th session of the General Assembly, 23 July 2009.

[41] For details, see the reports of the Global Centre for the Responsibility to Protect, available at: *http://globalr2p.org/advocacy/index.php.*

In July 2011, the dialogue was addressed to regional organizations and in 2012 it focused on pillar three. During the four years of interactive dialogues, the vast majority of states involved in the debate reaffirmed their support for the emerging norm and supported the continuation of the discussions. At the same time, unsurprisingly, the usual detractors continued to question the definition of the concept of responsibility to protect and previous agreements.

At the same time, the results of network diplomacy have also advanced operationally. Reference has already been made to Security Council resolutions 1674 of 2006 on the protection of civilians in armed conflict and 1706 on Darfur. Behind-the-scenes talk helped the responsibility to protect move beyond electoral violence in Kenya in 2007-2008[42]. It has been misapplied, temporarily, in Myanmar, Georgia and Iraq, but even these abuses, almost universally contested, have actually strengthened the belief that such a rule is necessary[43].

However, the first significant operational references came against Libya in 2011. Resolution 1970 had unanimous support for a substantial package of Chapter VII efforts (arms embargo, asset freeze, travel bans and referral of the situation to the International Criminal Court), and Resolution 1973 authorized "all necessary measures" to impose a no-fly zone and protect civilians.

In addition, the Human Rights Council first referred to the responsibility to protect in Resolution S-15/1, which led to General Assembly Resolution 65/60 which suspended Libya's membership of that Council.

Not only the rhetorical and military support of NATO in the region, but also the international efforts to stop Muammar el-Qaddafi's threat to exterminate those who opposed him were noteworthy, because since the publication of the ICISS report they have not there have been too many instances of the use of force to protect civilians.

Efforts in Libya remain contested and uncertain even at the time of writing, but the international reluctance to oust Laurent Gbagbo and install Alassane Ouattara in Côte d'Ivoire provided a stark contrast. After

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[42] Thomas G. Weiss, "Halting Atrocities in Kenya", in *Great Decisions 2010*, New York: Foreign Policy Association, 2010, pp. 17-30.

[43] Cristina Badescu & Thomas G. Weiss, "Misrepresenting R2P and Advancing Norms: An Alternative Spiral?", *International Studies Perspectives* 11:4, 2010, pp. 354-74.

Gbagbo's departure in April 2011, there followed half a year of slowing down efforts, during which the untold disaster in Ivory Coast took place.

The Security Council has threatened the loser of the November 2010 election three times and reiterated its authorization to "use all necessary means to fulfill its mandate to protect civilians". The refusal to deploy armed forces before the UN action in early April, led by the 1,700-strong French Licorne contingent, favored Gbagbo's intransigence.

In this context it is legitimate to ask whether it was necessary to allow the commission of war crimes, crimes against humanity, a million refugees and a devastated economy, and whether strong international military action should not have taken place earlier.

In addition to staunch defenders of sovereignty and critics of the military, another type of critic is found among advocates of humanitarian action, who emphasize the potential for the responsibility to protect to backfire. The expectation of benefiting from possible external intervention (including sanctions, embargoes, prosecution and military force under its rubric) encourages sub-state rebel groups to either launch or continue fighting[44].

International hesitancy likely affected the calculations of law enforcement and local elites, even leading them to take actions that likely had the effect, both intentionally and unintentionally, of prolonging the violence. However, we do not know if, starting from this fact, it can be stated that humanitarianism is destined to constitute a moral hazard.

For example, if the ICC's arrest warrant for Sudanese President Omar al-Bashir is as bland a threat as the use of external military force to phase out the genocide in Darfur, then the problem is not moral hazard, but empty rhetoric at all mobilizer of the collective. The moral hazard argument, if taken seriously, would lead to the conclusion that a commitment to do nothing is more appropriate, thereby renewing the license to kill to would-be interlocutors[45].

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[44] Alan J. Kuperman, "Mitigating the Moral Hazard of Humanitarian Intervention: Lessons from Economics", *Global Governance 14:2*, 2008, pp. 219-40; "The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans", *International Studies Quarterly* 52, 2008, pp. 49-80; "Darfur: Strategic Victimhood Strikes Again?", *Genocide Studies and Prevention* 4:3, 2009, pp. 281-303.

[45] Michael Barnett & Thomas G. Weiss, *Humanitarianism Contested: Where Angels Fear to Tread*, London, Routledge, 2011, cap. 10.

4. Conclusion

Contemporary multilateral diplomacy, which in the case of the responsibility to protect was boosted by the work of the International Commission on Intervention and State Sovereignty, has involved far more stakeholders than the variety of actors offered by bilateral diplomacy, which is the core curriculum in most diplomatic academies. It is also quite different from the secret diplomacy of the Great Powers, which is the rule of thumb for most economic and political negotiations within the United Nations.

This study argued that network diplomacy helped transform the normative landscape for stopping mass atrocities, rather than a small number of state representatives situated in a hierarchical structure, using opaque communications. ICIS began a process that mobilized individuals, a research directorate, civil society and worldwide consultations with academics, NGOs and the media, starting in 2001.

The concept of the responsibility to protect has gone through extensive intergovernmental processes with support and monitoring from a large number of organizations and private individuals. It is now part of the discourse used by states, promoted or rejected by some of them (itself an indication of its importance), as well as by public and private actors.

The argument in this study justifies us to ask whether multilateral diplomatic efforts should not consider collective *mea culpa* in the wake of the Rwandan genocide. Since the Iraq War, and particularly during the administration of UN Secretary-General Ban Ki-moon, the international community's move to use military force to stop the killing of some 800,000 Rwandans has ceased to be seen as anemic and belated.

Attention gradually turned to critics of the so-called new militarism, a criticism revived from the pioneering days of the responsibility to protect, when it was seen as a Trojan horse of Western neo-imperialism. In relation to Kosovo, many international lawyers considered that the intervention was decided and carried out in haste and was disproportionate in relation to the objective pursued.

Also, the completely dishonest justification of the invasion of Iraq in humanitarian terms, coming after the invalidation of other justifications (al-Qaeda links and possession of weapons of mass destruction), raised serious questions about the release of a norm of responsibility to protect.

Many analysts refer to Clausewitz's dictum that soldiers take over when diplomacy fails, and diplomats stand back and leave conflict resolution to the military to do politics by other means. Ironically, the responsibility to protect requires diplomats to achieve success in negotiations, either to reach agreement on preventive measures or on the use of force. If the negotiated solution is the use of force, the diplomats withdraw and the soldiers do what the diplomats cannot, which is to stop the atrocities.

Even a cursory glance at Darfur, the Democratic Republic of the Congo, Zimbabwe or Syria suggests that the central problem in stopping mass atrocities today is not the fragility of the normative base that should legitimize military intervention for human protection purposes.

Military force, with or without a justification such as the responsibility to protect, is obviously not a panacea, and its use is not a reason for satisfaction. However, for negotiations to succeed, other preventive measures and ultimately the safety of civilians must be credible, where stopping mass atrocities occasionally requires the use of military force, and always the threat of doing so.

However, international action since 2011 suggests that contemporary network diplomacy has led to a concrete outcome, namely the profiling of the responsibility to protect as a possible customary norm, being largely recognized by states, even if not assumed as such.

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IN THE BEGINNING WAS THE WORD

Rațiu Flavia Simona PETRIDEAN*

ABSTRACT

The binding force of the contract has its source in the will of the parties, the human will being the essential element of the contract, the parties bearing the consequences of their own intentional manifestations of will. The respect for the word given by the parties involved in the contractual relationship, postulates the trinity of fundamental principles applied in the contractual legal regime. The scope of the contractual provisions is broad and relates both to the parties' agreement of will and to their purpose in concluding the contract. Basically, the clauses are the fruit of the convergent will of the parties, through which rights are acquired and obligations assumed, giving authenticity to the will expressed, with the contracting parties becoming a kind of Chronos of the content of the legal relationship that has emerged.

KEYWORDS: *human will; animus contrahendi; obligatory legal relations;*

"Contracts are based on trust, their function being to reinforce the word given".

(Dan-Adrian Cărămidariu)

Brief introductory remarks

The legal literature on private law shows that the main source of legal relations of obligation is to be found in a qualified form of social relationship, such as the contract, which has a creative epicentre, circumscribed by the fruit of the wills of the parties involved. The contract is the creation of individual wills that meet in agreement, legitimising the contract with a legally binding existence, provided that there is an intention to produce legal effects, the result being the generation of rights and duties

* *Ph.D. Student, "Titu Maiorescu" University, Law Doctoral School, Bucharest, Romania. Ph.D. student Bucharest University, Doctoral School of Political Sciences.*

for the parties involved. Basically, the contract is based on mutual consent, given for the purpose of creating a legal relationship, which creates and establishes the content of the contract, on the legal basis of freedom of contract, a principle which gives expression to the freedom of the individual, under the guidance of the theory of autonomy of will. An individualist trend, which promotes the idea of freedom as a natural faculty of man, which only he can renounce, as a consequence of living in an organised society, on the basis of a social contract, which stems from human reason[1] itself. Such a provision has been built up in law, on the basis of contractual freedom, and is attributed to every subject of civil law, as *"part of the content of the civil capacity of natural and legal persons[2]"*. An energy which transforms the will of the parties into an element of viability of the legal act, which guarantees its existence, with the proviso that it must act in accordance with the limits imposed by objective law. A firewall imposed by the *"prohibitive and imperative prescriptions of the law[3]"*, in the face of the vulnerability of the free will, which is given a licence to choose a creative behaviour, producing legal effects, which will result in concrete actions.

It is also true that legal rules will not always succeed in balancing the rights and obligations of the parties involved, because they are forced to tolerate to some extent the consequences of the parties' own wills, which invariably entails the belief that each will behave ethically and morally towards the other in the freedom of interaction.

The subjects of the law are able to act according to their own wishes in order to achieve social needs, through prerogatives such as freedom of interaction, freedom to determine the content of the contract, and latitude as to the specific method of contracting. Thus, the contract has as its

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[1] See, Ioan Albu, *Drept Civil. Contractul și răspunderea contractuală*, Dacia Publishing House, Cluj-Napoca, 1994, p. 24. Fundamentarea în plan juridic a teoriei autonomiei de voință, s-a transpuns în baza concepțiilor enunțate de către filozoful elvețian J.J. Rousseau (*Contractul social*) și a filosofului german I. Kant (*Întemeierea metafizică a moravurilor. Critica rațiunii practice*). [*The legal foundation of the theory of autonomy of will was based on the concepts of the Swiss philosopher J.J. Rousseau (The Social Contract) and the German philosopher I. Kant (The Metaphysical Foundation of Morals. The Critique of Practical Reason*)].

[2] Ioan Adam, *Drept civil. Teoria generală a obligațiilor*, All Beck Publishing House, Bucharest, 2004, p. 28.

[3] *Ibidem*, p. 27.

gravitational centre consent, which has two meanings, one as *"a manifestation of the will of each of the contracting parties, by which they consent to the conclusion of a contract*"[4], and the other as the agreement of wills itself, which forms the basis of the contract.

At its core, whether we are talking about a declaration of the will of one party or a concordant meeting of the parties, the foundation of the legal edifice lies in the individual will, representing the capacity of the individual to act rationally to achieve elaborate goals. In this sense, consent, as a manifestation of unilateral will, sets out the decision to enter into a contract, which must be externalised in order to have a legal value that sets the creative process in motion.

The internal form, as a psychological act, constitutes the process of will formation, but it is only a reality when it can be perceived by others, so that the wills can compete and agree on the essential elements, giving it substance, on the basis of the principle of freedom of will in matters of contracts. The conclusion of contracts is therefore based on an offeror, who makes an initial expression of an individual will to contract, which, if perfected, meets the will of the addressee, and which together form the agreement of wills of the contracting parties[5]. A tripartite scheme which encompasses the whole process involved in the conclusion of the contract, from the point of view of consent.

Concerning the intentional element, it should be noted that, strictly speaking, a conscious and externalised will is merely a legal fact, to which an intentional factor must be associated as a vector of purpose[6]. In the absence of *animus contrahendi*, agreements of will *"do not generate obligations and have no legal effect*"[7]. For example, in the case of non-legal transactions, they can often be mistaken for genuine contracts, based on the intention of the parties involved, but the dissension arises from the fact

[4] Ioan Adam, *Tratat de drept civil. Obligațiile. Volumul I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 129.

[5] See, Ioan Albu, *Drept Civil. Contractul și răspunderea contractuală*, Dacia Publishing House, Cluj-Napoca, 1994, p. 70.

[6] See Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 2.

[7] Ioan Adam, *Tratat de drept civil. Obligațiile. Volumul I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 26.

that they lack a legal cause, the effects being mere facts[8]. A natural link, which does not produce legal effects, in that social framework. In this respect, we recall acts of complicity or mere courtesy, which, in the absence of *animus contrahendi*, cannot generate obligations.

It is also true that the principle of consensus is associated with the way in which the legal will is expressed, with the proviso that the law allows the parties to derogate from this principle by their own will and to resort to the performance of solemnities, raising form to the level of an essential element. The appeal to substantive formalism is also a natural faculty of the parties, given that the contract is the *"privileged instrument of individuals"*[9], on the basis of which complex rules for managing contractual relations can be established. The *ad validitatem* conventional form, however, entails a number of theoretical and practical uncertainties when Article 1242(2) of the Civil Code is invoked, but in order to safeguard the text, we consider that the hypothesis refers to the impossibility of proving the legal operation, being an agreed *ad probaționem* form. Otherwise, the very individual freedom of the person would be violated, because the formal source of the form is the will of the parties itself[10], which imposes long-term effects. In extenso, not only the clauses must take the form *ad solemnitatem*, but also all agreements with which relations of interdependence are to be established, and even more, they are incompatible with the tacit expression of will[11].

The body of law is therefore obliged to maintain a conciliatory relationship with the concepts imposed under the theory of autonomy of wills, so as not to jeopardise its nature, which governs the contractual institution. The entire existence of the contract is based on the social edifice which the will of the parties creates and which must be interdependent with objective law. Moreover, "*the law has the duty to maintain the coexistence*

[8] See, Paul Vasilescu. *Drept civil. Obligații. În reglementarea Noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 235.

[9] Vasile Pătulea, *Clauzele contractuale*, Editura Universitară, Bucharest, 2015, p. 7.

[10] See, Alinel Bodnar, "*Aspecte privind formarea contractului în viziunea Noului Cod Civil*", in the Magazine Dreptul No. 8/2013, Year CXLII. New series Year XXIV, pp. 16-19.

[11] See, Ioan Adam, *Tratat de drept civil. Obligațiile. Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, pp. 370-371.

between the general will and the individual will"[12] by creating a harmonious legal framework within which individual wills can develop autonomously. However, guaranteeing a social order in a legal regime can only be done on the basis of the law, which is the only one empowered to maintain a degree of universal objectivity that ensures security in the contractual legal regime. The will must be linked to public order and good morals, and there is no reluctance to curtail the freedom of the legal will, because, as the father of utilitarian philosophy, John Stuart Mill, put it: "*Your freedom ends where another's freedom begins*".

And although the precepts of the theory of autonomy of wills sometimes seem to fall into duality, on the principle that "*the possibility of contracting arises objectively from the law and only subjectively from the will of the contracting parties, i.e. the parties can contract because the law allows them to*"[13], it retains its legal force despite the metamorphosis of the volitional aspects that we have witnessed in recent decades. After all, people are free to enter into any contract, even if in recent times agreements have become the power of a unilateral will, the freedom to interact even minimally, i.e. the power to express consent, remains at the disposal of the other contracting party. In that simple confirmatory act of acceptance of the conditions imposed by the other participant lies a force of commitment, in the absence of which the other party has no legal force either. In this sense, we could say that when we speak of contracts, the intention to create, modify or extinguish a civil legal relationship implies at least a bivalent collusion, the non-existence of the individual will of one of the parties involved in such discussions, determining the non-existence of the bilateral legal act, a throwing into nothingness, of the entire supposable content.

In this context, practitioners are reluctant to accept that contractual freedom is compatible with legal provisions, but only in this form does the legal obligation obtain validation, with promotion to the rank of law between the parties, and since the contract itself is the product of the wills of the parties involved in the interaction, it should have a fair and legitimate nature, which should not require the intervention of the rules of

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[12] Ioan Adam, *Drept civil. Teoria generală a obligațiilor*, All Beck Publishing House, Bucharest, 2004, p. 28.

[13] Ioan Albu, *Drept Civil. Contractul și răspunderea contractuală*, Dacia Publishing House, Cluj-Napoca, 1994, p. 27.

objective law. It is just that the hypothesis of a relationship free of abusive or good faith interference is a reality that is difficult to achieve even within the current limitations, let alone in their absence. Individual freedom being relative, regardless of the dimension in which it is approached, constraints being of many kinds, it becomes a sensitive issue, not only for the legislator or the parties involved, but for any entity, which is part of a society, and since man is a social being, the maintenance of relationships, in this case legal ones, is vital.

The generative energy of the will

Just as God is the essence of life – "*In the beginning was the Word and the Word was with God and God was the Word*"[14] – so in the case of contracts, the foundation is reflected by the agreement of wills. By the phrase *agreement of wills* a concordant intertwining is meant of two or more individual wills, "*for the purpose of producing a legal effect, i.e. of conveying, modifying or extinguishing a right*"[15]. The parties are free to determine the effects of the contracts they conclude, based on the principle of freedom of will, which ensures "*complete freedom of contract, both as regards the freedoms of substance, i.e. the freedom to introduce all kinds of clauses, and freedom of form*"[16]. As can be seen from the pre-existing definitions in the specialist literature, but also from the legislator's understanding, according to Article 1166 of the Civil Code, the contract as a bilateral legal act requires at least two wills, "*on the one hand the will of the person who legally undertakes to perform a service, and on the other hand the will of the creditor to accept the commitment*"[17]. Their legal will is a first defining element, which must be accompanied by the intention to produce legal effects, i.e. it gives rise to, modifies or extinguishes the obligation. After all, the legal effects of a legal act are the very purpose for which they are concluded, an intentional search for a result. The relations generated, having as their aim the realisation of their content, which

[14] *The Holy Gospel of John*; Chapter 1; verse 1.

[15] I. Rosetti-Bălănescu, C. Hamangiu, Al. Băicoianu, *Tratat de drept civil, Vol. II*, Editura Națională S. Ciornei, Bucharest, 1929, p. 788, *apud* Ioan Adam, *Drept civil. Teoria generală a obligațiilor*, All Beck Publishing House, Bucharest, 2004, p. 26.

[16] Ioan Adam, *Drept civil. Teoria generală a obligațiilor*, All Beck Publishing House, Bucharest, 2004, p. 27.

[17] *Ibidem*, p. 45.

reveals as their essence, states of law, exposing both subjective rights and civil obligations[18].

In this context, it should be noted that the legal relationship of obligation has an active side involving a creditor and a claim, and a passive side identifying a debtor and a debt, who is bound either by a positive performance (*giving, performance*) or a negative performance (*nonperformance*). There is therefore a legal connection, whereby the creditor is entitled to require the debtor to provide the service to which the debtor is indebted. For example, sale is a synallagmatic contract, whose mutual and interdependent obligations show that "*the performance of one party is the cause of the obligation assumed by the other party*"[19]. In this case, we are dealing here with a complex relationship of obligation, in which the parties have a dual status, since both the buyer and the seller are creditors of one performance and debtors of another. The contractual field also covers legal relationships in which the obligations are unilateral, as in the case of a gift contract[20].

We have therefore seen, according to Article 1164 of the Civil Code, that the obligation is a legal relationship established between two persons, with the proviso that the sources may be multiple, but the relationships arising from civil contracts are of a subjective nature, since they are determined by the will of the parties, which plays an important role in the creation of the obligation. In this sense, the contract, as a creative act, generates subjective rights, correlated with obligations that are consistent with these rights, by reference to the role of the will in producing legal effects. It will say "*the legal relationships generated by the intentional will of the parties, as a conscious act, do not represent an end in themselves, but the realisation, through their content, of the rights and obligations of the parties*"[21].

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[18] See to this purpose, Paul Vasilescu. *Drept civil. Obligații. În reglementarea Noului Cod Civil*, Hamangiu Publishing House, Bucharest, 2012, pp. 228-232.

[19] G. Boroi, C.A. Anghelescu, *Curs de drept civil. Partea generală*, Hamangiu Publishing House, Bucharest, 2011, p. 114. *Apud* Liviu Stănciulescu, *Curs de drept civil. Contracte*, ed. a 2-a, Hamangiu Publishing House, 2014, p. 108.

[20] See Ioan Adam, Anca Roxana Adam, *Codul civil: Cartea a V-a – Despre obligații: Titlurile I-VIII (art. 1164-1649): Comentarii și explicații*; C.H. Beck Publishing House, Bucharest, 2016, pp. 8-11, in reference to Art. 1164 Civil Code.

[21] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 2.

Therefore, the contract is made for a specific purpose and the obligation is the means to achieve it, otherwise why would they assume certain commitments, limiting their natural freedom. Moreover, the assumption of an obligation for no particular reason denotes a lack of reason, which would affect the very viability of the agreement. After all, any manifestation of will must meet the conditions of validity required by law, thus giving authenticity to the very intention of modifying the civil circuit by generating private rules.

On the other hand, the contract as a legal category is practically exposed by its named or unnamed species. There is no limitation of contracts, the sphere of contractual freedom shows us that the parties have a choice between those contracts whose content is expressly regulated by the provisions of civil law, identified by special names, and those contracts which are exclusively the fruit of the will, the content being determined by the contracting parties. In the case of unnamed contracts, "*the rights acquired and the obligations assumed do not fall within any of the so-called special contracts*" and are therefore not identified by a separate name[22]. These contracts are the exclusive work of free will, which reveals an act of creation, which can contribute to the evolution of contractual diversity, as evidenced by the maintenance contract or supply contract, which under the old regulations were qualified as unnamed legal acts, but in the regulations of the New Civil Code, based on its specific regulations that practice and doctrine have developed, it was considered to be named agreements, benefiting from a special legal regime[23]. Moreover, even in the absence of a specific legal label, all contracts are subject to the rules regarding the conditions of validity, to which common law applies, but in the case of agreements that are not named, "*by virtue of freedom of will, the parties may dress up the operations they perform, in various contracts, without being bound to fall under any of the types of contracts provided for in the Civil Code or in the special laws*"[24].

Another reflection of the principle of freedom of contract is the classification of contracts according to the way in which the will of the

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[22] Ioan Adam, *Tratat de drept civil. Obligațiile. Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 104.

[23] See, Paul Vasilescu. *Drept civil. Obligații. În reglementarea Noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 257.

[24] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 147.

parties is expressed, i.e. their power to determine the content of the contract. On the one hand, we are talking about negotiated contracts, as the result of free discussions between the parties with a view to determining their content and terms by mutual agreement; on the other hand, the standard contractual formula of dictated contracts must be taken into account. Basically, this is an interpretation by ricochet of Article 1175 of the Civil Code, which overshadows the freedom of both parties to tighten up the content of the contract, since contracts of adhesion obstruct this right by the fact that the essential clauses are laid down by one of the parties, the other having only the option of accepting them without reservation or refusing them. They are therefore the exclusive work of a single party which strengthens its position by unilaterally predetermining the terms, democratically imposing its own law, and which implicitly sometimes creates a "*breeding ground for abuse of rights*"[25]. In this respect, professor Aurelian R. Ionașcu also stated in his lectures that in the case of these contracts, sometimes "*there is no longer moral, economic and discussion equality between the parties*"[26]. In the same sense, attention should also be drawn to forced contracts, as a species of standardised contracts, the content of which is not only established by law, but also by law we are obliged to conclude them. In fact, the entire classification is a systematic distribution of "*the different roles of the parties' wills in the conclusion of contracts (...) their binding force being identical (...) they have the force of law between the contracting parties*[27], because the essence of the agreement lies in the energy which the agreement of wills exudes.

Based on the classical dogma of the autonomy of the will, the principle of freedom of contract is particularly obstructed[28] in areas where traders

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[25] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Curs de drept civil. Obligațiile*, Universul Juridic Publishing House, Bucharest, 2015, p. 29.

[26] Prof. Aurelian R. Ionașcu, *Teoria generală a obligațiunilor în dreptul civil român. Note rezumative luate după cursul predat studenților anului II în anul școlar 1935-1936*. Written and published with the authorization of Professor; Student Ioan Rațiu; University of Cluj- Faculty of Law, Cluj, 1936, p. 37. Apud Central University Library "Lucian Blaga" Cluj-Napoca | (bcucluj.ro); Electronic version; accessed on 28 November 2023.

[27] Ioan Albu, Drept Civil. *Contractul și răspunderea contractuală*, Dacia Publishing House, Cluj-Napoca, 1994, pp. 49; 52.

[28] See to this purpose, Stanciu D. Cărpenaru, *Tratat de drept comercial român*. 5th edition, updated, Universul Juridic Publishing House, Bucharest, 2016, p. 415.

have a monopoly, as in the case of the municipal waste collection and transport service, which requires users, such as owners' associations, to conclude contracts only with the operator who is privileged and authorised by the local authorities to collect. Failure to comply with the above and the consequent refusal to conclude such a contract attracts fines. Therefore, in such a case, we can no longer speak of a manifestation of free will, because from the outset it imposes on us a contractual partner, the clauses being dictated by the provider. The challenge arises at the point where, as can be seen, the beneficiary no longer has the ability to adhere or not to this contract, and any conduct to the contrary would attract financial penalties, which I personally consider to be abusive to the detriment of the case-by-case users, but also to other operators who could provide the service on the basis of a much more advantageous offer. However, the obligation to hold a sanitation contract is not imposed haphazardly, but on the basis of a winning bid and tender documentation, validated by the administration, on the basis of a general interest in public health and environmental protection.

"*In other words, contracts are based on trust, their function being to reinforce the word given*"[29]. The contractual legal landscape helps to strengthen the security of the legal relationship initiated by people who in most cases are strangers to each other, and yet wish to create legally confirmed *family ties*. Having said that, it can be summarised that the contract as a creation is a "*qualified legal form of social relationship*"[30].

Conclusion

The ideological basis of the theory of autonomy of will shows us that the conclusion and binding force of agreements do not depend on the law, but on the exclusive will of the parties. Essentially, every human action involves a dose of will, except that in the case of the legal act, there is a concentrated action by which man "*seeks by candlelight a certain legal*

[29] Dan-Adrian Cărămidariu, *Contractul standard în afaceri. O perspectivă de law and economic*, Universul Juridic Publishing House, Bucharest, 2021, p. 210, *apud https://www.bcucluj.ro/* ; electronic version.

[30] Liviu Stănciulescu, *Curs de drept civil. Contracte*, ed. a 2-a, Hamangiu Publishing House, 2014, p. 23.

effect"[31], the volitional arc being the subjective element of the intention to be legally bound and to achieve an end. It is not by chance that the legal will, as the defining element of the agreement, is made up of consent and cause, because in the absence of purpose, consent remains a mere state of fact, without any legal relevance, the legal effects being states of law, which relate to rights and obligations, which may give rise to a judicial remedy. Therefore, the will animated by intention, makes the effects manifest, constitutive, modifying, but also extinctive[32]. However, this relationship requires a correlation with the limits imposed by the law, public policy and morality, because "*the relationship between the contract and its terms is the relationship between the general (common will) and the particular (individual will)*"[33]. In this context, the genesis of a contract begins with a so-called individual will, which creates a destiny according to the interaction of the subject at a moment prior to the conclusion of the contract, when an entire psychological process is triggered, whereby each party projects a duality of determining motive and declaratory decision which are mutually agreed, giving substance to the contract, by reaching agreement on the essential elements.

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[31] Paul Vasilescu. *Drept civil. Obligații. În reglementarea Noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 229.

[32] See, Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 2.

[33] Camelia Spasici, "*Conținutul contractului: de la clauze negociate, la clauze impuse și abuzive*", in Universul Juridic Premium No. 10/2021. Apud Lege5.ro | Viitorul documentării legislative; Accessed on 06.09.2023.

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THE RELEVANCE OF THE CONCEPT OF DISCRIMINATION IN LEGAL EMPLOYMENT RELATIONS

Dragoş Lucian RĂDULESCU[*]

ABSTRACT

Discrimination, as a legal institution, concerns the ways of establishing differentiations through the application of different legal treatments regarding the fundamental rights of people in comparable legal situations, thus affecting the principle of legal equality. As an effect of acts of discrimination, different legal situations can be created, including through the use of identical methods of treatment in the case of people not in comparable situations. The criteria applicable to the legal institution of discrimination have been clarified and limited as a result of the adoption of international norms, subsequently acquiring new legal values with their adoption in the national legislative system of various states. The article presents the evolution of the concept of non-discrimination, in international and European law, as well as the main elements necessary for the recognition and interpretation of the rules on equal treatment between employers and employees in legal employment relationships.

KEYWORDS: *discrimination; directives; criteria, international; European;*

Introduction

We can appreciate that in the legislative and jurisprudential field there has been a permanent evolution regarding the regulation and interpretation of the concept of discrimination, which determined the ways of expanding the criteria regarding discrimination.

Regarding the international norms that referred to the concept of discrimination, they originally provided limiting criteria, especially race, nationality, ethnicity, or religion. Later, they were followed by the introduction of those that targeted social category, beliefs, sex, age, disability, disease, disadvantaged category, etc.

[*] *Associate professor Ph.D., Petroleum – Gas University of Ploiești, Romania.*

Under this aspect, the evolution over time of the concept of discrimination[1] led to the need to expand the analysis from the point of view of the applicable criteria, thus allowing a narrower limitation of the law, especially with reference to direct acts of discrimination. The new dimensions involved new concepts, such as that of indirect discrimination, in the situation where the discriminatory conduct was not directly causally related to the result produced, but the purpose pursued by this apparently neutral act still aimed at a restriction of rights and freedoms certain people, against the imperative principles of equality.

Practically, the author performed a neutral act, apparently not related to certain regulated criteria of discrimination, which, however, ultimately determined the restriction or removal of the equal exercise of the rights of the persons against whom it was directed, thus accumulating the necessary conditions for the existence of discrimination. As a result, the legislative technical analysis led to the birth of a presumption of discrimination, with reference to the purpose of the perpetrator's action, when its main effect was to be related to the restriction of the person's rights. We can appreciate that, the relative presumption implies the reduction of the importance of the criteria of discrimination provided imperatively by the legislator, they are no longer essential for the recognition of discrimination. In this case, a neutral act implies a legal situation equivalent to that achieved as a result of direct discriminatory conduct.

In all cases, the concept of discrimination, in the opinion of the European and national legislator, refers to the protection of human rights, the recognition of fundamental freedoms and recognized rights[2], in various fields, political, economic, social, cultural or other relevant to public life.

On the other hand, the foundation of the regulation of measures in order to protect fundamental rights and freedoms involved the need to expand the scope of the concept of discrimination, which initially referred to non-respect of equality, and later to conduct aimed at producing the effects of distinction, exclusion, restriction or preference of the rights of persons in comparable situations. Not only comparable situations were taken into account, the new concept also determines the consideration of some facts

[1] Dima L., *Relații de muncă și industriale în Uniunea Europeană*, C.H. Beck Publishing House, Bucharest, 2012, p. 130.

[2] Riach Peter A., Rich Judith, *Testing for racial discrimination in the labour market,* Oxford University Press, *Cambridge Journal of Economics,* Vol. 15, No. 3, 1991, p. 239.

as discriminatory and when certain people were in different legal situations, but benefited from an equal form of treatment.

At the present time, within legal employment relationships, non-discrimination rules are no longer analyzed only from the perspective of the existence of the subordination relationship between employer and employee, referring to aspects concerning the fundamental rights and freedoms of individuals, as a basis for recognizing the principle of non-discrimination[3].

Practically, we can appreciate that from the point of view of the principle of non-discrimination, it depended on the reality that the employee has no value only a contractual part, being analyzed only as a factor of production, being the holder of rights, which implicitly leads to the idea of protecting dignity it as an end in itself. We can thus appreciate the existence of the direct relationship between the employee's dignity and discrimination, in employment relations the differential treatment affecting career opportunities and social status.

International and European recognition of the concept

We can state that the recognition of the principle of non-discrimination at the level of national states came from the intervention of universal institutions, namely the United Nations Organization, through the Universal Declaration of Human Rights, the International Labor Organization through the Convention on Discrimination and through the International Convention on the Elimination of All Forms of Discrimination since 1965.

In this sense, Convention no. 100 of June 6, 1951 regarding equal remuneration of the International Labour Organization, imposes the principle of equal remuneration for the performance of work of equal value, based on the principle of equality, later found at the European level in the European Convention on Human Rights[4], which in the Protocol[5]

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[3] Cernat C., *Dreptul muncii,* ed. a V-a revised and added, Universul Juridic Publishing House, Bucharest, 2014, p. 51.

[4] Art. 14 of the European Convention on Human Rights imposes non-discrimination regarding the exercise of the rights and freedoms provided for by the convention "without any distinction based, in particular, on sex, race, colour, language, religion, political or any other opinions, national origin or social, belonging to a national minority, wealth, birth or any other situation".

[5] Ratified by 20 of the 47 member states of the Convention.

no. 12 extended the possibility of regulation for any other rights related to discrimination. Regarding legal labour relations, the revised European Social Charter[6] discussed elements related to unrestricted access to the job offer, professional training, promotion, professional reinsertion or illegal dismissal.

As far as European legislation is concerned, we can appreciate the evolution of non-discrimination from the main criterion of gender equality[7], to issues regarding ethnic and racial origin, religious beliefs, gender, age, disabilities. This legislative development occurred through[8] Treaty of Amsterdam[9], under the conditions in which the Treaty on the European Union had references[10] to the principles of human dignity, freedom and democracy.

It can thus be stated that at the level of the European Union, the recognition of the rights, freedoms and principles of the Charter of Fundamental Rights of the European Union[11] of December 7, 2000 was affirmed by prohibiting discrimination of any kind, with reference to criteria of sex, race, colour, ethnic origin, genetic characteristics, language, religion, political or other beliefs, minority, wealth, age, disability or orientation sexual in the fields[12] employment, work and remuneration.

Regarding the expansion of non-discrimination regulations in legal employment relationships, this occurred from the perspective of secondary

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[6] Part I, point 20 states that all employees have the right to equal opportunities and treatment in matters of employment and exercise of the profession without discrimination based on gender.

[7] Art. 141 TCE (Art. 157 TFUE).

[8] Dima L., *Dreptul muncii*, C.H. Beck Publishing House, Bucharest, p. 129.

[9] Art. 13 (19 din TUE) grounds the Council and Parliament to take "the necessary measures to combat any discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation.

[10] Art. 2 of the Treaty on the European Union aims to respect human dignity, freedom, democracy, equality, the rule of law, human rights, including minorities, values are common to societies characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and man.

[11] According to paragraphs 2 and 3, the Union adheres to the European Convention for the Protection of Human Rights and Fundamental Freedoms, fundamental rights constituting general principles of Union law.

[12] Art. 23 aims to recognize equality between women and men in terms of employment, work and remuneration, the principle of equality not excluding the possibility of applying measures to grant specific advantages to the under-represented sex.

European law as a result of the issuance of the main directives[13]. Thus, the Directive 2000/43/CE[14] regarding the implementation of the principle of equal treatment[15] between persons regardless of racial or ethnic origin and the Directive 2000/78/CE[16] of creating a general framework in favor of equal treatment regarding employment and working conditions substantiated the non-differentiated treatment in labour relations. Subsequently, Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment between men and women in employment and work led to the unification of previous regulations in the field of labour legislation and social security[17], through distinct rules regarding equal treatment, in particular regarding employment, professional training, appeals and law enforcement.

In this sense, from the international level, European law has extended the application of the principle of non-discrimination in legal employment relationships in the sense of determining the professional protection of employees, ensuring equal opportunities and tolerance in work, as a support to establish their possibility[18] to benefit from all fundamental rights and freedoms including in work processes. As a main effect, a nullity was thus determined of the conventions contrary to the principle of non-discrimination in work concluded between employees and employers, in the application of the democratic rules aimed at equality and unrestricted access to the labour offer, as well as to the conditions stipulated in the individual employment contract.

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[13] Directive no. 79/7/EC on the progressive application of the principle of equal treatment between women and men in the field of social security amended by Directive no. 2002/73/EC, Directive no. 92/85/EEC on the introduction of measures to encourage improvement health and safety at work of pregnant workers, workers who have recently given birth and those who are breastfeeding, Directive no. 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and CES.

[14] Regarding employment relations, access to goods, services or social benefits.

[15] Popescu R.R., *Dreptul muncii*, Universul Juridic Publishing House, Bucharest, 2014, p. 96.

[16] Regarding employment relations and discrimination based on sexual orientation, religious affiliation or beliefs, age and disability.

[17] Ştefănescu I.T., *Tratat teoretic și practic de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2010, p. 673.

[18] Pelissier J., Auzero G., Dockes E., *Droit du Travail*, 2010, 25ème éd., Dalloz, p. 174.

However, it could be noted that the European regulations that founded the protection regime in the field of non-discrimination in legal employment relationships, did not manage to fully cover this desire for equality. Intuiting this aspect, the protection rules against discrimination that were initially incomplete were later supplemented, interpreted and expanded by means of jurisprudence rules, resulting from the activity of the European courts of justice. These started in interpretation from the general principles of the law, an aspect that later led to a better application of the discrimination criteria in the national legislative systems of the norms indicated as being specific to equal treatment. Under this aspect, the European Court of Justice's interpretation of the concept of non-discrimination allowed to overcome the situations in which this concept was enshrined differently within the national legislative systems, given that the national courts differed in their reference to this principle in the disputes with the object of discrimination.

We can state that, at the level of the EU member states, there is still no conceptual uniformity regarding the analysis of non-discrimination, even in the presence of similar application rules in the matter, given that the national courts have interpreted differently the material provisions of national legislation, including constitutional ones, with reference to European regulations. As a result, the different interpretations from the various national EU member states aimed at either expanding or narrowing the concept of non-discrimination, sometimes in the functions of their own national interests, a fact that led to a totally non-unitary practice in the matter.

As a result, this situation of differentiating assessments regarding the application of non-discrimination rules has led to the need for national courts to address preliminary questions to the European Court of Justice or other institutions empowered to apply the principle of equality, especially in the conditions where including European directives refer to general purposes and do not specifically define factual situations. In this context, the convergence in the matter of non-discrimination ultimately involved the way of addressing preliminary questions to the European courts and subsequently of unitary application at the level of the member states.

As a result, the main effect that resulted from this different way of interpreting the rules in the disputes that have the object of discrimination[19] of the national courts, was linked to the role of the European courts of legal compatibility of the specific non-discrimination provisions used in the European Union and the limitation of different national standards in legal employment relationships[20]. The mode of compatibility produced its effect as a result of the fact that, although fundamental rights were recognized in all member states, European courts enjoy supremacy in interpretation with reference to national ones, thus producing a true transfer of European decisions at the level national.

In this sense, we can note that as far as the Court of Justice of the European Union is concerned, it recognized the principle of non-discrimination by referring to the recognition of rights derived from nationality[21], although other jurisdictions have taken a somewhat different view[22]. As a result, the direct establishment of the principle of non-discrimination was necessary from the perspective of introducing legal limitations to employers, who sometimes proceeded to apply or recognize different rights in their relations with certain employees, except for the concept of positive discrimination.

For example, the Court of Justice of the European Union elaborated the interpretation of the principle of equality in the matter of non-discrimination by making a distinction between the class of principles-ideas and principles-norms. In this sense, the class of principles-norms covers the permitted conduct and its justification in legal employment relations, as standard rules, and the principles-ideas are found in positive law, being imposed by the doctrine and referring to a distinct system of protected fundamental rights.

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[19] Bergé J.-S. et Robin-Olivier S., *Introduction au droit européen*, P.U.F., coll. Thémis droit, Paris 2008, nr. 670, p. 489.

[20] Delmas-Marty M., *Le pluralisme ordonné et les interactions entre ensembles juridiques*, D. 2006, p. 951.

[21] C.J.C.E. 28 November 1989, Anita Groener v Minister for Education and Dublin City Training Commission, C-379/87, text available online at https://eur-lex.europa.eu/resource.html?uri=cellar:372e6760-6f1e-48bd-bb70-cdb50a090cd9.0002.03/DOC_1&format=PDF.

[22] C.J.C.E. September 15, 2005, National Employment Office v. Ioannis Ioannidis, af. C-258/04, text available online at http://csdle.lex.unict.it/Archive/LW/EU%20social%20law/EU%20case-law/Judgments/20111215-011714_C_258_04enpdf.pdf.

The principle of equal treatment

The concept of equality is differentiated by specific areas of law, and with regard to the principle of non-discrimination, it implies a general way of applying more limited or more extensive criteria with the aim of protection against differential treatment. Practically, civil law recognizes equality regarding the theory of autonomy of will, but regarding legal employment relations, equality refers to autonomous protection tools.

In this sense, the principle of equal treatment in the matter of non-discrimination interested European legislation as a support for the prohibition of direct or indirect acts of discrimination by employers towards employees, initially from a purely economic perspective, in the conditions where the European space aimed to ensure a full utilization of the workforce of employees of different nationalities, in order to benefit from their individual qualities.

However, equality should not be limited only to its component of equal treatment, implying also an equality of chances or results, with reference to the principle of non-discrimination. That principle involved a comparison of similar situations in which employees were found at a certain employer in a certain field of work, with reference to the potentially differentiated conduct of employers, involving certain particular circumstances.

Thus, from the analysis of the principle of equality and non-differentiated treatment, we can appreciate the fact that non-discrimination norms become complementary and specific, although they are aimed at the general protection of fundamental natural rights. As a result, the principle of equality allowed a change of concept in social systems that recognized the existence of a potential natural inequality of people, now being introduced norms that aimed to mitigate differences in treatment and in labour relations the possibility of equal access and opportunities.

In this sense, the recognition of equality in legal employment relationships was instituted for the purpose of limiting employers' considered arbitrary treatments, whose object was the use of objectively unjustified selection criteria. In these conditions, the need was felt to introduce into the regulation some criteria that were part of the hard core of discrimination, which were to cancel the privileges of some societies organized on distinct social classes, with reference to ethnic origin,

religious beliefs, nationality, sex, disabilities, language or sexual orientation.

Last but not least, the legislator's vision by referring to the principle of equality in terms of non-discrimination, as a universal right, did not mean the lack of future legislative evolution, the rules regarding differential treatment being continuously supplemented, and the legislation permanently adapted.

On the other hand, the recognition of the principle of equality and non-discrimination is not unlimited, the legislator allowing the establishment of objectively justified differences in the treatment of employers, proportional to the intended purpose, with a limiting aspect regarding the acceptance of their conduct. In the other cases, non-compliance with the non-discrimination criteria established in the law will implicitly determine the direct non-recognition of the principle of equality, thus requiring a concise definition of the applicable criteria.

Non-discrimination through the differential treatment of employers in legal employment relationships is circumscribed to the non-recognition of the legal equality of persons, applicable including employees who hold similar duties at the workplace. Moreover, the recognition of the principle of equality is all the more important in the case of ensuring the protection of employees who are part of categories considered disadvantaged and from the point of view of the need to respect the rules aimed at equity in work. Equity also allows the analysis of non-discrimination resulting from the equal treatment offered to employees with different, not only similar, training and duties, which could also lead to inequality.

We can thus appreciate that the definition of the principle of equal treatment determined the subsequent development of the concept of non-discrimination, given that the idea of equality derives from social law. However, non-discrimination allows the recognition and establishment of equal treatment in legal employment relations between employees and employers[23], of the unitary practice in labour relations[24], including from the point of view of the ways of covering social problems[25].

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[23] Popescu R.R., *Dreptul muncii*, Universul Juridic Publishing House, Bucharest, p. 29.

[24] Pélissier J., Supiot A.et Jeammaud A., *Droit du travail*, 24 éd., Dalloz, 2008, nr. 6, p. 5.

[25] See, also, Nicolae Voiculescu, Maria-Beatrice Berna, *Treatise on Human Rights*, Universul Juridic Publishing House, Bucharest, Romania, 2023, pp. 602-629.

Conclusions

In the current legal system, we can appreciate that equality and non-differentiated treatment have become non-unitary concepts in the legislative framework of certain states, driven by the need to maintain a distinct national specificity.

Practically, if we consider the existence of the new trends of individualization of employees, but also the appearance of new forms of work performance, such as remote or on electronic platforms, the principles of non-discrimination have become concepts that are increasingly difficult to recognize and protected.

On the other hand, the need to recognize the principle of non-discrimination will be linked to its main purpose, within the framework of legal employment relations it is related to the specific protection of the right to work, with its components aimed at excluding prejudices against people considered disadvantaged, the absence of double standards of employers' conduct towards certain employees, so that each of them can have a free and equal participation in the evolution of society, based on their own capabilities.

Thus, the goal of non-discrimination in legal labour relations concerns the equality of employees in working conditions, with the existence of work duties and equivalent professional training, with the recognition of individual freedom of conscience and with respect for a balance of the interests of employers and their employees.

All these premises of equal treatment in legal labour relations determined the regulations on non-discrimination, with the aim of achieving a uniform practice at the international level in the matter of labour relations, respectively the relations between employees and employers.

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THE LEGAL PROTECTION OF THREE-DIMENSIONAL SCIENTIFIC-ARTISTIC CREATION

Alina TEACĂ[*]

ABSTRACT

In our previous research, "Experimental methods based on three-dimensional technology, a new paradigm in judicial forensic expertise", published in Titu's Maiorescu University Annales Review, Law Series, Year XIX, Ed. Hamangiu, 2020, we highlighted a new paradigm of the reconstruction process of representing the nature, alive or dead, as a way of disseminating information, both from a scientific and historical-artistic point of view. The Forensic expertise of 3D data, more specific, the Forensic information extracted from the criminal field, is the result of the two ways of interaction with the digital environment, virtual reality and augmented reality, which involves a multidisciplinary analysis, being a component of interest for the legislator, both in public law and the private one.At this moment, in our opinion, the most important aspect is the way in which the legal protection of the three-dimensional scientific-artistic creation, respectively of the three-dimensional reconstitution/recreation/reproduction of a sequence, event, factual situation or phenomenon, using computer modeling, is ensured.

KEYWORDS: *expertise of 3 D data; copyright and related rights; right to authorship;*

Introduction

As a result of our Ph.D. scientific research initiated three years ago, *"Methods and modern technical means of documenting the crime scene"*, in the field of Forensic expertise, we have recorded the need to implement new technical means of capturing the three-dimensional image, to ensure the registration and representation, in an objective way, of the main objects identified in the criminal field and to establish the dimensions or distances between various objects located in the crime scene. This necessity

[*] *Registrar, Ph.D. Student, "Titu Maiorescu" University, Law Doctoral School, Bucharest, Romania.*

determined, in turn, the expansion of the fields of Forensic expertise, in accordance with current needs.

Taking into consideration this fact, in the previous research, we proposed a new pedagogical design that incorporates three-dimensional technologies, but also the extension of the fields of Forensic expertise with a new field: the expertise of 3D data and the Forensic interpretation of realistic models, represented three-dimensionally, in a virtual environment (augmented reality).

In this context, the scientific result obtained for instructive-educational purposes has become a subject of analysis for the status of our three-dimensional scientific-artistic creation, respectively of the three-dimensional reconstitution/recreation/reproduction of a sequence, event, factual situation or phenomenon using computer modeling.

Essentially, we appreciate that brief considerations are required regarding the character of this type of composition, respectively whether the result of a creative activity, the product of an intellectual activity that impregnates the author's personality, constitutes a creation protected by the right of intellectual property, in the sense of our common right, described by the provisions of Law no. 8/1996 on copyright and related rights.

Referring, by analogy, to the reproduction of a photographic image and the status of this type of an artistic work, we know, from jurisprudence and doctrine, a part of the authors has assessed that photography represents a technical procedure of fixation and others have assessed that it represents an original artistic work, an expression of the author's personality.

In this sense, most specialized authors appreciated that when choosing the subject, lights and colors, etc., demonstrates a creative and original activity, then the photograph can be considered an original artistic work, protected by copyright, according to Directive 2006/116/EC[1] of the European Parliament and of the Council of 12.12.2006 regarding the duration of copyright protection and certain related rights.

[1] Directive 2006/116/EC of the European Parliament and of the Council of 12.12.2006 on the duration of protection of copyright and certain related rights, available here: https://op.europa.eu/en/publication-detail/-/publication/dd8b5a41-de76-4fad-bfd4-9420dcfaa06d/language-ro.

Legal framework

The Romanian legislator ensures protection to works of intellectual creation, unconditionally by the fulfillment of any formality, the simple fact of creation being sufficient for the work to be protected.

In doctrine, the object of copyright protection is different, in the sense that the moral right has as its object the respect of the author's personality, and the patrimonial right has as its object the intellectual creation or its exploitation.

The result of the creative activity, the product of the intellectual activity that constitutes the object of our research, more specific, a radical innovation in the teaching and dissemination of Forensic information, both from a scientific and historical-artistic point of view, the digital diorama of the crime scene, finds its regulation in the general legal framework, respectively, Law no. 8/1996[2] on copyright and related rights covering all categories of protectable intellectual creations.

Thus, according to provision no. 7, Law no. 8/1996 on copyright and related rights, original works of intellectual creation in the literary, artistic or scientific field, regardless of the mode of creation, mode or form of expression and independent of their value and destination, are subject to copyright:

a) literary and journalistic writings, conferences, sermons, pleas, lectures and any other written or oral works, as well as computer programs;
b) scientific works, written or oral, such as: communications, studies, university courses, school textbooks, scientific projects and documentation;
c) musical compositions with or without text;
d) dramatic compositions, dramatic-musical works, choreographic works and pantomimes;
e) cinematographic works, as well as any other audiovisual works;

[2] The provisions of art. 1 of Law no. 8/1996 regarding copyright and related rights: " (1) *Copyright on a literary, artistic or scientific work, as well as on other works of intellectual creation is recognized and guaranteed under the conditions of this law. This right is linked to the person of the author and includes moral and patrimonial attributes. (2) The work of intellectual creation is recognized and protected, independently of bringing it to public knowledge, by the simple fact of its realization, even in an unfinished form*.", available here: https://legislatie.just.ro/Public/DetaliiDocument/7816.

f) photographic works, stills of cinematographic films, as well as any other works expressed through a process analogous to photography;
g) works of graphic or plastic art, such as: works of sculpture, painting, engraving, lithography, monumental art, scenography, tapestry, ceramics, plastic glass and metal, drawings, design, as well as other works of art applied to products intended for practical use;
h) architectural works, including plans, models and graphic works that form architectural projects;
i) plastic works, maps and drawings in the field of topography, geography and science in general.

Pursuant to Law no. 8/1996 regarding copyright and related rights, are excluded from protection, according to provision no. 9:

a) the ideas, theories, concepts, scientific discoveries, procedures, operating methods or mathematical concepts as such and inventions, contained in a work, regardless of the way of retrieval, writing, explanation or expression;

b) official texts of a political, legislative, administrative, judicial nature and their official translations;

c) official symbols of the state, public authorities and organizations, such as: coat of arms, seal, flag, emblem, coat of arms, badge, badge and medal;

d) means of payment;

e) news and press information;

f) simple facts and data;

g) photos of letters, documents of any type, technical drawings, etc.;

h) materials resulting from an act of reproduction of a work of visual art, whose term of protection has expired, unless the material resulting from the act of reproduction is original, in the sense that it represents the author's own intellectual creation.

In this context, the Bern Convention from 09th of September, 1886 for the protection of literary and artistic works, completed in Paris on 4th of May 1896, revised in Berlin on 13th of November 1908, completed in Bern on 20th of March 1914, revised in Rome on 2nd of June, 1928, revised in Brussels on 26th of June, 1948, revised in Stockholm on 14th of July, 1967

and in Paris on 24th of July, 1971, amended on 28th of September, 1979 and published in Official Gazette under no. 156/17.04.1998[3].

Having the Berne Convention[4] as a model, the Romanian legislator adopted in different texts a double criterion for determining the object of copyright (the work of intellectual creation), first offering a very general criterion, then proceeding to enumerate some categories of protected works[5].

An aspect to remember in order to ensure the protection of the work of intellectual creation is also the distinction between the intangible property over the work, respectively the copyright and the corporeal property of the support which is important regarding the moral right of disclosure and the patrimonial right of reproduction.

This distinction can be obtained, in the opinion of the author Viorel Roș, by interpreting the provisions of art. 47 para. 6 of Law no. 8/1996 on copyright and related rights[6], according to which the acquisition of

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[3] Article 2 (1): The term literary and artistic works includes all works in the literary, scientific and artistic field, any type or form of expression, such as: books, brochures and other writings; conferences, allocutions, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and pantomimes; musical compositions with or without words; cinematographic works, to which works expressed through a process analogous to cinematography are assimilated; works of drawing, painting, architecture, sculpture, engraving, lithography; photographic works, to which works expressed through a process analogous to photography are assimilated; works of applied art; illustrations, geographical maps; plans, sketches and plastic works related to geography, topography, architecture or sciences. Article 7 (1): The duration of the protection granted by this convention includes the lifetime of the author and 50 years after his death. (2) However, for cinematographic works, the countries of the Union have the right to provide that the duration of protection expires 50 years after the work was made accessible to the public, with the consent of the author or that, in the absence of such an event, intervened within 50 years, counted from the creation of the work, the duration of protection expires 50 years after this creation. Source: https://legislatie.just.ro/Public/DetaliiDocument/54260.

[4] Romania adopts the Berne Convention in its revised form by the Paris Act of 24th of July, 1971 and amended on 28th of September, 1979 by Law no. 77, 1998.

[5] Roș V., *Intellectual property law. Vol 1. Copyright, related rights and sui-generis rights*, C.H. Beck Publishing House, 2016, *op. cit.,* p. 181.

[6] Law no. 8/1996 on copyright and related rights. Assignment of copyright patrimonial rights, available here: https://legeaz.net/legea-8-1996-drepturi-autor/art-47-cesiunea-drepturilor-patrimoniale-de-autor#:~:text=%285%29%20Autorul%20nu%20poate%20renunţa%20anticipat%20la%20executarea,ea%20însăşi%20un%20drept%20de%20utilizare%20asupra%20operei.

ownership over the material support of the work does not by itself confer a right of use over the work.

Unlike the Berne Convention, which enshrines two moral rights of authors: the right to authorship and the right to the inviolability of the work, Romanian copyright law is superior, ensuring increased protection of moral rights. For example, the provisions of art. 10 of Law no. 8/1996 on copyright and related rights include the following categories of moral rights:

a) the right to decide if, in what way and when the work will be brought to public knowledge;

b) the right to claim recognition of the authorship of the work;

c) the right to decide under which name the work will be brought to public knowledge;

d) the right to claim respect for the integrity of the work and to oppose any modification, as well as any touch brought to the work, if it damages its honor or reputation;

e) the right to withdraw the work, compensating, if necessary, the holders of the rights of use, prejudiced by exercising the withdrawal.

Thus, the right to claim recognition of the authorship of the three-dimensional scientific-artistic creation, known in doctrine as the right to the authorship of the work, is enshrined in art. 10 of Law no. 8/1996 on copyright and related rights.

This constitutes the identification of the work with the spirit that created it, individualizing the creation and ensuring, at the same time, the possibility of claiming authorship, which can be exercised at any time.

It should be noted in this context that the right to authorship is recognized only to natural persons, the intellectual creation itself being protected by copyright, not its material support, when the work is susceptible to fixation[7] and has been fixed on this type of support.

Since the author's right is closely related to the person of the author, having moral and patrimonial attributes, and according to the provisions of art. 1 of Law no. 8/1996 on copyright and related rights, the copyright on a work of intellectual creation is recognized and guaranteed, we appreciate that this three-dimensional scientific-artistic creation represents a complex right, respectively a separate category of rights in relation to

[7] Fixation implies its incorporation in a sport or on a material support, a materialization of the work in or on a tangible asset distinct from the work itself, Roș V., *op. cit.*

personal rights and the rights of debt, being a typology of property that does not fit into the patterns of common law property.

Three-dimensional scientific-artistic creation

In the present approach, the three-dimensional scientific-artistic creation represents the static result of a dynamic interaction in the criminal field[8], a result subject to mental, graphic and photographic representation, being the fruit of thought, knowledge, a rational activity, respectively the result of one's ability to operate with notions abstract.

This type of artistic work is original in terms of composition, script, central theme, etc., the author having moral and patrimonial rights over it, being a conscious, intentional approach, respectively an act that mirrors the external reality of the author.

Considering the doctrine in this field, we note that intellectual property law has as its object creations items and immaterial items resulting from intellectual activities through knowledge, development, innovation, writing, painting, musical notes, etc.

The owner of the intellectual creation is also its creator, a subjective right which includes both non-patrimonial rights and patrimonial rights, born from the fact of creation.

Thus, from our specialized literature, we can remember that intellectual property rights are the rights related to intellectual activity, in various fields such as: the industrial, scientific, literary, artistic field, and the result is literary, artistic, scientific works, the interpretations of performers, performances by performers, phonograms, broadcasts, databases, inventions in all fields of human activity, and utility models (small inventions and innovations), designs and models (industrial), configuration schemes (topographies), integrated circuits, undisclosed information, trademarks, service marks, etc.[9].

Returning to the analogy regarding the case of the author of photographic works, we note that, according to art. 86 of Law no. 8/1996, "*The patrimonial rights over the photographic work, which was created in*

[8]The area where an illegal activity took place or is assumed to have been carried or the place where its result was produced, including the areas where disasters or catastrophes occurred, *Best practices manual on the crime scene investigation procedure of the Forensic Science Institute of Romanian Police*, 2009, p. 4.

[9] Roș V., *op. cit.,* p. 34.

the execution of an individual work contract or to order, are presumed to belong, for a period of 3 years, to the person who hires or to the person who made the order, if by the contract did not pretend otherwise. In the absence of a contrary agreement, the author's patrimonial rights over the photographic works created within the individual employment contract belong to the employer, also by law, for a limited period of 3 years, after which they revert to the author"[10].

The same rules are established for the situation in which the photographic work was executed by the author outside of an individual employment contract, at the behest of a natural or legal person.

Conclusion

The work protected by copyright is a creation of the spirit, a cultural product, both from a scientific and historical-artistic point of view, with a special vocation.

In this sense, we consider the current normative regulation to be critical, namely this analogy in the case of the three-dimensional scientific-artistic creation which, taking into consideration, as we stated, that this represents a typology of property that does not fit into the patterns of common law property, having very complex moral and patrimonial attributes.

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[10] *Ibidem*, p. 178.

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THE ROLE AND IMPORTANCE OF ROMANIAN PARLIAMENTARY STRUCTURES IN PROMOTING LEADERSHIP IN FOREIGN POLICY

Titi SULTAN*

ABSTRACT

In most states, the rules of organization and operation of Parliaments occupy a special place within the system of sources of law. The implications of adopting one position or another regarding the role of the Parliament's Regulations, the framework it provides in terms of both the Parliament's internal and external relations, are however very great. Regulatory autonomy is found in the practice of drawing up separate parliamentary regulations, in the case of the existence of a bicameral system, independent of any participation of the other Chamber or the influence the executive. Unlike laws, which are the result of a collaboration between the executive power and the legislative power, parliamentary regulations are the result of the Parliament's autonomy, of some of its own decisions that the Parliament adopts regarding its organization and functioning and its relational system.

KEYWORDS: *parliamentary relations; commissions; statements; foreign policy; diplomacy; international cooperation; common interests;*

1.1. Parliamentary groups

The affirmation of parliamentary political groups within modern structures is a result of the wider recognition of the role and importance of political parties. Parliamentary groups represent an organizational structure of the Chamber based on political affinity. Resulting from the voluntary union of parliamentarians, the creation of parliamentary groups is a faculty, not an obligation, but considering the political and regulatory role of the group, the parliamentarian, who does not belong to any group, by this very fact, is, as a rule, **marginalized**[1].

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* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

[1] Ioan Muraru, Mihai Constantinescu, *Romanian Parliamentary Law*, All Beck Publishing House, Bucharest, 2005, p. 111.

In a report presented within the Association of General Secretaries of the Parliament, Louis Madureira, based on the answers to a questionnaire sent to all member Parliaments of the Inter-Parliamentary Union, reveals the fact that there is no unanimously accepted definition of parliamentary groups, this issue being the subject of some reflections and controversies[2].

According to art. 64 paragraph 3, the Constitution of Romania states that deputies and senators can organize themselves into parliamentary groups according to the Regulations of each Chamber.

The two regulations provide that deputies, respectively senators, who ran in elections on the lists of the same party (or who were elected on the lists of the same party, as stipulated in the Senate Regulations), or of the same political formation, can be part of the parliamentary groups.

However, there is a difference in numbers for the establishment of a parliamentary group in the Chamber of Deputies, with at least ten deputies being required, and for the establishment of a parliamentary group in the Senate, a number of at least five senators. The parliamentarian is the one who highlights the parliamentary structure, he is the one who gives life to the respective parliamentary group, he is also the one who can, through a certain parliamentary structure, impose – or not – on the debate the current issues that disturb the international political life of the world contemporary.

That is why parliamentary groups have a special role in carrying out external parliamentary actions, actions that consist of:

in terms of bilateral parliamentary relations:

- intensifying relations with the parliaments and friendship groups of countries of strategic importance for Romania's major foreign policy interests (NATO and EU member countries), in order to achieve effective and sustainable foreign policy actions;
- the development of relations with the parliaments of neighboring states, based on a coherent strategy, the establishment of consolidated relations with the parliaments of central European countries, with which we are bound by common concerns and interests;
- developing relations with the parliaments of countries from other areas of interest, starting from existing traditional ties and, first of all, from Romania's political and economic interests;

[2] Louis Madureira, *Le statut de groupes parlamentaires,* Rapportà la Réunion des Secrétaires généraux des parlaments, Bucharest, 1995, p. 7.

- strengthening Romania's role and contribution to the development of regional cooperation and stability in South-Eastern Europe, primarily through the Stability Pact and other regional cooperation structures;
- official visits of the presidents of the two Chambers of the Parliament, actions at the level of committees for foreign policy, actions at the level of other standing committees, actions at the level of parliamentary friendship groups.

in terms of European and international parliamentary relations:

- the adoption of Romania's accession laws to the constitutive treaties of the European Union and the North Atlantic Treaty;
- participation in interparliamentary meetings for the purpose of reintegrating Romania with full rights into the great family of European nations;
- intensifying the participation of the Romanian Parliament in regional and sub-regional organizations and structures, promoting pragmatic dialogue and affirming the role of our country as a factor of stability in this area of the continent;
- supporting dialogue and cooperation at governmental level with international financial institutions, through specific parliamentary means, to facilitate the access of the private and public sector to capital and international markets;
- the promotion by the Senate and Chamber of Deputies of Romania's interests within international organizations concerned with preventing and combating non-conventional threats to security (international terrorism, corruption and organized crime, the proliferation of weapons of mass destruction, drug and human trafficking, etc.);
- promoting Romanian culture, spirituality and science in the world.

1.2. Attributions of the permanent offices in the completion of foreign policy actions

The permanent offices are elected internal working bodies of the Chambers, which represent all the political forces that are part of the Parliament. In the proper sense of the word, permanent offices are collegial management bodies, which include the president of the respective Chamber, usually elected for the entire duration of the legislature, and a

number of vice-presidents, secretaries and quaestors established by the operating regulations of the respective Chamber.

In accordance with the provisions of the Regulations of the Chamber of Deputies and the Regulations of the Senate, the permanent offices of the two Chambers have, in the field of external relations, a series of important attributions that reflect the role of the Parliament in the management of foreign policy[3]

It is self-evident that through the express attributions given by the Regulations of the Permanent Bureaus, the latter have the possibility to impose on the agenda draft normative acts that include results of the performance of the leadership function in foreign policy or fix the path that must be- l is covered by parliamentary diplomacy for the adoption of necessary normative acts.

The President of the Senate and the President of the Chamber of Deputies represent the Chamber in the internal and external relations of the Romanian Parliament, and the President of the Senate is, according to the Constitution, the second person in the hierarchy of important positions in the state, when he ensures the interim position of President of Romania.

When the external political situation requires it, and the Chamber of Deputies or the Senate are not in session, the permanent offices of the two chambers can take note of the international political situation at a given moment and, as the case may be, they can initiate and undertake actions specific to their field[4]. In this sense, we will exemplify both the statement of the Permanent Bureaus of the Assembly of Deputies and the Romanian Senate, as well as the statement of the plenary session of the Romanian Parliament of September 3, 1991.

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[3] We exemplify the organization of the external relations of the Chambers with the parliaments of other states and with international parliamentary organizations based on the consultation, depending on the nature of the actions envisaged, of the Steering Committee of the Romanian Group of the Interparliamentary Union, the parliamentary groups, the Commission for Foreign Policy and other standing committees, informing the chambers on the established measures, including on the nominal composition of the delegations. They also submit for approval to the Chamber of Deputies and the Senate the composition of permanent delegations to world or regional parliamentary organizations, and at the same time, analyze and submit to the Chambers the proposals of the foreign policy commissions regarding the general orientations of Romania's foreign policy or foreign policy programs.

[4] Gheorghe Rizescu, *Parliamentary Diplomacy. Its role in solving international problems,* Lumina Lex Publishing House, Bucharest, 2000, pp. 149-151.

Worth noting is also the position of the Romanian Parliament in relation to the war in Iraq, materialized by the submission to debate and approval of the Parliament's Decision regarding Romania's participation in the coalition against Iraq adopted by the joint meeting of the Chamber of Deputies and the Romanian Senate on February 12, 2003 with 351 votes for, 75 abstentions and no votes against.

1.3. The Plenary of the Parliament and the leading position in foreign policy

In order to emphasize even more meaningfully the importance of parliamentary diplomatic relations between the two countries and Romanian peoples, it is necessary to ascertain the will of the Romanian Parliament, in its plenary session, as it was expressed then, immediately after the events in Chisinau.

In the decision of the Parliament of Romania no. 23 of September 3, 1991 regarding the proclamation of the independence of the Republic of Moldova[5], the Romanian parliamentarians showed unity and consistency in relation to the adoption of a foreign policy act, by which the following are strongly appreciated aspects that highlight the role of Parliament in foreign policy[6].

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[5] Decision of the Parliament of Romania no. 23 of September 3, 1991 regarding the proclamation of the independence of the Republic of Moldova was published in the Official Gazette of Romania of September 6, 1991.

[6] The members of the two legislative Chambers of the Romanian Parliament, the elected representatives of the Romanian people, met on Tuesday, September 3, 1991, in an atmosphere of deep patriotic strength to express their attitude towards the historic event of the Proclamation of the Independence of the Republic of Moldova, and to rule on the Declaration of the Permanent Bureaus of the Assembly of Deputies and the Senate, adopted on August 28, 1991 on this issue. Following the debates, the Romanian Parliament decides: "adopts the Declaration of the Permanent Bureaus of the Assembly of Deputies and the Romanian Senate as an official document recognizing the decision of the Chisinau Parliament of August 27, 1991, by which it proclaimed the independence of the Republic of Moldova. He considers the proclamation of the independence of the Republic of Moldova an event of overwhelming significance in front of the Romanian brothers across the Prut, which marks the beginning of a natural, necessary and legitimate historical restoration. He declares his full determination to support the Parliament, the President and the Government of the Republic of Moldova in actions to defend the national identity, language and culture of the Romanians across the Prut and in removing the consequences of the Ribbentrop-Molotov act. He expresses his conviction that

In our opinion, the Decision of the Parliament, as it functioned in 1991, on September 3 constitutes an act of parliamentary diplomacy at the highest level (Plenary of the Parliament) through which a certain kind of policy and its results are accepted, political relations are directed between the two Romanian states and international recognition is demanded for the young Moldovan state.

Obviously, the Plenary of the Parliament, from 1990 until now, adopted decisions, statements, resolutions, appeals, through which the Romanian Parliament expressed its position in relation to certain aspects of foreign policy, among which we exemplify: **Resolution** no. 1 of November 29, 2023 of the Romanian Parliament regarding the European perspective of the Republic of Moldova, Ukraine, Georgia and the Western Balkans[7], **Declaration** of the Romanian Parliament no. 2 of October 11, 2023 regarding terrorist attacks directed against the State of Israel and the civilian population[8], **Decision** of the Parliament of Romania no. 42 of November 25, 2021, regarding the granting of confidence to the Government[9], **Declaration** of the Parliament of Romania no. 1 of February 28, 2022 regarding the situation in Ukraine, whereby the Parliament of Romania strongly condemns the massive armed aggression of the Russian Federation on Ukraine[10], **Declaration** of the Romanian Parliament no. 2 of June 28, 2022, on the occasion of the 25th anniversary of the launch of the strategic partnership between Romania and the United States[11], **Declaration** – Appeal of the Romanian Parliament of March 11, 1999 to the parliaments of the NATO member states in anticipation of the

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through this historical act favorable conditions are created for close collaboration and collaboration in all areas of political, economic and spiritual life, in the interest of Romanians on both banks of the Prut. In this sense, it requests the President of the country, the Government of Romania, all national political forces to act consistently in this direction. The Parliament of Romania appeals to the Parliaments of countries in Europe and around the world to act alongside their governments for the recognition of the independence of the Republic of Moldova. At the same time, the Parliament of Romania addresses the Parliamentary Assembly of the Council of Europe and the European Parliament to recognize the independence of the Republic of Moldova in the spirit of the historical truth of the principles and norms of international law.

[7] Published in the Official Gazette, Part I no. 1081 of November 29, 2023.

[8] Published in the Official Gazette, Part I no. 918 of October 11, 2023.

[9] Published in the Official Monitor of Romania no. 1122 of November 25, 2021.

[10] Published in the Official Monitor of Romania, Part I no. 198 of February 28, 2022.

[11] Published in the Official Monitor of Romania, Part I no. 639 of June 28, 2022.

Washington summit[12], **Resolution** on the activity of the Romanian Parliament at the 84th IPU Conference of October 26, 1990[13], **Appeal** of the Romanian Parliament of November 24, 1997 regarding the start of negotiations for accession to the European Union[14].

1.4. Standing Committees

Parliamentary committees occupy one of the most important places in the activity of Parliaments in the world.

Therefore, studying their legal nature and the features they present is of the greatest importance both on the theoretical and political levels of parliamentary activity. Within the commissions, a priority role is played by the permanent commissions considered as "the most important"[15], due to their attributions and the role they fulfill in the legislative process. It is rightly emphasized that these commissions are mainly elected for the entire duration of the mandate of a Chamber and they are constituted on the basis of a specialization of deputies or senators, according to their professional experience and the sectors of activity in which they worked before to become parliamentarians.

The regulations of the two Chambers contain, in general, similar provisions in relation to the parliamentary committees and in particular to the standing committees.

Among the provisions of a general nature, we can mention those regarding the nature of the "working bodies" commissions of the two Chambers, their composition in accordance with the observance of the political configuration of the Chambers based on the proposals of the parliamentary groups, the need to communicate these commissions to the plenary session of the respective chamber, the existence of offices of the parliamentary commissions which, among other things, propose the draft regulation of the operation of the respective commission, adopt decisions and constitute – if necessary – subcommittees, designating their management, mission and competence. Permanent commissions are constituted for the entire duration of the Parliament's mandate. The Chamber's regulation

[12] Published in the Official Monitor of Romania no. 107 of March 15, 1999.

[13] Published in the Official Monitor of Romania no. 117 of October 26, 1990.

[14] Published in the Official Gazette of Romania no. 339 of December 3, 1997.

[15] Ioan Muraru, Simina Tănăsescu, *Constitutional Law and Political Institutions,* 15th Edition, Vol. I, C.H. Beck Publishing House, Bucharest, 2016, p. 381.

provides for the possibility of setting up new permanent committees, abolishing committees or changing the areas of activity at the beginning of each ordinary session[16].

An important role belongs to the permanent commissions in carrying out the leadership function of foreign policy through the activity of friendship groups which, according to the principle of reciprocity, have a special role in launching a new type of parliamentary diplomacy.

Thus, in both the Senate and the Chamber of Deputies there is a commission for foreign policy, which carries out its activity based on a regulation approved by the Romanian Parliament, which provides for their attributions and powers.

1.5. Special commissions

In the practice of the Romanian Parliament, special commissions were established either at the level of one of the chambers of the parliament, or at the level of both chambers.

The special commissions are established by a decision of the Chamber for the approval of complex draft laws, for the elaboration of some legislative proposals, the carrying out of a study for the documentation of the Parliament, or for other objects indicated in the decision establishing the commission.

From the analysis of the constitutional text of art. 64 para. 4 results, indeed, that the possibility of setting up by each chamber, not only permanent commissions, but also to establish investigation commissions or "other special commissions" was considered. Regarding the establishment of joint special commissions, by Decision of the Constitutional Court of Romania no. 828/December 13, 2017, (relating to the notice of unconstitutionality regarding Decision of the Parliament of Romania no. 95/2017 for the amendment of Decision of the Parliament no. 69/2017 regarding the establishment of the joint special commission of the Chamber of Deputies and the Senate for unification and ensuring legislative stability in the field of justice)[17]. The Court ruled that the fundamental law does not include an express or implicit provision in the

[16] Ioan Muraru, Elena Simina Tănăsescu, *The Constitution of Romania, Commentary on the articles,* 3rd Edition, C.H. Beck Publishing House, Bucharest, 2022, p. 575.

[17] Published in the Official Gazette of Romania no. 185 of February 28, 2018.

sense that joint special commissions can be constituted only for situations in which the Parliament works in joint sessions, establishing only the possibility of their constitution. Such a general constitutional regulation, related to the legislative function of the Parliament, had in mind the criterion of the coherence, completeness and unity of the legislative act, and not that of the working method of the Parliament in a joint or separate session. The decision on the opportunity to establish them rests with the Parliament. A legislative proposal developed by such a commission will be debated and adopted in a joint or separate meeting, taking into account the provisions of art. 65, 74 and 75 of the Constitution. Consequently, it follows that the powers of the joint special committee are not limited to the cases in which the Parliament works in a joint session, reasons related to the efficiency and effectiveness of the parliamentary approach in the sense of the elaboration of legislative projects/proposals of a certain complexity justify the decision of the Parliament to constitute a such a parliamentary committee[18].

In practice, however, the draft laws aimed at adapting Romanian legislation to the norms of the European Union are approved by the Commission for European Integration, which is common to both Chambers of the Parliament, and the constitutive treaties of the European Union, as well as the other community regulations, are submitted for debate to the plenary session of the Parliament after obtaining the opinion of the Committee on Foreign Policy.

1.6. Commissions of inquiry

Commissions of inquiry are regulated generically at the constitutional level, leaving the parliamentary regulations the task of detailing their constitution, organization and operation.

Parliamentary investigation is one of the means by which parliamentary control is exercised and can be carried out either in the form of commissions of inquiry or through any permanent commission, which has the right to order, with the approval of the plenary session of the respective Chamber, an investigation, regarding the activity carried out by the Government or public administration. The commission of inquiry may invite for the hearing any person who has the obligation to appear.

[18] Ioan Muraru, Elena Simina Tănăsescu, *op. cit.,* p. 575.

Decision of the Constitutional Court of Romania no. 428/June 21, 2017, (relating to the notice of unconstitutionality of the provisions of the Chamber of Deputies Decision no. 37/2017 regarding the amendment and completion of the Regulations of the Chamber of Deputies)[19] states, among other things, that, from a conceptual point of view, the parliamentary investigation, being a direct consequence of the principle democratic representation, it aims to research, document and control issues of public interest, which by their nature are intrinsically linked to the common good and the defense of the national interest. Consequently, the commission of inquiry has a limited role both from the point of view of the object of investigation, namely the verification necessary to clarify certain causes or circumstances in which events occurred or actions with negative effects took place, and from the point of view temporally, acting as long as necessary to clarify its concrete objectives[20].

The regulations of the two Chambers provide, at the same time, that the parliamentary investigation can also be carried out by a permanent committee, it is not necessary that a special investigation committee be established in all cases.

By **Decision of the Constitutional Court of Romania no. 720/ November 15, 2017**[21] (regarding the rejection of the notice of unconstitutionality of the provisions of Decision of the Parliament of Romania no. 85/2017 for the amendment and completion of Decision of the Parliament of Romania no. 30/1993 regarding the organization and operation of the permanent joint commission of the Chamber of Deputies and the Senate for the exercise of parliamentary control on the activity of the Romanian Intelligence Service), it ruled on the distinction between the permanent control commission and the commission of inquiry, showing that between the two there are the following differences: the permanent control commission has fullness of analysis, verification and evaluation of the activity of the public authority under parliamentary control, under all aspects in which the public authority carries out duties, and the commission of inquiry has a role limited to the verification necessary to clarify certain causes or circumstances in which events occurred or actions with negative effects took place. The permanent control committee

[19] Published in the Official Monitor of Romania no. 626 of August 2, 2017.
[20] Ioan Muraru, Elena Simina Tănăsescu *op. cit.,* p. 576.
[21] Published in the Official Monitor of Romania, Part I, no. 52 of January 18, 2018.

exercises its control competence throughout the duration of the Parliament's mandate, carrying out regular and continuous verification activities, and the investigation commissions act for a determined period of time, ceasing their activity after conducting the investigation and presenting the conclusions to the plenary session of the Parliament. The similarity between them lies in the fact that both categories of commissions prepare reports by which they establish conclusions, responsibilities and measures that are imposed at the Parliament level. The purpose of establishing the commission of inquiry, but also the nature of this working body of the Parliament, as well as the proposed objectives – aim to ensure the real possibility for the Parliament to exercise the control function, in the sense of having access to the information necessary to elucidate some aspects of public interest, which is why the parliamentary investigation covers factual situations of a general nature, causes and events, and not activities carried out by specific persons. The commissions of inquiry aim to establish the existence or non-existence of the facts for which the commission was created by means of parliamentary research and documentation, their activity having no connection with a judicial investigation, having a different object and purpose. In parliamentary practice there have been controversies regarding the object of parliamentary control carried out by means of commissions of inquiry[22].

In the practice of the Romanian Parliament, there have been numerous situations in which the establishment of commissions of inquiry was resorted to either by both Chambers or by one of them.

The commissions of inquiry also have a significant role in carrying out the leadership function of the Parliament's foreign policy, by the fact that, following the activity carried out, it can contribute to the construction of the components of the parliamentarian's diplomatic horizon, based on professional training, patriotism, character, fairness, etc. The mediation commissions are set up at the request of one of the presidents of the chambers in the framework of the Constitution revision procedure, in the situation where one of the chambers adopts its revision proposal in a form different from the text adopted by the other chamber. The report of the mediation commission is debated in each Chamber of the Parliament. Only

[22] *Law no. 195/July 24 2017* amended *Law no. 96/2006 on the Statute of deputies and senators* regarding the categories of persons who have the obligation to participate in the activity of investigative commissions.

the solutions proposed by the mediation committee that are different from those initially adopted by the other chamber are put to the vote. The report of the mediation commission is adopted, in each of the two Chambers, with the vote of at least two thirds of the number of members of each Chamber. If the mediation committee does not reach an agreement regarding the texts in disagreement, or if one of the Chambers does not approve the report of the mediation committee, the texts remaining in disagreement are subject to debate in a joint meeting of the two Chambers, which decide with the vote of at least three fourths of the number of deputies and senators[23].

2. Actions at the level of both Chambers of Parliament (declarations, motions, appeals, statements – appeal)

According to the provisions of art. 67 of the Constitution, Parliament adopts laws, decisions and motions, in the presence of the majority of members, all of which are legal acts.

Legal acts are manifestations of will in order to produce legal effects, of course incorporating a political dimension. The legal acts of the Parliament come under the protection of the state authority with all the consequences, and if necessary, they can be imposed on the subjects of law by the force of the state. In the category of legal acts with a normative character, all laws and a part of the decisions are included.

The other legal acts have an individual character (manifestations of will that establish rights and obligations for certain legal subjects determined in advance), the rest of the decisions and motions being part of this category.

Due to the fact that exclusively political acts are not provided for by the Constitution, the Parliament can adopt, in matters of foreign policy, any kind of such acts: declaration, appeal, message, proclamation, summons, declaration – appeal, protocol, motion (without legal power), etc.

The decisions of a political nature adopted by the Parliament of Romania in matters of foreign policy are different from those specified by art. 67 of the Constitution (they are supported by the provisions of art. 84 paragraph 2 of the Regulation of the Senate and art. 85 of the Regulation of the Chamber of Deputies).

[23] Ioan Muraru, *op. cit.*, p. 578.

The above-mentioned articles of the Regulation of the Chamber of Deputies and the Senate stipulate that they adopt messages, statements, resolutions and other acts of a political nature by decision.

The political events of the last decade illustrate, without any possibility of denial, that the "act of parliamentary diplomacy" – well used by those interested – can sometimes be decisive in making the most important decisions regarding the very future of a nation and a state at a given moment.

Conclusions

National parliamentarians can "*play the role of diplomats*" on their own when they travel abroad, have relations with the authorities of the respective country and design public statements that are repeated by the mass media. Officially speaking, they only employ themselves. But in reality, the public and the authorities of the state whose guests they are cannot ignore their quality as parliamentarians. Moreover, there are often doubts whether they are not somehow acting with the consent or even at the request of their governments. Consequently, the executive can use parliamentarians for polls, or for "scooping the ground" in addition to the authorities of other states, without formally engaging. Also, on the occasion of the movement of the members of the commissions or subcommittees of the international assemblies, in the member states, and especially in the non-member states, they often make public statements (press releases). In principle, these texts only engage the responsibility of the commissions involved. But often the public perceives them as taking positions of the parliamentary assembly as a whole (which can sometimes become embarrassing for the latter). This may also apply to MPs traveling individually[24].

In all democratic states, the basic function of parliaments is to propose legislative solutions; parliaments represent the political forces to which the electorate has given its vote. In recent years, in the context of the globalization of issues, we are witnessing the increasingly meaningful

[24] Heinrich Klebs, *Parliamentary Diplomacy*, Romanian Institute of International Studies (IRSI), "Regia Autonomă Monitorul Oficial" Publishing House, Bucharest, 1998, pp. 84-85.

affirmation of parliamentary diplomacy, through parliamentary missions and the networks of associations of which national parliaments are a part[25].

In most European states, the number of parliamentary initiatives has increased significantly, simultaneously with the involvement of national parliaments in international parliamentary assemblies. The tendency of parliaments is to get more and more involved in foreign policy.

The European Union has extended its halo of peace at its gates. She got here by inspiring her foreign policy actions from the values and convictions that had presided over the European construction: she mutualized the definition of interests, deeply renounced the state of war between nations, to jointly defend shared values. Thus Europe is about to invent a new system of collective security. But does the invention of this approach have the vocation to remain circumscribed to the countries of the European continent? Not. On the contrary, let us bet that as the number of peoples it inspires and who will appropriate it increases, mankind will fare much better[26].

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MICRO MICRO-STUDY OF ANALYSIS REGARDING THE ABSENCE OF REPRESENTATIVE QUALITY VS. THE ABSENCE OF PROOF OF REPRESENTATIVE QUALITY IN A COMPARATIVE CONTEXT

Alexandru Valentin VARVARA[*]

ABSTRACT

The scientific study explores aspects related to representation in civil proceedings, in accordance with the Civil Procedure Code of Romania. It emphasizes the right of the parties involved in a legal process to personally exercise their procedural rights or to opt for representation through a legal representative, thereby providing flexibility in legal procedures. The concept of representation is detailed, highlighting that in the case of a contract concluded between a representative and a third party, the effects of the contract will occur directly between the represented party and the third party, with the representative becoming only a formal participant in the contract's conclusion. The importance of these legal requirements for ensuring transparency and legality in the process of representation within judicial procedures is highlighted. Additionally, exceptions related to the absence of representative quality and the lack of proof of representative quality are analyzed, emphasizing that the lack of proof can be corrected according to legal provisions. A distinction is made between these aspects, highlighting that the former has an impact on the right to act, while the latter influences the procedural aspects of legal representation. In conclusion, the study addresses a specific situation from Romanian judicial practice, highlighting some difficulties and controversies related to the legal representation of the Romanian State in a case contesting a local decision regarding the public ownership of land.

KEYWORDS: *quality of representation; validity of information; rigorous standards; fairness assessment;*

In accordance with the provisions of Article 80, paragraph 1 of the Civil Procedure Code, the parties involved in a legal proceeding have the right to personally exercise their procedural rights or to opt for representation through a legal representative. This legal provision emphasizes the possi-

[*] *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

bility of acting in court either directly or through a person authorized to represent their interests, thereby providing flexibility in legal procedures.

Thus, the law grants the party the possibility to exercise their procedural rights either personally or through a representative.

Representation is the legal technique through which a person, referred to as the representative, executes a legal act on behalf and in the interest of another person, known as the represented. The effects of any potential contract concluded between the representative and a third party will directly impact the relationship between the represented and the third party. In other words, the contractual binding effects will materialize between the third party and the represented, with the representative merely assuming the role of a formal participant in the contract's execution. Concerning the repercussions of representation, a direct legal relationship is established between the represented and the third party, effects that hinge on the third party's actual awareness of the powers bestowed upon the representative and their legal status. The representative must disclose to the third party for whom they intend to execute the contract. Should they fail to do so, and the third party is unaware, through other means, of the representative's status, the representative remains directly obligated to the third party. The third party has the right to demand from the representative written proof of representation. In cases where the representative acts without the authority of representation or exceeds it, the contract entered into with the third party has no legal consequences for the represented, and the representative assumes personal liability towards the third party. Representation terminates either through the representative's voluntary relinquishment of the mandate or through the revocation of the power of representation[1].

Professor Liviu Pop's exposition delves into the concept of representation within the framework of legal technique. According to this definition, representation involves the action of a representative who concludes a legal act on behalf and for the account of another person, known as the represented. It is emphasized that, in the case of a contract concluded between the representative and a third party, the effects of the contract will occur directly between the represented and the third party. This interpretation suggests that the representative becomes merely a

[1] Liviu Pop, Civil Law. *Obligations. -Course Support- After the Elementary Treaty of Civil Law. Obligations*, Universul Juridic Publishing House 2012, p. 25.

participant in the conclusion of the contract, with a formal presence, while the substantial legal relationship is established between the represented and the third party. This approach clarifies how representation affects the dynamics of contractual relationships and the transfer of legal obligations.

The institution of representation in civil proceedings pertains to the legal process in which a person, referred to as the representative, performs procedural acts on behalf and for the account of a party in the proceedings, with the effects of the performed act directly affecting that party.

The general rule regarding representation is that a party has the freedom to choose whether to exercise their procedural rights personally or through a representative[2].

Professor Gabriel Boroi's remark regarding representation in legal matters emphasizes the principle of freedom of choice for a party concerning the exercise of procedural rights. According to this rule, a party in a legal proceeding has the autonomy to decide whether to personally exercise their procedural rights or through a legal representative. This principle enshrines flexibility in approaching legal procedures, recognizing the importance of the freedom to choose the mode of representation and to participate in the judicial process. This interpretation highlights the concern for individual rights and ensuring a fair legal process.

The statement that representation can be legal, conventional, or judicial suggests that there are multiple ways in which a party can be represented in a legal context. Additionally, according to Article 82 of the Civil Procedure Code, the court has the right to ascertain the lack of proof of the representative quality of a party and to provide a short term for remedying this deficiency. Otherwise, the claim may be dismissed, emphasizing the importance of proper representation and the provision of appropriate evidence in judicial procedures.

According to the provisions of Article 151, paragraph 4 of the Civil Procedure Code, representatives of private legal entities are subject to the obligation to provide a copy of the extract from the public register attesting to their authorization. This legal requirement is based on the need to ensure transparency and legality in the process of representation within judicial procedures. By submitting such a document, the court and other involved parties can officially and certifiedly verify the status and authority of

[2] Gabriel Boroi et al., *The New Code of Civil Procedure: Commentary on Articles*, Hamangiu Publishing House, Bucharest, 2013.

representatives of legal entities, thus contributing to ensuring the correctness and regularity of the legal process.

Article 151 of the New Civil Procedure Code (NCPC) addresses the request formulated and signed by the representative of the party on behalf of the latter, in which case the power of attorney, authorization, or proof of the legal representative's status will be attached to the request. The legal text specifies the concrete acts that constitute evidence of representation and must be annexed to the case file, namely:

a) The power of attorney in original or legalized copy, in the case of representation by a non-lawyer proxy;

b) The lawyer's authorization or legal representation/representation delegation in original, in the case of representation by a lawyer or legal advisor;

c) Civil status documents, court decisions, etc., in a legalized copy, in the case of legal representation of natural persons;

d) Extract from the public register showing the representation right of the signatory of the request (for example, an extract issued by the Trade Registry Office), in the case of the representation of private legal entities;

e) A legalized copy of the extract from the document attesting to the right of legal representation in court of the governing body or, as appropriate, the designated representative of an association, company, or other entity without legal personality, established according to the law.

In the event that these pieces of evidence are not attached to the case file, the court will adjourn the case and instruct the represented party to prove the representative quality of the signatory of the request or to declare whether they endorse or reject the request until the trial date assigned for this purpose, under the penalty of annulment, for the lack of proof of the representative's quality, in accordance with Article 82, paragraph (1) of the NCPC. If the mentioned evidence has not been attached to the summons, its annulment is necessary within the procedure regulated by Article 200 of the NCPC[3].

Thus, there arises the need for a precise distinction between two distinct aspects within legal representation, namely the absence of the representative's status and the lack of proof of the representative's status. It is crucial to emphasize that, under the conditions provided by Article 82 of the Civil Procedure Code, the lack of proof of the representative's status

[3] *Ibidem.*

can be rectified. This clarification underscores the importance of a differentiated approach and immediate intervention to address such deficiencies in legal proceedings, ensuring the integrity and correctness of legal representation.

The exception of the lack of representative status, related to the ability to represent, focuses on the necessary conditions for exercising a civil action. This exception is peremptory in nature, meaning it directly sanctions deficiencies in the right to bring an action, thus having a substantial impact on the merits of the case.

On the other hand, the exception of the lack of proof of representative status centers on procedural aspects and is primarily dilatory. It influences the procedural course of the case rather than its substance, indicating the need for providing adequate evidence to validate the representative status. This distinction is crucial, highlighting that the first exception pertains to the right to bring an action itself, while the second focuses on the procedural aspects of legal representation.

The lack of proof of representative status is an aspect that can be invoked by both parties and the court ex officio. We appreciate that the court is not obligated to raise the procedural exception of the lack of proof of representative status at the hearing where this issue is noticed because, to the extent that this evidence is provided by the given deadline, the court would have to reject its own raised exception. Therefore, it is preferable for the court to merely instruct the party to provide this evidence by the next trial date. If, by the appointed date, the deficiency is not rectified, the court can then invoke, admit, and consequently annul the request[4].

We appreciate that the lack of proof of the representative's status invoked before the first instance can only be rectified until the moment of closing the debates on the merits of the case before this instance, when the granted mandate will retroactively take effect. In the event that the first instance legally annulled the claim for the lack of proof of representative status, in compliance with the provisions of Article 82, paragraph (1) of the Civil Procedure Code (NCPC), submitting the evidence in the appeal process will lead to the admission of the appeal and the annulment of the first instance's decision, as the purpose of the appeal is to verify the legality and well-foundedness of the first instance's decision, which was correctly pronounced.

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[4] *Ibidem,* p. 224.

The appeal could only be admitted if the evidence was presented before the first instance but it erroneously annulled the claim, either by overlooking the evidence or misinterpreting it. The exception of the lack of proof of representative status is raised in the contradictory discussion of the parties, and then the court decides on it through a ruling, either rejecting it or, if applicable, admitting it but remaining seized with the resolution of the case, or through the judgment or decision, if applicable, if it admits it and divests itself of hearing the case. Thus, for example, if there are two plaintiffs and the lawyer has submitted authorization only for one of them, with the statement of claim signed by the lawyer, in the absence of proof of representative status for the other plaintiff, the court may admit the corresponding exception for one plaintiff through a ruling, continuing the process with the other plaintiff, and ultimately annulling, by decision, the claim filed by the first plaintiff for the lack of proof of representative status without disjoining the case or issuing a decision at the time of admitting the exception.

The lack of proof of representative status should not be confused with the lack of active procedural capacity. In the first case, the claim is filed by the representative on behalf of the party, but there is no evidence of the power of representation in the case file. In the second case, from the content of the claim, it is evident that it is filed by the representative in their personal capacity, not on behalf of the entitled party, and whether there is evidence of the power of representation in the case file is irrelevant[5].

Thus, in a clear contrast with the exception of the lack of proof of representative status, which allows for remedying deficiencies in accordance with the provisions of Article 82 of the Civil Procedure Code, it is important to emphasize that the lack of representative status cannot be corrected by mere confirmation, in the absence of a legal provision explicitly granting the representative this status or the party the power of confirmation. This evident distinction highlights the importance of explicit legal agreement for the conferment of representative status or the power of confirmation, thereby underscoring the rigidity in addressing this deficiency within legal procedures.

In practice, there are cases where certain institutions self-attribute the status of legal representative of the Romanian State. As an example, we

[5] *Ibidem*, pg. 226.

will refer to Case file no. 991/99/2023, currently pending in the courts in Iași.

Through the administrative litigation request, the plaintiff, the Romanian State (through the Ministry of Transport and Communications, through the National Company for the Administration of Road Infrastructure, through the Regional Directorate of Roads and Bridges Iași), requested the court to declare the partial absolute nullity of the Local Council Decision (HCL) Valea Lupului no. 48/2005, which inventoried a portion of 24837 sq.m. of land in the public ownership of the Valea Lupului Commune, located within the urban area of the Valea Lupului Commune in T 50; p 1817-1818. The administrative act was adopted in violation of the public property rights of the Romanian State.

To justify the status of the representative of the Romanian State, the editor and signatory of the court initiation request (the director of the Regional Directorate of Roads and Bridges Iași) asserts that through the action, they are defending the state's right of public property. According to specific regulations, the Ministry of Transport and its subordinate structures exercise the prerogatives of the right of public property of the Romanian State. Consequently, these structures have the status of representatives of the plaintiff, the Romanian State.

At the hearing on September 26, 2023, the defendants invoked the exception of the lack of legal representation for the Romanian State's Ministry of Transport and Communications, the National Company for the Administration of Road Infrastructure, and the Regional Directorate of Roads and Bridges Iași. They argued that this exception is based on Article 287 of the Administrative Code, which states:

Article 287. Entities exercising the right of public property of the state or local administrative-territorial units:

The exercise of the right of public property, except for the representation in court of the Romanian state by the Ministry of Public Finance in relation to legal relations concerning public property, is carried out by:

a) The Government, through the ministries or specialized bodies of central public administration under the Government or the relevant ministries, as the case may be, for the goods belonging to the public domain of the state;

b) Deliberative authorities of local public administration, for goods belonging to the public domain of local administrative-territorial units.

The trial court, through the order dated September 26, 2023, rejected the exception, stating, "considering that their representative status derives from the law, specifically from the provisions of Government Ordinance no. 43/1997 and Emergency Ordinance no. 84/2003. CNAIR has empowered the director of the Regional Directorate of Roads and Bridges Iași to represent CNAIR's interests in court, including for filing actions."

The court refers in a general manner to Government Ordinance no. 43/1997 regarding the road system and Emergency Ordinance no. 84/2003 for the establishment of the National Company for the Administration of Road Infrastructure – S.A. through the reorganization of the Autonomous Administration of National Roads in Romania, without specifying the exact article from the legal norm.

The defendants argue that the decision to reject the exception is illegal because the court violated procedural rules, the breach of which carries the sanction of nullity.

According to Article 80, paragraph (1) of the Civil Procedure Code, parties before the court may exercise their procedural rights either personally or through a representative, who can be determined by law, by the parties themselves, or by the judge.

Both Article 287 of the Administrative Code and Article 223 of the Civil Code explicitly and exclusively state that in disputes where the Romanian State appears as the holder of rights and obligations (including the exercise of the right to public property), it is represented in court by the Ministry of Public Finance unless the law establishes another body for this purpose. The Romanian state has the legal status of a public law legal entity. In this capacity, the Romanian state is represented by the Ministry of Public Finance whenever it is involved in civil legal relationships directly, in its own name, as the holder of rights and obligations. If the law stipulates otherwise, then the Romanian state is represented in these legal relationships by the person or institution indicated in the special law. In any case, in public law relationships or in relationships of international public law, the Romanian government or, as the case may be, the President of Romania, represents the Romanian state. The representativity rule established for the Romanian state applies, correspondingly, to administrative-territorial units participating in civil relationships in their own name, with their representative being, as the case may be, the mayor or the president of the county council.

Therefore, to remove this provision from the general norm, the special norm must expressly state that the Romanian state is represented in court by another person (institution, authority, etc.) for the Ministry of Public Finance to lose its representative status for the state.

It is true that through the special provision (Article 20 of Government Ordinance 43/1997 regarding the regime of roads), it is established that "the Ministry of Transport is the central public administration body that exercises the prerogatives of the state's public property rights in the field of national interest roads." However, this regulation does not override the provision in the general norm, "with the exception of representing the Romanian State in court by the Ministry of Finance."

If the legislator had intended to grant the Ministry the power of representation in court, they would have removed the provision from the general norm through an express provision, for example, "including regarding the representation in court of the Romanian State." Only in this way could the rule that "the special overrides the general" be applied. However, since the special norm is subject to strict interpretation and application, it cannot be extended to the right of representation in court.

CNAIR S.A. is a commercial company, and in this capacity, it cannot represent the Ministry of Transport, which, in turn, is a legal entity of public law. According to Decision no. 370/2021 on the organization and functioning of the Ministry of Transport and Infrastructure: "Art. 1. – (1) The Ministry of Transport and Infrastructure is the specialized body of central public administration, with legal personality, organized and functioning under the Government's subordination, headquartered in Bucharest, Dinicu Golescu Blvd. no. 38, sector 1."

Moreover, a legal entity cannot be represented in court by another legal entity, as no norm allows this. On the contrary, a legal entity exercises its rights and fulfills its obligations through its administrative bodies (Article 209 of the Civil Code), including representation in court. None of the norms invoked by the party who initiated this action states that CNAIR has the power to represent the Ministry of Transport.

CNAIR exercises administrative rights over state-owned public property, granted for use through concession. Since the lawsuit is an act of disposition, it exceeds the powers granted to this company by the Ministry of Transport.

The decisions of the High Court of Cassation and Justice regarding the recognition of the procedural standing (active and passive) of the National Forest Administration in land disputes cannot be extended to the present case:

Decisions made under Article 514 or 519 of the Code of Civil Procedure have effects only regarding the legal issues delegated by these decisions, meaning they are of strict interpretation.

The arguments derived from the norms governing the allocation of land ownership, which led to the pronouncement of these decisions, are not found in the special norms invoked in the present action.

Through these decisions, there is a departure from the general norm, so interpretation by analogy (Article 9 of the Civil Code), referred to by the plaintiff, is prohibited, known as mutatis mutandis.

The author of the lawsuit confuses the representation in court of a party, whether a legal entity or not, through its legal representative (president, director, administrator, etc.) and the representation through another legal entity. In the latter situation, representation is illegal and not provided for by law.

The conventional representation in court of a legal entity by the director of another legal entity, in this case, CNAIR by the Director of DRDP Iași, based on an authorization given by the director of the first entity to the director of the second entity, is impermissible and entirely illegal. "Legal entities can be conventionally represented in court only by a legal counselor or lawyer, under the conditions of the law."

The imperative and exclusive form of the text, "only by," excludes any other form of conventional representation.

Although "the court rejects the exception of the lack of evidence of the representative of the Ministry of Transport, Infrastructure, and Communications, the National Company for the Administration of Road Infrastructure S.A., and the Regional Directorate of Roads and Bridges Iași, on behalf of the Romanian State" (emphasis added), the reasoning indicates that it rejected the exception of the lack of quality of the representatives of these entities, arguing that they have the capacity, the power to represent the Romanian State in court.

In literature, it has been emphasized that the exception of the lack of quality of the representative should not be confused with the exception of the lack of evidence of the representative[6].

In the first situation, the power to represent is lacking, a fundamental condition for the valid execution of a procedural act by someone other than the party in the process. In this case, the absolute nullity of the procedural act performed by the "false representative" operates, even if the act did not cause harm to the represented party. The sanction of nullity is the consequence of admitting the exception of the lack of quality of the representative (in the sense of the power of representation acquired under the conditions of the law).

In this regard, we also add the provisions of Article 176, point 2 of the Civil Procedure Code, which sanctions the unconditional absolute nullity of the violation of legal provisions regarding procedural representation. The rules regulating the representation of parties in the process are of public order and must be strictly interpreted.

Article 176 of the New Civil Procedure Code (NCPC) enumerates cases of unconditional nullity regardless of the existence of harm, a sanction that occurs independently of whether harm has been caused to the party by not complying with the legal requirement for the performance of the procedural act. The legal enumeration in the new regulation is intended to put an end to controversies regarding cases of unconditional nullity. In the past, there were opinions suggesting that only in the case of the court's incompetence were we dealing with unconditional nullity, as provided in Article 105(1) of the Civil Procedure Code of 1865. Additionally, the strict drafting of point 3 of the article in question in the current regulation is noteworthy, specifying the existence of unconditional nullity in the case of the court's incompetence, not the judge's, as the previous code provided.

According to Article 82, paragraph (1) of the NCPC, when the court finds the lack of evidence of the representative's quality for the one who acted on behalf of the party, a short deadline will be given to cover the deficiencies. If these are not covered, the claim will be annulled. We believe that the sanction in question constitutes an extrinsic nullity of the

[6] Gheorghe Florea, *Noul Cod de procedură civilă comentat și adnotat*, coordinators V.M. Ciobanu and M. Nicolae, vol. I, Universul Juridic Publishing House, Bucharest, 2016, p. 649, and Alexandru Suciu, *Excepțiile procesuale în noul cod de procedură civilă*, Universul Juridic Publishing House, Bucharest, 2012, pp. 478-484.

procedural act for which the law expressly provides the unconditional incidence regardless of the existence of harm.

In the second case (exception of the lack of evidence of the representative), the representative has the power (is authorized by law to represent the party in the process) but has not placed evidence of this representation in the file. The lack of evidence can be covered by submitting the document. If the proof of quality is not submitted within the deadline set by the judge, the lawsuit filed by the representative will be annulled (Article 82 of the Civil Procedure Code).

Conclusions

In practice, significant confusion often arises between the concepts of "lack of quality as a representative" and "lack of evidence of the quality as a representative" within judicial procedures. This subtle distinction can create uncertainties and may affect the correct unfolding of legal processes. While the lack of evidence of the representative's quality refers to the absence of proof attesting to the representative status, the lack of quality as a representative essentially indicates the absence of the legal right or capacity to act on behalf of another.

This lack of clarity can lead to misunderstandings and substantially impact justice. To avoid such ambiguities and ensure a fair and correct judicial process, it is essential, legislatively, for the legislator to clarify and establish more clearly the distinctions between these fundamental institutions of civil law, providing clear rules and specific procedures. Additionally, legal education and informing the parties involved in the judicial process about these differences could contribute to avoiding confusion and ensuring a more transparent and predictable legal environment.

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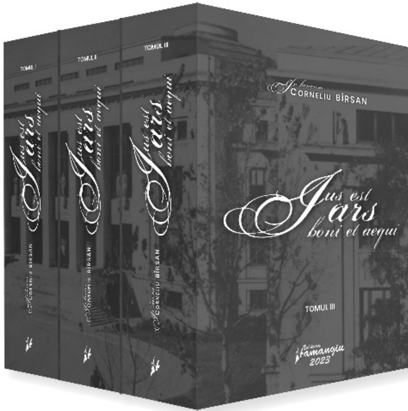


In honorem Corneliu Bîrsan

Ius est ars boni et aequi

ISBN general: 978-606-27-2394-1
vol. I+II+III: 300 de lei; 2.480 de pagini

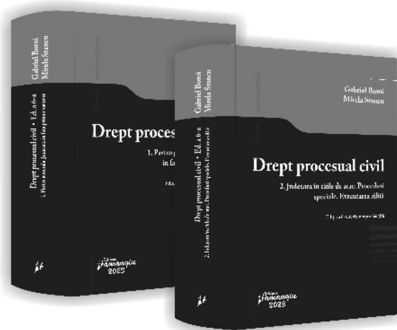
121 de autori, 103 articole, 3 tomuri și 2.480 de pagini sunt principalele cifre ale acestei cărți omagiale dedicate Profesorului Corneliu Bîrsan cu prilejul împlinirii vârstei de 80 de ani. Foști și actuali colegi ai Profesorului, discipoli și prieteni, din țară și din străinătate, au răspuns chemării lansate de Facultatea de Drept a Universității din București pentru a onora pe unul dintre cei mai reprezentativi dascăli ai săi din ultimii 50 de ani.

Vă invităm să descoperiți în aceste volume o interesantă colecție de studii juridice, care, pe lângă valoarea lor omagială, alcătuiesc, parcă, și o suită de pledoarii pentru frumoasa definiție aleasă ca titlu al acestei cărți.

„Ius est ars boni et aequi este definiția, atribuită jurisconsultului roman Celsus, care a traversat veacurile, pentru a fi și astăzi considerată cea mai reprezentativă, mai cuprinzătoare și mai elegantă modalitate de a ilustra Dreptul. Binele și Echitatea definesc în manieră concomitentă mijlocul, dar și finalitatea Dreptului. Ambele noțiuni reprezintă piatra unghiulară a legii, deopotrivă în edictarea, cât și în aplicarea ei, ca precondiții ideale în orice domeniu al Dreptului.

Definiția înțelege conceperea și înfăptuirea dreptului ca pe o artă, termenul nefiind întâmplător ales. Armonia necesară promovării binelui și echității poate fi obținută prin pricepere și talent, prin valorificarea nu doar a gândirii, dar și a emoției. Într-o societate în care tot mai multe exemple arată că doar un fir extrem de fragil previne pervertirea dreptului în scopuri neonorante, credem că modelul oferit de Omul Bîrsan, de a dedica o întreaga viață păstrării simțului echității și al binelui în toate planurile de activitate, trebuie să primească confirmarea recunoașterii pe care societatea juridică i o acordă."

Adriana Almășan, Flavius-Antoniu Baias,
Bogdan Dumitrache, Ioana Vârsta, Cristina Elisabeta Zamșa
(Editorii volumului)



Drept procesual civil

ediţia a 6-a, revizuită şi adăugită

Gabriel Boroi, Mirela Stancu

octombrie 2023
ISBN general: 978-606-27-2359-0
ISBN vol. 1: 978-606-27-2360-6; ISBN vol. 2: 978-606-27-2361-3
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Cartea cuprinde o analiză de ansamblu a instituțiilor procesuale civile astfel cum sunt reglementate de actualul Cod de procedură civilă. Proiectată inițial de Profesorul Gabriel Boroi ca un manual destinat mai ales studenților, cu timpul, lucrarea s-a tot îndepărtat de acest obiectiv, astăzi ea depășind cu mult întinderea și nivelul de tratare a materiei specifice cursurilor universitare. Și aceasta, mai ales datorită interpretărilor și soluțiilor pe care autorii s-au văzut nevoiți să le ofere numeroaselor probleme generate de intrarea în vigoare a noului Cod de procedură civilă și care continuă să apară chiar și la zece ani după acest moment.

Ediția a 6-a a lucrării *Drept procesual civil*:

- analizează toate modificările legislative intervenite din anul 2020 și până în prezent (inclusiv cele aduse prin: Legea nr. 140/2022, Legea nr. 173/2022, Legea nr. 192/2022, Legea nr. 199/2022, Legea nr. 336/2022, Legea nr. 57/2023, Legea nr. 304/2022, Legea nr. 303/2022, noul Regulament de ordine interioară al instanțelor judecătorești);
- include jurisprudența obligatorie – deciziile Curții Constituționale și ale Înaltei Curți de Casație și Justiție pronunțate în recursurile în interesul legii sau pentru dezlegarea unor chestiuni de drept cu incidență în procedura civilă;
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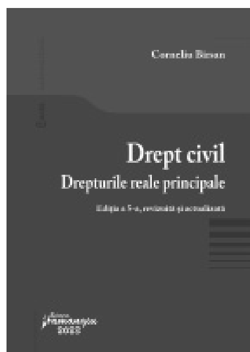
Drept civil. Drepturile reale principale

Ediţia a 5-a, revizuită şi actualizată

Corneliu Bîrsan



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150 de lei, 560 de pagini

Sub semnătura bine cunoscută a Profesorului Corneliu Bîrsan, lucrarea analizează în detaliu regimul juridic al bunurilor, reglementat de Cartea a III-a a Codului civil în vigoare.

În succesiunea indicată de Codul civil, sunt tratate toate aspectele importante privind drepturile reale: noțiune și clasificare, delimitarea față de drepturile de creanță, dobândirea drepturilor reale, regimul juridic al proprietății private și cel al proprietății publice, modalitățile juridice, limitele și apărarea dreptului de proprietate, dezmembrămintele dreptului de proprietate (superficia, uzufructul, uzul și abitația, servituțile), posesia și publicitatea drepturilor reale.

Comentariile și opiniile autorului sunt însoțite de numeroase trimiteri la literatura de specialitate și la soluții din jurisprudența națională și a Curții Europene a Drepturilor Omului, iar acolo unde cazul, prezentarea instituțiilor este realizată prin compararea dispozițiilor noului Cod civil cu cele anterioare în materie, ținând seama de faptul că unele dintre acestea din urmă încă se mai aplică actelor și faptelor născute sub imperiul lor.

Această a 5-a ediție a fost revizuită și actualizată la data de 1 octombrie 2023, fiind avute în vedere modificările legislației speciale menționate în cuprinsul cursului, dar și doctrina și practica judiciară publicate după apariția ediției anterioare.

Tratat de drept civil. Contracte speciale

Vol. 1. Vânzarea și schimbul

Ediţia a 3-a, revizuită

DAN CHIRICĂ

decembrie 2023
vol. 1. ISBN 978-606-27-2377-4
250 de lei, 624 de pagini

„Intrarea în vigoare a acestui act normativ, inspirat, așa cum se cunoaște, din numeroase, diverse și diferite sisteme legislative naționale și internaționale a pus, pune în prezent și va pune și în viitor oricui probleme serioase în încercarea de integrare a reglementărilor cuprinse în acest Cod într-un sistem cât de cât unitar. Fiecare din aceste enunțuri are un trecut – o istorie –, un prezent – o situare în contextul actual legislativ național și în conexiune cu alte reglementări naționale sau internaționale – și un viitor – oferind o perspectivă spre anumite țeluri”.

Autorul Dan Chirică, profesor universitar, doctor în drept, oferă cititorului în cadrul acestui tratat traseul parcurs de normele juridice specifice vânzării și schimbului, argumentând și explicând aplicabilitatea acestora atât în vechiul Cod civil și în noul Cod civil, cât și aplicabilitatea normelor în contextele sistemelor juridice din care au fost preluate. Această modalitate de analiză a normei de drept, nu numai că ajută la înțelegerea raționamentului apariției acesteia, ci oferă și capacitatea de a ne forma propriile opinii și de a desprinde singuri concluzii cu privire la noua reglementare.

Mai mult, în prezentul tratat, pe baza analizei jurisprudenței (române și străine) și a doctrinei clasice și moderne, autorul oferă păreri proprii cu privire la problemele cele mai dificile puse în practică.

Această a treia ediție a *Tratatului de drept civil. Contracte speciale. Volumul I. Vânzarea și schimbul* este actualizată și revizuită în raport de doctrina și, mai ales, de practica judiciară care s-a dezvoltat în această materie de la publicarea ediției precedente și până în prezent.

Drept procesual penal. Partea generală
Note de curs

Ediția a 5-a, revizuită și adăugită

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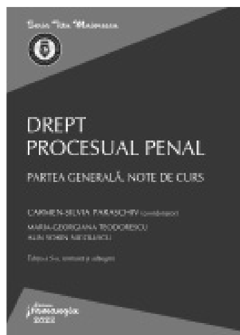

ISBN 978-606-27-2392-7
75 de lei, 392 de pagini

Lucrarea a prins contur pornind de la ideea unui material de studiu concis și accesibil, dedicat studenților facultăților de drept. Cartea este structurată în șapte capitole, în care sunt prezentate toate instituțiile prevăzute în Partea generală a Codului de procedură penală.

Modalitatea de abordare a materiei și claritatea stilului facilitează asimilarea informațiilor care vizează aceste instituții, analizându-le atât prin prisma modificărilor legislative intervenite, cât și a numeroaselor decizii ale Curții Constituționale și ale Înaltei Curți de Casație și Justiție în materie. În scopul explicării adecvate, lucrarea conține scheme grafice, exemple teoretice și practice utile oricărui student interesat să înțeleagă, să rețină și să fixeze cât mai bine noțiunile dobândite. Mai mult decât atât, autorii propun și un sistem de verificare a cunoștințelor, prin inserarea la finalul fiecărui capitol a unor întrebări recapitulative.

La elaborarea acestei a 5-a ediții au fost avute în vedere modificările legislative intervenite până în luna octombrie 2023, prin care au fost puse în acord dispozițiile Codului de procedură penală cu deciziile Curții Constituționale de admitere a unor excepții de neconstituționalitate, precum și deciziile în recursuri în interesul legii sau hotărârile prealabile pronunțate de Înalta Curte de Casație și Justiție în unificarea interpretării și aplicării legii de către instanțele judecătorești. Au fost adăugate noi diviziuni în cadrul secțiunilor care descriu metodele speciale de supraveghere sau cercetare și audierea martorilor și au fost dezvoltate explicațiile privind instituții precum constituirea părții civile în procesul penal, abținerea și recuzarea, audierea persoanelor vătămate, valorificarea bunurilor mobile sechestrate, în acord cu noile modificări.

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